



1 of 10 DOCUMENTS

California Courtroom Evidence

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Publication Information

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2008



2 of 10 DOCUMENTS

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3 of 10 DOCUMENTS

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4 of 10 DOCUMENTS

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Statement on Fair Use

RELEASE NO. 2008, MAY 2008

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5 of 10 DOCUMENTS

California Courtroom Evidence

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Publication Information

1 California Courtroom Evidence About the Author

About the Author

Joseph W. Cotchett is among the nation's foremost trial lawyers. He is currently with the firm of Cotchett, Pitre, & McCarthy, which has offices in the San Francisco Bay Area, Los Angeles, and Washington, D.C. He is a Fellow of the American College of Trial Lawyers; the International Academy of Trial Lawyers, and the International Society of Barristers. He has served on the Board of Governors of the State Bar of California, and also on the California Judicial Council, the California Commission on the Future of the Courts, the California Select Committee on Judicial Retirement, and the Board of Directors of Hastings College of Law, University of California.



6 of 10 DOCUMENTS

California Courtroom Evidence

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Publication Information

1 California Courtroom Evidence Introductory Note

Introductory Note

Introductory Note

Historically, the California Law of Evidence was first codified in 1872 as Part IV of the Code of Civil Procedure of the State. For 93 years thereafter, the judiciary and the Legislature evolved rules of practice and theory which were often felt to be conflicting or self-defeating. An effort at Legislative Revision in 1901 was declared unconstitutional by the courts. An attempt at drafting a revision was instituted in 1936 by the California Code Commission. This study continued until 1939, when it was abandoned in deference to the American Law Institute, which had initiated efforts to draft a model Code of Evidence. The Model Code was finally completed by the ALI in 1942. It, however, failed to obtain enactment in any state and was in turn referred to the National Conference of Commissioners on Uniform State Laws in 1949. This resulted in the Uniform Rules of Evidence approved by the Conference in 1953. This effort, a less drastic revision, was the subject of a 1956 directive from the California Legislature to a special Study Commission.

The Commission Report, lauding many of the Uniform Rules changes, found others too far reaching. Chiefly noting the absence of need for a Uniform Law on Court procedure, the Commission recommended a redrafting of the California Law of Evidence.

The new Evidence Code, enacted by the 1965 Legislature and effective in Court proceedings beginning January 1, 1967 (See § 12), is a result of this redrafting. It purports to incorporate many sections of the existing law with new and different sections from the Uniform Rules.

Official comment on the code, subsequently approved by the Legislature, was published by the Law Revision Commission. This included a listing of former Code of Civil Procedure sections brought forward into the new code unchanged, those amended, and those discontinued. New sections were also noted. Since such a designation controls the applicability of previous case law and comment, these will be noted in this manual.

It should be borne in mind that the Law Revision Commission envisioned, while not a rigid code, still one more dependent on its own content than upon subsequent interpretation. In this light, many of the sections speak for themselves.

This manual is intended as an impartial presentation, as the authors have each worked from their respective sides of the counsel table. I note with deep regret that my co-author, Fulton Haight, passed away in July of 1997; his contributions to this book remain alive in the text. The Fifth Edition continues our original commitment to providing the best legal information with the greatest of brevity, for a courtroom demands both points in earnest, and success often follow those who match these principles with good timing.

Joseph W. Cotchett



7 of 10 DOCUMENTS

California Courtroom Evidence

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Publication Information

1 California Courtroom Evidence Abbreviations

Abbreviations

California Constitution and Statutory Sources

Cal Const California Constitution

B&P Code Business and Professions Code

CC Civil Code

CCP Code of Civil Procedure

Com Code Commercial Code

Corp Code Corporations Code

Ed Code Education Code

Elec Code Elections Code

Evid Code Evidence Code

Fam Code Family Code

1 California Courtroom Evidence Abbreviations

Fin Code	Financial Code
F&G Code	Fish and Game Code
F&A Code	Food and Agriculture Code
Gov Code	Government Code
H&N Code	Harbors and Navigation Code
H&S Code	Health and Safety Code
Ins Code	Insurance Code
Lab Code	Labor Code
M&V Code	Military and Veterans Code
Pen Code	Penal Code
Prob Code	Probate Code
PC Code	Public Contract Code
PR Code	Public Resources Code
PU Code	Public Utilities Code
R&T Code	Revenue and Taxation Code
S&H Code	Streets and Highways Code
UI Code	Unemployment Insurance Code
Veh Code	Vehicle Code

1 California Courtroom Evidence Abbreviations

Water Code Water Code

W&I Code Welfare and Institutions Code

Cal Stat California Statutes **United States Constitution and Statutory Sources**

US Const United States Constitution

USC United States Code

USC app United States Code Appendices **Case Law**

C California Reports

C2d California Reports, Second Series

C3d California Reports, Third Series

C4th California Reports, Fourth Series

CA California Appellate Reports

CA2d California Appellate Reports, Second Series

CA3d California Appellate Reports, Third Series

CA4th California Appellate Reports, Fourth Series

CA Supp California Appellate Reports, Supplement

CA2d Supp California Appellate Reports, Second Series, Supplement

CA3d Supp California Appellate Reports, Third Series, Supplement

CA4th Supp California Appellate Reports, Fourth Series, Supplement

1 California Courtroom Evidence Abbreviations

CR California Reporter

CR2d California Reporter, Second Series

P Pacific Reporter

P2d Pacific Reporter, Second Series

P3d Pacific Reporter, Third Series

US United States Supreme Court Reports

S Ct Supreme Court Reporter

L Ed Lawyer's Edition

L Ed2d Lawyer's Edition, Second Series

F Federal Reporter

F2d Federal Reporter, Second Series

F3d Federal Reporter, Third Series

F Supp Federal Supplement

F Supp2d Federal Supplement, Second Series **California State Court Rules**

Cal Rules Ct California Rules of Court **Federal Rules**

Fed R Evid Rules of Evidence **Miscellaneous**

Assemb Com Jud Comment Assembly Committee on Judiciary Comment

Cal Law Rev Com Comment California Law Revision Commission Comment

1 California Courtroom Evidence Abbreviations

Leg Com Comment Legislative Committee Comment

Sen Jud Com Comment Senate Judiciary Committee Comment



8 of 10 DOCUMENTS

California Courtroom Evidence

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9 of 10 DOCUMENTS

California Courtroom Evidence

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1 California Courtroom Evidence The Victims' Bill of Rights

The Victims' Bill of Rights

While a discussion of how Proposition 8 (Cal. Const., art. I, § 28) has changed the criminal law is beyond the scope of this book, The Victims' Bill of Rights affects the Evidence Code in the following areas:

1. **Relevant Evidence.** Subdivision (d), the "Right to Truth-in-Evidence" section of the initiative, provides that "relevant evidence shall not be excluded in any criminal proceedings." In other words, in criminal proceedings, **all relevant evidence is admissible**, regardless of prejudicial impact. Under this section, trial courts have admitted testimony of **hypnotized witnesses** (see Evid. Code, § 350), **polygraph tests**, and evidence of a rape **victim's sexual history** (see Evid. Code, § 782; but see part 3, below).
2. **Admission of Prior Felony Conviction.** Subdivision (f) authorizes use of "any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile" without limitation for purposes of impeachment. This subdivision and subdivision (d) are in opposition to the line of Supreme Court cases descended from *People v. Beagle* (see Evid. Code, § 788). Previously inadmissible **character evidence** would come in under these sections as well. (See Evid. Code, § 1101.)
3. **Evidence Code Sections Unaffected.** Subdivision (d) of The Victims' Bill of Rights states that it does not affect:
 - A. Existing statutory rules relating to **hearsay**
 - B. Existing statutory rules relating to **privileges**
 - C. Existing statutory and constitutional rules of the **press**
 - D. Evidence Code section 352, **Discretion** of the Court to Exclude Evidence
 - E. Evidence Code section 782, Evidence of **Prior Sexual Conduct**
 - F. Evidence Code section 1103, Evidence of **Character of Victim**

See the various Evidence Code sections for further discussions of highlighted material.



10 of 10 DOCUMENTS

California Courtroom Evidence

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What's New

1 California Courtroom Evidence Scope

Scope

HIGHLIGHTS

Release 2008 May 2008

2008 Edition Fully Updated for Recent Legislation and Judicial Decisions

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

The 2008 edition of *California Courtroom Evidence* has been updated for the following:

- Legislative enactments through the end of the 2007 portion of the 2007-2008 Regular Session of the Legislature.
- All significant United States Supreme Court, California Supreme Court, and California Court of Appeal through January 2008.
- Selected federal court decisions.

Significant changes incorporated into this edition include:

Admissibility

Court admitted three-minute videotape of rescue recorded by COPS reality TV show. See *People v. Ibarra* (2007) 151 CA4th 1145, 61 CR3d 22 (trial for attempted murder).

Courts admitted increasingly more graphic photographic evidence. See *People v. Zambrano* (2007) 41 C4th 1082, 1138, 63 CR3d 297, 163 P3d 4 (admitting full extent of victims' beating injuries in murder prosecution, notwithstanding defense offer to stipulate); *People v. Howard* (2008) 42 C4th 1000, 71 CR3d 264, 175 P3d 13 (in prosecution for felony murder and rape, admitted enlarged photo of victim's intimate injuries); *People v. Hoyos* (2007)

41 C4th 872, 908, 63 CR3d 1, 162 P3d 528, cert. den. 2008 U.S. LEXIS 1571 (photographs of crime scene and victim autopsies); *People v. Bonilla* (2007) 41 C4th 313, 60 CR3d 209, 160 P3d 84 (photographs of victim's body corroborated testimony about use of duct tape in killing and details of burial).

Prior similar conduct was admitted, although prior conduct resulted in conviction for unjust imprisonment and not for sexual offense. See *People v. Lopez* (2007) 156 CA4th 1291, 68 CR3d 376 (prosecution for assault and rape).

Exemplar not admitted. In a product liability and personal injury action, plaintiff's attorney sought to introduce an identical product as exemplar. The product package and enclosed instruction sheet were inadmissible hearsay. The lawyer's declaration purporting to recite this written information was inadmissible double hearsay [*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 CA4th 666, 680] .

Sufficiency of Evidence

Contingency fee lawyers' estimate of time spent on case, without contemporaneous time sheets, supports quantum meruit claim. There is no legal requirement that a lawyer supply billing statements to support a claim for attorney fees. Fair approximations based on personal knowledge will suffice [*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 CA4th 257, 62 CR3d 665] .

Evidence supporting order must have known source. Although lower courts are presumed to act properly in reaching their decisions, that presumption was not sufficient in the highly irregular situation presented by a case when the only possible support for the court's reduction of parental visitation was a mysterious "stipulation" altered by handwritten interlineation, without explanation, and not signed by the parent's counsel [*In re Elizabeth M.* (2008) 158 CA4th 1551, 70 CR3d 746] .

New method of valuing business goodwill. In an eminent domain action, the trial court did not err in admitting expert testimony valuing the goodwill of a business by the "cost to create" approach, which no previous case had recognized as an acceptable method of valuing goodwill. The business's expert testified that the owner had reasonably expended over \$200,000 to position its business, pending completion of a nearby commercial development. The business had not yet experienced excess profits but clearly had great potential for increased patronage and profit, including a desirable location [*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 CA4th 1095, 64 CR3d 519] .

Privileges

Attorney-client privilege within corporation is limited to those with "need to know." If legal advice or strategy is discussed or contained in the communication between corporate employees, then to that extent, it is presumptively privileged. Disputed documents must be reviewed to determine whether the company waived the privilege by distributing the advice within the corporation beyond those with the "need to know" [*Zurich American Ins. Co. v. Superior Court* (2007) 155 CA4th 1485, 66 CR3d 833] .

Peace officer employment records not protected. Peace officer names, employing departments, and dates of employment were not "peace officer personnel records" exempted from discovery by the Public Records Act or the Evidence Code [*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 C4th 278, 303, 64 CR3d 661, 165 P3d 462] .

Mediation privilege does not protect all negotiation. Plaintiff failed to show that a reduced settlement offer, made just before the scheduled mediation, was linked to the mediation or that it was anything other than the expected negotiation posturing that occurs in most civil litigation [*Wimsatt v. Superior Court* (2007) 152 CA4th 137, 61 CR3d 200] .

Procedure

California Supreme Court repudiates local court rules using declarations in lieu of oral testimony. A trial court's local rule and pretrial scheduling order calling for the admission and use of declarations, in lieu of oral testimony at marital dissolution trials, conflicted with the hearsay rule and was contrary to the interest of the public [*Elkins v. Superior Court* (2007) 41 C4th 1337, 1359-1360, 63 CR3d 483, 163 P3d 160] .

Appellate court decides an evidentiary objection not argued on appeal. In an action for wrongful termination and sexual harassment, the trial court sustained objections to parts of plaintiff's declaration that allegedly repeated the harasser's offensive statements. The trial court then dismissed the action on a procedural ground. The appellate court reversed on the procedural ground, noting that plaintiff's failure to specifically challenge the propriety of the evidentiary ruling on appeal was not a waiver of that error, since neither the trial nor appellate orders were based on the issue of sufficiency of evidence [*Ahmadi-Kashani v. Regents of the University of California* (2008) 159 CA4th 449, 71 CR3d 556].

Right to Confrontation

The doctrine of *Crawford v. Washington* is not retroactive. See *Whorton v. Bockting* (2007) ___ US ___, 127 SCt 1173, 1177, 1184, 167 LEd2d 1.

Forensic lab report was not testimonial. Statements made in laboratory reports and other types of forensic evidence are nontestimonial statements under *Crawford v. Washington*, notwithstanding their possible use at trial [*People v. Geier* (2007) 41 C4th 555, 605-607, 61 C3d 580, 161 P3d 104].

Victim's statement to doctor for diagnosis was not testimonial. An assault victim's statement about the cause of his injury, to the physician who treated him at the hospital, was nontestimonial and not barred by *Crawford* [*People v. Cage* (2007) 40 C4th 965, 970-971, 56 CR3d 789, 155 P3d 205, cert. den. 2007 US LEXIS 12279].

Victim's statement to police at their arrival during emergency was not testimonial. See *People v. Pedroza* (2007) 147 CA4th 784, 54 CR3d 636 ; *People v. Chaney* (2007) 148 CA4th 772, 56 CR3d 128 .

Prior testimony of unavailable witness was admitted, notwithstanding unsatisfactory cross-examination at preliminary hearing. *Crawford v. Washington* does not require that the opportunity for cross-examination be effectively exercised [*People v. Guess* (2007) 158 CA4th 283, 295-297] .

Witness statement to police was implicitly trustworthy. A witness spoke to the police about what he knew, despite his deep conflict about his public responsibility, his friendship for defendant, his willingness to give defendant the benefit of the doubt, and his concern for his own safety, which turned out to be completely justified. Ample evidence thus supported the trial court's implicit finding that the statement was made under circumstances indicating its trustworthiness [*People v. Zambrano* (2007) 41 C4th 1082, 1146-1147, 63 CR3d 297, 163 P3d 4].



1 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.syn

§ 1.syn Synopsis to Chapter 1: Provisions and Construction Evidence Code §§ 1-12

1.01 Code Title Evid Code § 1

[1] Evid Code § 1 Text

1.02 Liberal Construction--Evid Code § 2

[1] Evid Code § 2 Text

[2] Case Notes

1.03 Provisions Severable--Evid Code § 3

[1] Evid Code § 3 Text

[2] Commission Comments

1.04 Preliminary Provisions Govern Construction--Evid Code § 4

[1] Evid Code § 4 Text

1.05 Headings Have No Effect--Evid Code § 5

[1] Evid Code § 5 Text

1.06 Amendments, Additions Subject To Code References--Evid Code § 6

[1] Evid Code § 6 Text

1.07 Definition Of Chapter, Article, Section, Subdivision, Paragraph--Evid Code § 7

[1] Evid Code § 7 Text

1.08 Present, Future Tenses--Evid Code § 8

[1] Evid Code § 8 Text

1.09 All Genders Included--Evid Code § 9

[1] Evid Code § 9 Text

1.10 Singular, Plural Words--Evid Code § 10

[1] Evid Code § 10 Text

1.11 Shall--May Construed--Evid Code § 11

[1] Evid Code § 11 Text

1.12 Effective Date Of Code--Pending Proceedings--Evid Code § 12

[1] Evid Code § 12 Text



2 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 1 through 12* on preliminary evidentiary matters.



3 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.01 Code Title

1.01 Code Title Evid Code § 1

[1] Evid Code § 1 Text

- *Evid Code § 1.*

This code shall be known as the Evidence Code.

LegH: 1965 ch. 299.



4 of 168 DOCUMENTS

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.02

1.02 Liberal Construction--Evid Code § 2

[1] Evid Code § 2 Text

■ *Evid Code § 2.*

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.

LegH: 1965 ch. 299.

[2] Case Notes

Under the terms of the Evidence Code, the statutory scheme put forth by the legislature is the sole and authoritative arbiter of matters within its purview [*Pitchess v. Superior Court* (1974) 11 C3d 531, 113 CR 897, 522 P2d 305 (courts may not create new privileges)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCommon LawGovernmentsLegislationGeneral Overview



5 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.03

1.03 Provisions Severable--Evid Code § 3

[1] Evid Code § 3 Text

■ *Evid Code § 3.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Standard California Severability Clause makes it unnecessary to include similar provisions in future amendments to this code [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationSeverability



6 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.04

1.04 Preliminary Provisions Govern Construction--Evid Code § 4

[1] Evid Code § 4 Text

- *Evid Code § 4.*

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

LegH: 1965 ch. 299.



7 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.05

1.05 Headings Have No Effect--Evid Code § 5

[1] Evid Code § 5 Text

- *Evid Code § 5.*

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

LegH: 1965 ch. 299.



8 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.06

1.06 Amendments, Additions Subject To Code References--Evid Code § 6

[1] Evid Code § 6 Text

- *Evid Code § 6.*

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.

LegH: 1965 ch. 299.



9 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.07

1.07 Definition Of Chapter, Article, Section, Subdivision, Paragraph--Evid Code § 7

[1] Evid Code § 7 Text

- *Evid Code § 7.*

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.**

LegH: 1965 ch. 299.



10 of 168 DOCUMENTS

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.08

1.08 Present, Future Tenses--Evid Code § 8

[1] Evid Code § 8 Text

- *Evid Code § 8.*

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

LegH: 1965 ch. 299.



11 of 168 DOCUMENTS

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.09

1.09 All Genders Included--Evid Code § 9

[1] Evid Code § 9 Text

- *Evid Code § 9.*

The masculine gender includes the feminine and neuter.

LegH: 1965 ch. 299.



12 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.10

1.10 Singular, Plural Words--Evid Code § 10

[1] Evid Code § 10 Text

- *Evid Code § 10.*

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

LegH: 1965 ch. 299.



13 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.11

1.11 Shall--May Construed--Evid Code § 11

[1] Evid Code § 11 Text

- *Evid Code § 11.*

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

LegH: 1965 ch. 299.



14 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 1 Provisions and Construction Evidence Code §§ 1-12

1-1 California Courtroom Evidence 1.12

1.12 Effective Date Of Code--Pending Proceedings--Evid Code § 12

[1] Evid Code § 12 Text

■ *Evid Code § 12.*

(a) This code shall become operative 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.

LegH: 1965 ch. 299.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pretrial Matters Separate Trials Governments Legislation Statutes of Limitations Time Limitations



15 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.syn

§ 2.syn Synopsis to Chapter 2: Words and Phrases Defined Evidence Code §§ 100-260

2.01 Governing Definitions--Evid Code § 100

[1] Evid Code § 100 Text

2.02 Action--Evid Code § 105

[1] Evid Code § 105 Text

2.03 Burden of Producing Evidence--Evid Code § 110

[1] Evid Code § 110 Text

[2] Commission Comments

[3] Case Notes

[a] Burden of Production in General

[b] Criminal Hearings

[c] Family Law Hearings

2.04 Burden of Proof--Evid Code § 115

[1] Evid Code § 115 Text

[2] Official Comments

[3] Case Notes

[a] Specific Civil Actions--Preponderance of Evidence Required

[b] Specific Civil Actions--Different Standard of Proof Required

[c] Specific Criminal Actions--Preponderance of Evidence Required

[d] Specific Criminal Actions--Different Standard of Proof Required

2.05 Civil Action--Evid Code § 120

[1] Evid Code § 120 Text

[2] Commission Comments

[3] Case Notes

2.06 Conduct--Evid Code § 125

[1] Evid Code § 125 Text

[2] Case Notes

2.07 Criminal Action--Evid Code § 130

[1] Evid Code § 130 Text

2.08 Declarant--Evid Code § 135

[1] Evid Code § 135 Text

[2] Case Notes

2.09 Evidence--Evid Code § 140

[1] Evid Code § 140 Text

[2] Commission Comments

[3] Case Notes

[a] Examples of "Evidence"

2.10 The Hearing--Evid Code § 145

[1] Evid Code § 145 Text

[2] Commission Comments

2.11 Hearsay Evidence--Evid Code § 150

[1] Evid Code § 150 Text

2.12 Law--Evid Code § 160

[1] Evid Code § 160 Text

[2] Commission Comments

[3] Case Notes

[a] Constitutional, Statutory or Decisional Laws

[b] What is Not "Law"

2.13 Oath--Evid Code § 165

[1] Evid Code § 165 Text

2.14 Perceive--Evid Code § 170

[1] Evid Code § 170 Text

2.15 Person--Evid Code § 175

[1] Evid Code § 175 Text

2.16 Dependent Person--Evid Code § 177

[1] Evid Code § 177 Text

2.17 Personal Property--Evid Code § 180

[1] Evid Code § 180 Text

2.18 Property--Evid Code § 185

[1] Evid Code § 185 Text

2.19 Proof--Evid Code § 190

[1] Evid Code § 190 Text

[2] Commission Comments

[3] Case Notes

2.20 Public Employee--Evid Code § 195

[1] Evid Code § 195 Text

[2] Commission Comments

[3] Case Notes

2.21 Public Entity--Evid Code § 200

[1] Evid Code § 200 Text

[2] Case Notes

2.22 Real Property--Evid Code § 205

[1] Evid Code § 205 Text

2.23 Relevant Evidence--Evid Code § 210

1-2 California Courtroom Evidence 2.syn

[1] Evid Code § 210 Text

[2] Commission Comments

[3] Case Notes

[a] Definition of "Relevant Evidence"

[b] Role of Court in Determining Relevance

[c] Civil Law: Specific Issues

[d] Criminal Law: Specific Issues

[i] Effect of Proposition 8 on Relevance

[ii] State of Mind/Motive

[iii] Prior Statements of Defendant or Victim

[iv] Photographs of Crime Scenes

[v] Driving While Intoxicated

[vi] Defendant's Prior Conviction

[vii] Miscellaneous Characteristics/Facts About Defendant

2.24 State--Evid Code § 220

[1] Evid Code § 220 Text

[2] Case Notes

2.25 Statement--Evid Code § 225

[1] Evid Code § 225 Text

[2] Commission Comments

[3] Case Notes

2.26 Statute--Evid Code § 230

[1] Evid Code § 230 Text

[2] Commission Comments

[3] Case Notes

2.27 Trier of Fact--Evid Code § 235

[1] Evid Code § 235 Text

[2] Commission Comments

[3] Case Notes

2.28 Unavailable as a Witness--Evid Code § 240

[1] Evid Code § 240 Text

[2] Case Notes

[a] Unavailability in General

[b] Death

[c] Privilege

[d] Physical Disability/Then Existing Illness

[e] Beyond Reach of Court Process

[f] Reasonable Diligence to Procure Attendance

[g] Good Faith Effort and Reasonable Diligence

2.29 Writing Defined--Evid Code § 250

[1] Evid Code § 250 Text

[2] Commission Comments

[3] Case Notes

[a] Examples of Writings

[b] Rules for Admission of Writings

2.30 Original--Evid Code § 255

[1] Evid Code § 255 Text

[2] Case Notes

2.31 Duplicate--Evid Code § 260

[1] Evid Code § 260 Text



16 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 100 through 260* on the definitions of words and phrases.



Cross Reference:

For complete discussion of pretrial evidentiary procedures, see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.



17 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.01

2.01 Governing Definitions--Evid Code § 100

[1] Evid Code § 100 Text

■ *Evid Code § 100.*

Unless the provision or context otherwise requires, these definitions govern the construction of this code.

LegH: 1965 ch. 299.



18 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.02

2.02 Action--Evid Code § 105

[1] Evid Code § 105 Text

■ *Evid Code § 105.*

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

LegH: 1965 ch. 299.



19 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.03

2.03 Burden of Producing Evidence--Evid Code § 110

[1] Evid Code § 110 Text

■ *Evid Code § 110.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code §§ 110 and 115 provide a convenient means for distinguishing between the burden of proving *a fact* and the burden of *going forward* with the evidence [Cal Law Rev Com Comment].

► **Cross Reference:**

Discussion of *Evid Code § 550*, see Ch. 14, Burden of Producing Evidence, 14.01.

Discussion of *Evid Code § 1450*, Presumptions Affecting the Burden of Producing Evidence, see Ch. 22, Authentication, 22.17.

[3] Case Notes

[a] Burden of Production in General

In California, the burden of producing evidence or burden of production also has been known as the "burden of going forward" with the evidence [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 3 CR3d 279] .

Unlike the burden of proof (or burden of persuasion), which does not shift during trial, the burden of producing evidence (or burden of going forward) under *Evid Code § 110* may shift between plaintiff and defendant throughout the trial [*Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 CA4th 1086, 1097, 48 CR3d 525 (in action for compensation, in which plaintiff had ability to calculate earnings from available information, trial court properly did not

shift burden of proof to defendant)].



Cross Reference:

Discussion of burden of proof, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burdens of Proof and Persuasion.

[b] Criminal Hearings

Alert:

The California Supreme Court may decide whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense in a medical marijuana case is a burden of producing evidence under *Evid Code* § 110 or a burden of proof under *Evid Code* § 115. On a petition to grant review in such a case, the court sua sponte instructed the parties to brief this question, as well as whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt and, if so, how [*People v. Mentch* (2007) 153 P 3d 953, 2007 Cal LEXIS 1113 (granting petition 2/7/07, on appeal from Sixth Appellate District)].

The initial burden of introducing evidence on the legality of an arrest or a search and seizure is on the defendant, who makes a prima facie case by establishing an arrest or search made without a warrant. The burden then shifts to the prosecution to show proper justification. This burden is discharged by proof of a preponderance of the evidence [*People v. James* (1977) 19 C3d 99 (warrantless search)].

On a motion to suppress evidence as a result of an illegal search, defendant has the burden to prove standing [*People v. Williams* (1992) 3 CA4th 1535, 5 CR2d 372] .

When the evidence that is necessary to establish a fact essential to a claim is peculiarly within the knowledge and competence of the defendant, the defendant has the burden of going forward with the evidence on the issue even though the defendant did not assert the claim [*People v. Marquez* (1992) 1 C4th 553, 3 CR2d 710, 822 P2d 418 (capital homicide offense, burden of proving age is on defendant); *People v. Montalvo* (1971) 4 C3d 328, 93 CR 581, 93 CR 581 ; *Morris v. Williams* (1967) 67 C2d 733, [63 CR 689, 433 P2d 697] .

A probationer who objects to use of the probationer's testimony given at the probation revocation hearing has the initial burden of producing evidence that the charges are related to the circumstances at issue in the probation hearing [*People v. Coleman* (1975) 13 C3d 867, 120 CR 384, 533 P2d 1024] .

In an "own recognizance" hearing, the burden of producing evidence on the detainee's ties to the community is on the detainee [*Van Atta v. Scott* (1980) 27 C3d 424, 166 CR 149, 613 P2d 210] .

[c] Family Law Hearings

In a hearing on the termination of the parent-child relationship, the burden of proof by a preponderance of the evidence is with the party seeking to terminate the relationship [*In re Rose G.* (1976) 57 CA3d 406, 129 CR 338] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Arrests Warrantless Arrest Criminal Law & Procedure Search & Seizure Warrantless Searches General Overview



20 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.04

2.04 Burden of Proof--Evid Code § 115

[1] Evid Code § 115 Text

■ *Evid Code § 115.*

"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. It is clear that "burden of proof" requires the fact in question be proved by a preponderance of the evidence unless a greater or lesser burden is specifically required in a case because of constitutional, statutory, or decisional law.

LegH: 1965 ch. 299.

[2] Official Comments

The list of examples in the first paragraph is not exclusive, and in some cases, the law may prescribe some other burden of proof [Assemb Com Jud Comment].

It is clear that "burden of proof" requires the fact in question be proved by a preponderance of evidence unless a greater or lesser burden is specifically required in a case because of constitutional, statutory or decisional law [Cal Law Rev Com Comment].

Consider--Party with Burden of Proof:

Preponderance of the evidence means that the evidence on one side outweighs or preponderates over evidence of the other side. Therefore, a decision contrary to the weight of the evidence would be contrary to the preponderance of the evidence.



Warning--Other Burden of Proof May be Required:

Evid Code § 115 provides that the burden of proof in civil cases is a preponderance of the evidence except as otherwise provided by law. The law providing for a higher standard of proof may include decisional law, so counsel must check for any cases that might establish a different standard of proof.

Cross Reference:

For more discussion of burdens of proof in civil and criminal matters, see Ch. 13, Burdens of Proof (*Evid Code* §§ 500-523).

[3] Case Notes

[a] Specific Civil Actions--Preponderance of Evidence Required

The default standard of proof in civil cases is the preponderance of the evidence. Generally, a higher burden of proof applies only where particularly important individual interests or rights, which are more substantial than the loss of money, are at stake. Thus, for example, the clear and convincing evidence burden of proof has been applied where constitutional due process rights or important general public policy considerations are implicated [*Baxter Healthcare Corp. v. Denton* (2004) 120 CA4th 333, 365, 15 CR3d 430 ; *People ex rel Monterey Mushrooms, Inc. v. Thompson* (2006) 136 CA4th 24, 37, 38 CR3d 677 (preponderance of evidence standard applied to action on insurance contract)].

The burden of persuasion usually falls on the party seeking relief [*Schaffer v. Weast* (2005) 546 US 49, 126 S Ct 528, 535, 163 L Ed2d 387 (action under Individuals with Disabilities Education Act)].

In the absence of an express statutory standard, protective orders under the Elder Abuse Act require proof by a preponderance of the evidence of a past act or acts of elder abuse [*Bookout v. Nielsen* (2007) 155 CA4th 1131, 67 CR3d 2] .

The law does not require a defamation plaintiff to prove falsity by clear and convincing evidence. Plaintiffs showed by a preponderance of the evidence that defendant's statements were false. However, plaintiffs failed to demonstrate by clear and convincing evidence that defendant made the challenged statement with "actual malice" and so did not show a probability of prevailing [*Christian Research Institute v. Alnor* (2007) 148 CA4th 71, 55 CR3d 600 (reversing denial of motion to strike)].

The statute of limitations is a substantive matter for which the burden of proof is a preponderance of the evidence [*People v. Riskin* (2006) 143 CA4th 234, 241-242, 49 CR3d 287] .

In a legal malpractice action, a reviewing court approved use of the preponderance of evidence standard to determine whether the plaintiff would have succeeded in the underlying criminal case [*Sangha v. LaBarbera* (2006) 146 CA4th 79, 84, 52 CR3d 640] .

In condemnation action, preponderance of evidence standard is applied [*Regents of University of California v. Sheily* (2004) 122 CA4th 824] .

In contract actions, preponderance of evidence standard is applied [*Buss v. Superior Court* (1997) 16 C4th 35, 65 CR2d 366 (insurance action to recover defense costs); *Chamberlain v. Ventura County Civil Service Com.* (1977) 69 CA3d 362, 138 CR 155] .

Fraud cases require only a preponderance of the evidence [*Liodas v. Sahadi* (1977) 19 C3d 278, 137 CR 635, 562 P2d 316 (breach of fiduciary obligation)].

Fraud as a basis to oppose arbitration need be shown only by a preponderance of the evidence [*Rosenthal v. Great*

Western Fin. Securities Corp. (1996) 14 C4th 394, 58 CR2d 875 (fraud in the inception of the arbitration agreement)].

The California Supreme Court has held that the preponderance of evidence standard applies for proof of an oral joint venture or partnership agreement and in civil fraud cases. The court specifically discussed and rejected the clear and convincing proof standard in oral joint venture or partnership and civil fraud cases [*People ex rel. Allstate Ins. Co. v. Muhyeldin (2003) 112 CA4th 604, 5 CR3d 492* (insurance company sued doctors for fraud); *Weiner v. Fleischman (1991) 54 C3d 476, 286 CR 40, 816 P2d 892* (breach of alleged oral joint venture agreement)].

Securities fraud cases require the creditor to establish that his claim was not dischargeable by a preponderance of the evidence [*Grogan v. Garner (1991) 498 US 279, 111 S Ct 654*].

To state a prima facie case of improper jury selection, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias [*People v. Johnson (2003) 30 C4th 1302, 1 CR3d 1, cert. dismissed, (2004) 541 US 428, 124 S Ct 1833, 158 L Ed2d 696*].

To establish a prima facie case of improper jury selection, the objector must: (1) make as complete a record as feasible; (2) establish that the persons excluded are members of a cognizable group; and (3) show a strong likelihood or reasonable inference that such persons are being challenged because of their group association [*People v. Morrison (2004) 34 C4th 698, 21 CR3d 682*].

Matters of family law are subject to the preponderance standard [*In re Marriage of Ettefagh (2007) 150 CA4th 1578, 59 CR3d 419* (overcoming presumption that property was community property); *In re Marriage of Peters (1997) 52 CA4th 1487, 61 CR2d 493*, (date of separation in divorce action); *In re Heather Nadine B. (1992) 9 CA4th 535, 11 CR2d 891* (termination of parental rights)].

To recover lost punitive damages, a plaintiff must prove by a preponderance of the evidence that, but for attorney negligence, the jury would have found clear and convincing evidence of oppression, fraud, or malice [*Ferguson v. Loeff, Cabraser, Heimann & Bernstein, LLP (2003) 30 C4th 1037, 135 CR2d 46*].

A juvenile court may correctly adjudicate the termination of visitation, pursuant to *W&I Code §§ 388, 366.21(h), 366.22(a)*, by a preponderance of the evidence standard. Due process of law does not require a higher standard of proof than that chosen by the legislature in balancing the interests of the children with that of the parents [*In re Manolito L. (2001) 90 CA4th 753, 109 CR2d 282*].

Burden of proof higher than preponderance standard is applied only when particular important individual interests or rights are at stake; even severe civil sanctions not implicating such interest or rights do not require a higher standard of proof [*In re Marriage of Peters (1997) 61 CR2d 493* (date of separation in divorce action)].

Preponderance of evidence test is proper for a post-trial motion to add an alleged alter ego as an additional judgment debtor [*Wollersheim v. Church of Scientology (1998) 69 CA4th 1012, 81 CR2d 896*].

Once a judgment creditor presents prima facie evidence of existence of a debt by the third person to the judgment debtor, the burden shifts to the third person to establish by a preponderance of the evidence, under *Evid Code § 115*, that his or her denial of the debt is made in good faith [*Evans v. Paye (1995) 32 CA4th 265, 37 CR2d 915*].

[b] Specific Civil Actions--Different Standard of Proof Required

Although *Evid Code § 115* provides that the preponderance of evidence burden of proof is the default burden in a civil case, the section also allows the Legislature to specify a different burden of proof in certain civil proceedings. *W&I Code § 6602(a)*, a provision of the Sexually Violent Predators Act (SVPA), comes within the "otherwise provided by

1-2 California Courtroom Evidence 2.04

law" caveat of *Evid Code* § 115 and provides a "probable cause" standard as used in criminal preliminary hearing as the burden of proof [*Cooley v. Superior Court* (2002) 29 C4th 228, 127 CR2d 177, 57 P3d 654 (applying probable cause burden of proof in SVPA proceedings does not violate *equal protection clauses* of California or United States Constitutions)].

Exceptions to the general rule places the burden of proof for prima facie elements on a defendant when it is otherwise impossible for the plaintiff to make its case, and when policy considerations support affording the plaintiff greater protection. However, plaintiffs failed to show that such an exception to the normal allocation of the burden of proof was appropriate in a case involving calculation of earnings due under a production agreement. Greater access to relevant financial evidence did not mandate that a defendant bear the burden of proof on the issue, since plaintiff made no showing in the trial court that it was unable to obtain the information needed to establish its claimed rights [*Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 CA4th 1086, 1096-1097, 48 CR3d 525 (trial court properly did not shift burden of proof to defendant)].

Certain situations require a higher degree of proof in civil cases and rise to the level of clear and convincing proof, which requires a finding of high probability, so that the trier of fact is left with no substantial doubt [*In re Michael G.* (1998) 63 CA4th 700, 74 CR2d 642 (action to terminate parental rights; clear and convincing evidence requires a finding of high probability or evidence so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind)].

The burden of proof is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation; doubtful cases will be decided against a waiver. The clear and convincing proof standard is not limited only to those instances of statutorily created rights favored in the law [*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 CA4th 54, 35 CR2d 515 (lessor has burden of proving lessee's waiver of contractual contingencies by clear and convincing evidence); *Mock v. Michigan Millers Mutual Insurance Co.* (1992) 4 CA4th 306, 5 CR2d 594 (bad faith handling of insurance claims); *Lillian F. v. Superior Court (Kretz)* (1984) 160 CA3d 314, 206 CR 603 (hearing on conservatee's capacity to give informed consent to convulsive shock treatment)].

In a defamation action brought by a public figure, plaintiffs failed to demonstrate a probability of prevailing, by clear and convincing evidence that defendant made the challenged statement with "actual malice" [*Christian Research Institute v. Alnor* (2007) 148 CA4th 71, 55 CR3d 600 (reversing denial of motion to strike)].

Dependency proceedings are a form of civil case, and the Evidence Code applies in every action unless otherwise provided by statute [*Evid Code* § 300]. Accordingly, *Evid Code* § 115 should apply. Further, the Legislature's insertion of the higher clear and convincing standard of proof in *W&I Code* § 366.21(g)(1) and (2) for reasonable services findings at six- and 12-month review hearings, but not in *W&I Code* § 366.22 for 18-month permanency planning hearings, evidences its intent that reasonable services findings made at 18-month hearings not be subject to the higher standard of proof. Accordingly, the standard of proof required for a reasonable services finding at 18-month review hearings is preponderance of the evidence [*Katie V. v. Superior Court* (2005) 130 CA4th 586, 594-595, 30 CR3d 320].

Since the Probate Code conservatorship provisions do not specify a standard of proof, a court may apply the clear and convincing evidence standard in the situation where an individual has a probate conservator appointed of his person and estate [*Conservatorship of Sanderson* (1980) 106 CA3d 611, 165 CR 217].

In order to take as an equitably adopted child from the alleged adoptive parent's intestate estate, the claimant must prove the decedent's intent to adopt by the higher standard of clear and convincing evidence [*Estate of Ford* (2004) 32 C4th 160, 8 CR3d 541].

Preponderance of the evidence standard of proof was proper in determining that evidence supported grant of guardianship petition, taking into consideration private interests affected, risk of error, and government interest [*Guardianship of Diana B.* (1994) 30 CA4th 1766, 36 CR2d 447] .

An exception to the preponderance standard exists when title to property is involved. The owner of the legal title of property is presumed to be the owner of full beneficial title and this presumption may be rebutted only by clear and convincing proof [*Evid Code* § 662]. A plaintiff seeking to establish interest in property, under an agreement pursuant to *Marvin v. Marvin* (1976) 18 C3d 660 , must establish the claim by clear and convincing evidence [*Tannehill v. Finch* (1986) 188 CA3d 224, 228, 232 CR 749] .

In a marital dissolution case, in which the wife claimed that she had signed a quitclaim deed to property under undue influence, the burden of rebutting the presumption of undue influence was by a preponderance of the evidence. Because *Fam Code* § 721 does not specify a greater burden, the husband overcame the presumption of undue influence by a preponderance of the evidence. It was also the husband's burden to establish by a preponderance of the evidence that the quitclaim deed was freely and voluntarily made, with a full knowledge of all the facts and with a complete understanding of the transfer [*In re Marriage of Matthews* (2005) 133 CA4th 624, 631, 35 CR3d 1 (no basis for overturning trial court's ruling that quitclaim deed had been freely signed)].

Substantial evidence is defined as evidence of ponderable legal significance, reasonable, credible, of solid value and substantial proof of the essentials required by law [*United Professional Planning, Inc. v. Superior Court* (1970) 9 CA3d 377, 88 CR 551 (substantial evidence must be more than a mere scintilla); *Black v. Shearson, Hammill & Co.* (1968) 266 CA2d 362, 72 CR 157] .

Although the burden of proof normally rests with the plaintiff, there is a recognized exception in the bailment situation. A defendant bailee has the burden to show freedom from fault [see *Evid Code* § 500, "except as otherwise provided by law"; *Gebert v. Yank* (1985) 172 CA3d 544, 218 CR 585] .

[c] Specific Criminal Actions--Preponderance of Evidence Required

The statute of limitations is not an ingredient of an offense but a substantive matter for which the prosecution's burden of proof is a preponderance of the evidence [*People v. Riskin* (2006) 143 CA4th 234, 241-242, 49 CR3d 287] .

Certain findings in criminal cases require a lower degree of proof [*People v. Carpenter* (1997) 15 C4th 312 (proof of uncharged crimes need only be proven by a preponderance of the evidence); *People v. James* (1977) 19 C3d 99, 137 CR 447, 561 P2d 1135 ; *People v. Scola* (1976) 56 CA3d 723, 128 CR 477 (proximate cause of accident)].

In a discriminatory prosecution case, erroneous imposition of the wrong standard of proof (clear and convincing evidence instead of the correct preponderance of the evidence standard) is not federal constitutional error [*People v. Smith* (1984) 155 CA3d 1103, 203 CR 196] .

During the penalty phase of a capital offense prosecution, circumstances of aggravation and mitigation need only be proved by a preponderance of the evidence [*People v. Welch* (1999) 20 C4th 701, 85 CR2d 203, 976 P2d 754 (penalty phase statute inconsistent with burden of proof quantification)].

The state has the burden of proof in demonstrating by a preponderance of the evidence that the monitoring of a conversation between an inmate and a friend is necessary for the maintenance of security at a correctional institution [*People v. Jardine* (1981) 116 CA3d 907, 172 CR 408 (recorded conversation among three defendants in police car admissible; jailhouse conversation between defendant and wife admissible as no reasonable expectation of privacy)].

The state has the burden of proof in demonstrating by a preponderance of the evidence that an exhibit has been

reconstructed [*People v. Osband* (1996) 13 C4th 622, 55 CR2d 26, 919 P2d 640 (62 exhibits were precisely reconstructed)].

[d] Specific Criminal Actions--Different Standard of Proof Required

Alert:

The California Supreme Court may decide whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense in a medical marijuana case is a burden of producing evidence under *Evid Code* § 110 or a burden of proof under *Evid Code* § 115. On a petition to grant review in such a case, the court sua sponte instructed the parties to brief this question, as well as whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt and, if so, how [People v. Mentch (2007) 2007 C LEXIS 1113 (granting petition 2/7/07, on appeal from Sixth Appellate District)].

The rule is that the issue of guilt must be proved by evidence beyond a reasonable doubt [Prob Code § 1096; *Evid Code* § 501].

When defendant is a first offender and has been found not guilty of one count of a multiple-count prosecution, the same standard of proof beyond a reasonable doubt should apply in both conviction and sentencing [*People v. Takencareof* (1981) 119 CA3d 492, 174 CR 112 (improper application of preponderance of the evidence standard at sentencing)].

At a preliminary hearing, only slight evidence is needed [*People v. Jablon* (1957) 153 CA2d 456, 314 P2d 824 (reasonable probability of guilt)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCriminal Law & ProcedureAppealsGeneral OverviewEvidenceInferences & PresumptionsGeneral Overview



21 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.05

2.05 Civil Action--Evid Code § 120

[1] Evid Code § 120 Text

- *Evid Code § 120.*

"Civil action" includes civil proceedings.

LegH: 1965 ch. 299.

[2] Commission Comments

This section together with the definition of criminal actions in *Evid Code § 130* assures the applicability of the Evidence Code to all actions and proceedings [Cal Law Rev Com Comment].

[3] Case Notes

The term "civil action" is by definition not a "special proceeding" [CCP §§ 22, 23, 30], and "civil action" does not have a different meaning from "civil suit." The Legislature has used both "civil suit" and "civil action" in complementary statutory provisions, confirming that these terms are interchangeable in this context [*People v. Yartz* (2005) 37 C4th 529, 538, 36 CR3d 328, 123 P3d 604 (holding that sexual psychopathy proceeding was special proceeding and not civil suit)].

A petition for asset forfeiture is a civil proceeding [*Jauregi v. Superior Court* (1999) 72 CA4th 931, 85 CR2d 553 (hearsay rules apply to proof of standing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsRule Application & Interpretation



22 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.06

2.06 Conduct--Evid Code § 125

[1] Evid Code § 125 Text

■ *Evid Code § 125.*

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

LegH: 1965 ch. 299.

[2] Case Notes

Under certain circumstances, silence (i.e., passive, nonverbal behavior) may amount to a "statement" if it is intended to be so [*People v. Meza (1987) 188 CA3d 1631, 1646, 234 CR 235* (holding that a juror can commit perjury by concealing kinship with the defendant during voir dire); *see Evid Code § 225*].



23 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.07

2.07 Criminal Action--Evid Code § 130

[1] Evid Code § 130 Text

■ *Evid Code § 130.*

"Criminal action" includes criminal proceedings.

LegH: 1965 ch. 299.



24 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.08

2.08 Declarant--Evid Code § 135

[1] Evid Code § 135 Text

■ *Evid Code § 135.*

"Declarant" is a person who makes a statement.

LegH: 1965 ch. 299.

[2] Case Notes

"Declarant" includes criminal defendants, and not just citizens making statements to police officers [*Nienhouse v. Superior Court* (1996) 42 CA4th 83, 49 CR2d 573 (interpreting Proposition 115)].



25 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.09

2.09 Evidence--Evid Code § 140

[1] Evid Code § 140 Text

■ *Evid Code § 140.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

"Evidence" is defined broadly to include the testimony of witnesses, tangible objects, sights (e.g., a jury view of the scene), sounds (e.g., the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof [Cal Law Rev Com Comment].

This definition includes anything offered in evidence whether or not it is technically admissible and whether or not it is received. For example, if hearsay testimony is admitted without objection, this section makes it clear that such testimony would constitute evidence and as such may be considered by the trier of fact [Cal Law Rev Com Comment].

A presumption is not evidence under this section [Cal Law Rev Com Comment].



Warning--"Pre-Code" Decisions:

Evid Code § 140 restates and supersedes the concepts found in former *CCP* §§ 1823, 1827, and 1954. Although there have been many changes made by *Evid Code § 140*, there are cases construing the concepts of those former Code of Civil Procedure sections that are still felt to be "good law." When dealing with a precode case on this topic, counsel should take care to see that the law of the case has not been changed by the Evidence Code.



Cross Reference:

Practice-related discussion on handling different types of evidence at trial, see Ch. 26, Documentary

Evidence, Ch. 27, Documentary and Experimental Evidence, Ch. 28, Expert Testimony and Ch. 29, Motions in Limine.

Procedural discussion on introducing evidence, see California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence, Unit 22, Rules Affecting Admissibility of Evidence (Matthew Bender).

[3] Case Notes

[a] Examples of "Evidence"

A jury's view is evidence [People v. Garcia (2005) 36 C4th 777, 798 n7, 31 CR3d 541, 115 P3d 1191].

Physical demonstration of position of defendant's hand as he fired gun [People v. Buttles (1990) 223 CA3d 1631, 273 CR 397].

Physical appearance of alleged minor may be considered in judging his age [People v. Montalvo (1971) 4 C3d 328, 93 CR 581, 482 P2d 205].

Judge's view of scene [Cardenas v. Turlock Irrigation Dist. (1968) 267 CA2d 352, 73 CR 69].

Statements of counsel in argument or otherwise are not evidence and, unless in stipulation or admission, are not binding on client [*In re Estate of Nicholas* (1986) 177 CA3d 1071, 223 CR 410] .

Judicial notice is a kind of evidence and may be relied on to contradict other evidence and to support findings of fact and judgment based thereon [*Estate of Fawcett* (1965) 232 CA2d 770, 43 CR 160 (court records); *Mack v. State Board of Education* (1964) 224 CA2d 370, 36 CR 677 (error to judicially notice ultimate fact in dispute)].

Testimony not given under oath [see *Evid Code* § 710] is not evidence within the meaning of the Evidence Code and may not properly be considered as such by the trial court [*People v. Lee* (1985) 164 CA3d 830, 210 CR 799] .

Allegations in a verified complaint that are not offered into evidence are not evidence [*San Diego Police Officers Assn. v. City of San Diego* (1994) 29 CA4th 1736, 35 CR2d 253] .

A qualified expert's opinion is evidence. It may be based in part on other evidence already before the trier of fact [*Andersen v. Howland* (1970) 3 CA3d 380, 83 CR 308] .

A stipulation as to prior convictions is evidence of the fact it seeks to prove, and is a thing "presented to the senses" [*People v. Griggs* (2003) 110 CA4th 1137, 2 CR3d 380 ; *People v. Collie* (1981) 30 C3d 43, 177 CR 458] .

Unsworn statements of district attorney in opening remarks do not constitute evidence [*County of Alameda v. Moore* (1995) 33 CA4th 1422, 40 CR2d 18] .

In criminal cases, demonstrative evidence is admissible so long as it tends to prove a material issue or to clarify the circumstances of a crime [*People v. Corral* (1964) 224 CA2d 300, 36 CR 591 (purse admissible in burglary case); *People v. Buchtel* (1963) 221 CA2d 397, 34 CR 437 (demonstration of speed of gun)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Opening Statements Evidence Procedural Considerations Exclusion & Preservation by
Prosecutor Evidence Procedural Considerations Rule Application & Interpretation



26 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.10

2.10 The Hearing--Evid Code § 145

[1] Evid Code § 145 Text

■ *Evid Code § 145.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

This definition is much broader than would be a reference to the trial itself; the definition includes, for example, preliminary hearings and post-trial proceedings [Cal Law Rev Com Comment].



27 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.11

2.11 Hearsay Evidence--Evid Code § 150

[1] Evid Code § 150 Text

- *Evid Code § 150.*

"Hearsay evidence" is defined in Section 1200.

LegH: 1965 ch. 299.

Cross Reference:

Discussion of related matters under *Evid Code §§ 1200-1380*, see Ch. 21, Hearsay Rules and Exceptions.

Complete discussion of the hearsay rule, as well as making and responding to hearsay objections, see California Trial Guide, Unit 40, Hearsay (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsGeneral Overview



28 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.12

2.12 Law--Evid Code § 160

[1] Evid Code § 160 Text

- *Evid Code § 160.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

This definition makes it clear that "law" includes judicial decisions as well as statutory and constitutional provisions [Cal Law Rev Com Comment].

[3] Case Notes

[a] Constitutional, Statutory or Decisional Laws

"Law" includes the following:

- In matter of intestate estate, court persuaded by reasoning of sister states and commentary [*Estate of Ford* (2004) 32 C4th 160, 8 CR3d 541] .
- Judicial decisions [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803] .

The standard of proof may be changed by constitutional, statutory, or decisional laws [*People v. Burnick* (1975) 14 C3d 306, 313, 121 CR 488, 535 P2d 352 ; *Baxter Healthcare Corp. v. Denton* (2004) 120 CA4th 333, 15 CR3d 430] .

[b] What is Not "Law"

A local ordinance cannot be deemed a statute for purposes of deviation from the rules of evidence concerning burden of proof [*Fisher v. City of Berkeley* (1984) 37 C3d 644, 209 CR 682 ; see *Evid Code § 500*].



29 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.13

2.13 Oath--Evid Code § 165

[1] Evid Code § 165 Text

- *Evid Code § 165.*

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

LegH: 1965 ch. 299.



30 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.14

2.14 Perceive--Evid Code § 170

[1] Evid Code § 170 Text

■ *Evid Code § 170.*

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

LegH: 1965 ch. 299.



31 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.15

2.15 Person--Evid Code § 175

[1] Evid Code § 175 Text

■ *Evid Code § 175.*

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

LegH: 1965 ch. 299, 1994 ch. 1010.



32 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.16

2.16 Dependent Person--Evid Code § 177

[1] Evid Code § 177 Text

■ *Evid Code § 177.*

"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.

LegH: 2004 ch. 823.



33 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.17

2.17 Personal Property--Evid Code § 180

[1] Evid Code § 180 Text

■ *Evid Code § 180.*

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

LegH: 1965 ch. 299.



34 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.18

2.18 Property--Evid Code § 185

[1] Evid Code § 185 Text

■ *Evid Code § 185.*

"Property" includes both real and personal property.

LegH: 1965 ch. 299.



35 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.19

2.19 Proof--Evid Code § 190

[1] Evid Code § 190 Text

■ *Evid Code § 190.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

The disjunctive reference to the "trier of fact or the court" is needed because, even when the jury is the trier of fact, the court is required to determine preliminary questions of fact on the basis of proof [Cal Law Rev Com Comment].

[3] Case Notes

Because defendants admitted liability for the accident shortly before trial, plaintiff did not have to prove liability; therefore the trial court did not abuse its discretion in denying the plaintiff's motion for expenses incurred for proving matters not admitted [*Stull v. Sparrow* (2001) 92 CA4th 860, 112 CR2d 239] .



36 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.20

2.20 Public Employee--Evid Code § 195

[1] Evid Code § 195 Text

- *Evid Code § 195.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

This section makes it unnecessary to repeat the phrase officer, agent, or employee in numerous sections and eliminates the distinction between employees and officers [Cal Law Rev Com Comment].

[3] Case Notes

A private company that acted as the fiscal intermediary for respondent State Department of Health Services, in receiving claims, verifying the eligibility of the claimants, and paying or rejecting claims, was acting as an agent of a public agency within the meaning of *Evid Code § 195* for the purpose of satisfying the foundational requirements of the official records exception to the hearsay rule. The presumption that official acts were properly done applied in the absence of evidence to the contrary [*Bhatt v. State Dept. of Health Services* (2005) 133 CA4th 923, 930, 35 CR3d 335 (*Medi-Cal patient's claim*)] .

When private citizens act as an agent of a public entity, they are public employees under *Evid Code § 195* and their writings may be admissible under *Evid Code § 1280* [*Imachi v. Dept. of Motor Vehicles* (1992) 2 CA4th 809, 3 CR2d 478 (dictum in footnote)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsPublic RecordsGeneral Overview



37 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.21

2.21 Public Entity--Evid Code § 200

[1] Evid Code § 200 Text

■ *Evid Code § 200.*

"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.

LegH: 1965 ch. 299.

[2] Case Notes

Since "public entity" includes "every form of public authority" and the offices of the city manager and the police department are public authorities, the rules promulgated in a police department manual are regulations of a public entity for purposes of *Evid Code § 669* [*Colvin v. City of Gardena* (1992) 11 CA4th 1270, 15 CR2d 234 (city managers and police chiefs); *Peterson v. Long Beach* (1979) 24 C3d 238, 155 CR 360, 594 P2d 477] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawForeign BusinessesQualificationsGovernmentsLocal GovernmentsPolice Power



38 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.22

2.22 Real Property--Evid Code § 205

[1] Evid Code § 205 Text

■ *Evid Code § 205.*

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

LegH: 1965 ch. 299.



39 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.23

2.23 Relevant Evidence--Evid Code § 210

[1] Evid Code § 210 Text

■ *Evid Code § 210.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

Under *Evid Code § 210*, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred. This retains existing law as found in subdivisions 1 and 15 of the *CCP § 1870*, which are superseded by the Evidence Code. In addition, *Evid Code § 210* makes it clear that evidence relating to the credibility of witnesses and hearsay declarants is relevant evidence [Cal Law Rev Com Comment].

► Cross Reference:

Specific differences between relevancy of evidence in civil law and criminal law, see Ch. 6, Relevancy [*Evid Code §§ 350-351.1*].

Discussion concerning the admissibility of character evidence, see Ch. 19, Character, Habit and Custom [*Evid Code §§ 1101-1105*].

Thorough discussion of the rules concerning admission of evidence, see California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence (Matthew Bender).

Discussion of pretrial evidentiary procedures see Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

[3] Case Notes**[a] Definition of "Relevant Evidence"**

Relevant evidence has two distinct dimensions: (1) probative value, the tendency of the evidence in reason to prove or disprove the proposition for which it is offered, and (2) relationship to a matter which is provable in the action, the tendency of the evidence in reason to prove or disprove any disputed fact that is of consequence to the determination of the action [*Western States Petroleum Assn. v. Superior Court* (1995) 9 C4th 559, 38 CR2d 139, 888 P2d 1268 ; *People v. Torrez* (1995) 31 CA4th 1084, 37 CR2d 712 ; *People v. Hill* (1992) 3 CA4th 16, 4 CR2d 258] .

"The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive" [*People v. Wilson* (2006) 38 C4th 1237, 1245, 45 CR3d 73, 136 P3d 864 ; *People v. Hart* (1999) 20 C4th 546, 85 CR2d 132] .

Evidence is relevant when it tends to establish a fact from which a fact in issue can be directly inferred [*People v. Cordova* (1979) 97 CA3d 665, 158 CR 852] .

In an action on a note, the trial court erred in excluding evidence of plaintiff's Canadian tax returns as irrelevant. Defendant had alleged that the note was extinguished by a novation that specifically allowed plaintiff to write off the note on his Canadian taxes. If plaintiff had done so, then the jury could infer that plaintiff did consider the note extinguished, and the parties did enter into a novation providing for the write-off. The Canadian tax returns were relevant [*Firestone v. Hoffman* (2006) 140 CA4th 1408, 1419, 45 CR3d 534 (reversing judgment)].

Evidence regarding issues not in dispute may be irrelevant [*People v. Lucero* (1998) 64 CA4th 1107, 75 CR2d 806 (footprint evidence irrelevant for nonhearsay purpose offered)].

The test of relevancy for credibility evidence is whether or not it reasonably tends to aid the trier of fact in assessing the probative value of the witness's testimony [*People v. Sims* (1998) 65 CA4th 304, 76 CR2d 443 (prior felony conviction is relevant to witness's credibility, but underlying circumstances of conviction are irrelevant); *People v. Mickel* (1991) 54 C3d 140, 284 CR 511, 814 P2d 290 (evidence concerning whether psychiatric experts opposed death penalty was admitted as bearing on credibility); *People v. Medina* (1990) 51 C3d 870, 274 CR 849 (an officer may give an opinion as to whether a defendant appeared to understand a conversation); *People v. Sergill* (1982) 138 CA3d 34, 187 CR 497 (opinions of officers who interviewed a molested child as to her truthfulness were irrelevant)].

Evidence that has a tendency to either support or rebut the presumption of innocence is relevant in criminal cases [*People v. Whitney* (1978) 76 CA3d 863, 143 CR 301] .

Evidence is irrelevant and, hence, inadmissible when it is offered to prove an undisputed issue of fact [*People v. Lucero* (1998) 64 CA4th 1107, 75 CR2d 806 (footprint evidence irrelevant for nonhearsay purpose offered); *People v. Swearington* (1977) 71 CA3d 935, 140 CR 5] .

Trial court erroneously allowed evidence of gang graffiti in defendant's room where issue of gun ownership was not disputed [*People v. Avitia* (2005) 127 CA4th 185, 193, 24 CR3d 887] .

If the connection between the uncharged offense and the ultimate fact in question is unclear, the evidence should be excluded [*People v. Clark* (1992) 3 C4th 41, 10 CR2d 554, 833 P2d 561 ; *People v. Thompson* (1980) 27 C3d 303, 165 CR 289, 611 P2d 883] .

A fact "of consequence" to the prosecution's case is not "disputed" within the statute even though the accused has pleaded not guilty. Where a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant [*People v.*

Hall (1980) 28 C3d 143, 167 CR 844, 616 P2d 826 ; *People v. McElheny* (1982) 137 CA3d 396, 187 CR 39 (limited holding of Hall to stipulations of ultimate fact)].

[b] Role of Court in Determining Relevance

The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence [*People v. Scheid* (1997) 16 C4th 1, 65 CR2d 348 (photographs); *People v. Kelly* (1992) 1 C4th 495, 3 CR2d 677, 822 P2d 385 (court is not required to admit evidence that merely makes victim look bad); *People v. Green* (1980) 27 C3d 1, 164 CR 1] .

Courts are given wide discretion in determining relevance under the Code. An appellate court should reverse a decision only when a prejudicial abuse of discretion has occurred [*People v. Basuta* (2001) 94 CA4th 370, 114 CR2d 285 (improper mention of a polygraph test in combination with the error in excluding evidence that defendant's mother had jerked or shaken the child was prejudicial in a child abuse case); *DePalma v. Westland Software House* (1990) 225 CA3d 1534, 276 CR 214] .

Cross Reference:

Discussion of the *Evid Code* §§ 352-352.1, see Ch. 7, Discretion of Court to Exclude.

[c] Civil Law: Specific Issues

In eminent domain proceedings, the value of other land is admissible as relevant evidence to establish the value of real property [*City of Santa Cruz v. Wood* (1967) 252 CA2d 52, 60 CR 26 (remote, speculative, or conjectural evidence not admissible); *People ex rel. Dept. of Public Works v. Wasserman* (1966) 240 CA2d 716, 50 CR 95 (price to be paid must be sufficiently voluntary to be a reasonable index of value)].

Absence of previous accidents may be admissible on the issues of notice and defendant's foreseeability of harm [*Beauchamp v. Los Gatos Golf Course* (1969) 273 CA2d 20, 77 CR 914] .

Experimental evidence must be relevant. Accident reconstruction experiments to be relevant must be conducted under the same or substantially similar conditions as those existing at the time the accident occurred [*Culpepper v. Volkswagen of America, Inc.* (1973) 33 CA3d 510, 109 CR 110] .

The requirement of similarity of conditions (for the admissibility of previous accidents) is "much relaxed" when the evidence is offered to show notice [*Hilts v. County of Solano* (1968) 265 CA2d 161, 71 CR 275 (previous accidents at same intersection)].

Evidence of solvency is relevant on the issue of actual intent to defraud [*Hansford v. Lassar* (1975) 53 CA3d 364, 125 CR 804] .

Evidence of constructing a fence and maintaining lawn is relevant to issue of control over land at time plaintiff was injured [*Alcaraz v. Vece* (1997) 14 C4th 1149, 60 CR2d 448] .

[d] Criminal Law: Specific Issues

[i] Effect of Proposition 8 on Relevance

To the extent that California exclusionary rules and vicarious exclusionary rules had been more stringent than those explicated by the U.S. Supreme Court, they are abrogated by Proposition 8. Because Proposition 8 cannot reach the federal Constitution, relevant evidence obtained as a result of an illegal search and seizure may be excluded only under

circumstances explicated by the U.S. Supreme Court [*People v. Daan* (1984) 161 CA3d 22, 207 CR 228 (vicarious exclusionary rule may no longer be asserted in California)].

Enactors of the constitutional article providing that relevant evidence shall not be excluded in any criminal proceeding intended Evidence Code definition of relevant evidence to govern the interpretation of the words "relevant evidence" in the constitutional article [*People v. Hill* (1992) 3 CA4th 16, 4 CR2d 258] .



Warning--Criminal Prosecution:

Relevant evidence that includes evidence on credibility must be probative and tend to establish a material proposition. Following passage of Proposition 8 [Cal Const art I, § 28(d)] in 1982, which mandates admission of all relevant evidence, certain relevant evidence that had been excluded under the Cal Const art I, § 13 because it was illegally obtained is now admissible.

[ii] State of Mind/Motive

The fact that a defendant who is charged with first degree murder has thereafter killed or attempted to kill another person is relevant to show that his state of mind was such that he was not revulsed by the prior killing but was willing to kill again [*People v. Tahl* (1967) 65 C2d 719, 56 CR 318, 423 P2d 246 (killing; attempted killing; threats to kill)].

However, evidence that a third person had a motive to commit a crime with which the defendant is charged is "inadmissible if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense" [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164 (murder prosecution); *People v. Clark* (1992) 3 C4th 41, 10 CR2d 554, 833 P2d 561 ; *People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610 ; *People v. Green* (1980) 27 C3d 1, 164 CR 1] .

Evidence that established premeditation and motive are relevant in criminal cases [*People v. Garceau* (1993) 6 C4th 140, 24 CR2d 664, 862 P2d 664 (testimony about defendant's fear that victims would "snitch" on him)].

Evidence of motive or "state of mind" is relevant because the circumstantial evidence reasoning process accepts as valid that one tends to act in accordance with one's state of mind [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131 (photographs of victim's body with instruments of sexual assault were relevant to defendant's mental state at time of crimes); *People v. De La Plane* (1979) 88 CA3d 223, 151 CR 843] .

Defendant's conduct within a reasonable time before or after the act is admissible to show his mental condition at the time of its commission [*People v. Wolff* (1964) 61 C2d 795, 40 CR 271 (calm and coherent immediately after murder)].

[iii] Prior Statements of Defendant or Victim

Criminal defendant's videotaped statement can tend to prove consciousness of guilt and, thus, the identity of the murderer; hence the statement may constitute relevant evidence [*People v. Cain* (1995) 10 C4th 1, 40 CR2d 481 (defendant's denial of knowledge of the crimes, taken together with his subsequent statements to the police could be viewed as part of an evolving plan to evade responsibility and deflect blame); *People v. Terry* (1970) 2 C3d 362, 85 CR 409 (escape from jail pending trial); *People v. Sand* (1978) 81 CA3d 448, 146 CR 448 (may not use evidence of defendant kicking and swinging after he refused consent for medical treatment)].

Defendant's false statement, made in open court at a hearing on a preliminary motion, may be relevant. Inference of guilt comes from the fact that falsehood was told to mislead authorities and avoid suspicion, not the time at which the statement was made [*People v. White* (1995) 35 CA4th 758, 41 CR2d 510] .

In a prosecution for forcible rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible [*People v. Kipp* (2001) 26 C4th 1100 (death penalty was affirmed for murder, rape, and robbery where defendant's letters admitting crimes and professing satanic thoughts properly admitted)].

Victim's fresh complaint may be admitted in a criminal trial for nonhearsay purposes, provided the evidence meets the ordinary standard of relevance [*People v. Brown* (1994) 8 C4th 746, 35 CR2d 407, 883 P2d 949] .

In a prosecution for murder, the trial court reasonably determined that the victim's prior out-of-court statement, to the effect that defendant had been fondling her and that she was going to confront him if he did it again, was relevant to the circumstances of the murder. That is, it had a tendency to prove what transpired, because it suggested that she confronted defendant and that in response defendant murdered her willfully and with premeditation and deliberation [*People v. Griffin* (2004) 33 C4th 536, 15 CR3d 743] .

[iv] Photographs of Crime Scenes

Photographs of crime scenes generally are relevant [*People v. Hoyos* (2007) 41 C4th 872, 908, 63 CR3d 1, 162 P3d 528 petition for cert (12/10/2007) (photographs of crime scene and victim autopsies were clearly relevant to how victims were killed and what happened prior to killings); *People v. Bonilla* (2007) 41 C4th 313, 60 CR3d 209, 160 P3d 84 (photographs of victim's body corroborated testimony about use of duct tape in killing and details of burial); *People v. Stewart* (2004) 33 C4th 425, 15 CR3d 656, 93 P3d 271 (murder prosecution); *People v. Heard* (2003) 31 C4th 946, 4 CR3d 131 (photographs were relevant to establish the victim's injuries and the nature of the attack and struggle, and to corroborate prosecution witnesses); *People v. Taylor* (2001) 26 C4th 1155, 113 CR2d 827, 34 P3d 937 (during guilt phase of trial, court did not abuse its discretion in admitting the videotape of the crime scene); *People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (photos showed visibility of victim's pregnancy); *People v. Scheid* (1997) 16 C4th 1, 65 CR2d 348 (photos corroborated witness's testimony and supported theory of planned robbery/murder)].

The trial judge did not err in admitting challenged photographs, where each of which had probative value in proving contested issues at trial such as defendant's use of a gun, state of mind, premeditation, and motive [*People v. Stewart* (2004) 33 C4th 425, 15 CR3d 656, 93 P3d 271 (murder prosecution)].

[v] Driving While Intoxicated

Fact that nystagmus testing is neither definitive nor able to determine intoxication alone does not render it irrelevant [*People v. Joehnk* (1995) 35 CA4th 1488, 42 CR2d 6] .

[vi] Defendant's Prior Conviction

Expungement statutes of California [see *Pen Code* § 1203.4] and sister jurisdictions were enacted to eradicate the record of conviction for certain purposes when a probationer successfully completes probation, hence the very fact of expungement prevents a prior conviction from being relevant evidence on the issue of one's credibility [*People v. Field* (1995) 31 CA4th 1778, 37 CR2d 803] .

[vii] Miscellaneous Characteristics/Facts About Defendant

In an action for felony murder, defendant's resistance to police efforts to transfer him from one police car to another was admissible to show consciousness of guilt and to contradict the evidence of his later cooperation with a DNA swab procedure in custody [*People v. Jones* (2007) 157 CA4th 580, 599, 69 CR3d 132] .

The trial court in a murder prosecution properly permitted the prosecutor to cross-examine the defendant about his having formerly practiced with a buck knife, despite the claim that evidence of his past practice was irrelevant because

there was no evidence that he used a buck knife to stab the victims. The testimony on this issue was inconclusive and therefore did not foreclose that possibility. Moreover, evidence of defendant's earlier efforts to perfect his ability to quickly retrieve and open a pocketknife tended to undermine defendant's version of his attack on the victims [*People v. Lewis* (2001) 25 C4th 610, 106 CR2d 629, 22 P3d 392] .

Evidence of gang graffiti on posters in defendant's room was prejudicial and erroneously admitted where no evidence linked graffiti to defendant or gun ownership; evidence's only function was to show defendant's criminal disposition [*People v. Avitia* (2005) 127 CA4th 185, 193, 24 CR3d 887] .

Facts relating to the guilt of the accused person may be established by circumstantial as well as by direct evidence [*People v. Freeman* (1994) 8 C4th 450, 34 CR2d 558, 882 P2d 249 (possession of plastic garbage bag used by shooter during murder); *People v. Dickerson* (1969) 270 CA2d 352, 75 CR 828 (solicitation by decoy of accused with preexisting criminal intent)].

When evidence of defendants' gang membership tends "logically, naturally, and by reasonable inference" to establish their identities as perpetrators of charged offenses, the trial court does not abuse its "broad discretion" when it determines that the evidence of gang membership is relevant evidence [*People v. Champion* (1995) 9 C4th 879, 39 CR2d 547, 891 P2d 93] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Novation Criminal Law & Procedure Criminal Offenses Weapons Use General Overview Evidence General Overview



40 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.24

2.24 State--Evid Code § 220

[1] Evid Code § 220 Text

■ *Evid Code § 220.*

"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.

LegH: 1965 ch. 299.

[2] Case Notes

This statute is broadly defined [*Sosinsky v. Grant (1992) 6 CA4th 1548, 8 CR2d 552*] .



41 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.25

2.25 Statement--Evid Code § 225

[1] Evid Code § 225 Text

■ *Evid Code § 225.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

The significance of this definition is explained in the comment to *Evidence Code section 1200* [Cal Law Rev Com Comment].

[3] Case Notes

For purposes of the hearsay rule, conduct is assertive if the actor at the time intended the conduct to convey a particular meaning to another person. For example, a nod of the head in response to a question calling for a yes-or-no answer, or a gesture pointing to a particular person when asked to identify a perpetrator, are examples of assertive conduct [*People v. Jurado* (2006) 38 C4th 72, 129, 41 CR 3d 319, 131 P3d 400, cert denied, 127 S Ct 383, 166 L Ed2d 276] .

Silence (e.g., failure to offer an explanation under circumstances that call for one) is not a statement but merely nonassertive conduct [*People v. Gordon* (1966) 244 CA2d 391, 53 CR 252 (accusation of codefendant before police)].

Under certain circumstances, silence (i.e., passive nonverbal behavior) may amount to a "statement" if it is intended to do so [*People v. Meza* (1987) 188 CA3d 1631, 234 CR 235 (holding that a juror can commit perjury by concealing kinship with the defendant during voir dire); see *Evid Code § 125*].

Reasonable persons may take a drawing to be evidence of an implied statement [*In re D.L.* (1975) 46 CA3d 65, 120 CR 276 (drawing of person stabbed and strangled and labeled with murder victim's name admissible as admission of party); *Evid Code § 1220*].

Evidence Code section 1360 provides an exception for admission of a statement made by the victim when under the age of 12 describing any act of child abuse. A statement may include the victim's writings [*People v. Hammer* (2002) 94 CA4th 1443, 115 CR2d 144 (no error in admitting the victim's writings as statements)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayRule ComponentsNonverbal Conduct



42 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.26

2.26 Statute--Evid Code § 230

[1] Evid Code § 230 Text

- *Evid Code § 230.*

"Statute" includes a treaty and a constitutional provision.

LegH: 1965 ch. 299.

[2] Commission Comments

This section means that, when a particular section is subject to any exceptions "otherwise provided by statute," exceptions provided by the Constitution are also applicable [Cal Law Rev Com Comment].

[3] Case Notes

The Evidence Code defines "statute" broadly to include treaties and constitutional provisions. The term is not limited to statutes codified in the Evidence Code or to state statutes in general [*Evid Code § 230; see also Evid Code § 920* (enumeration of privileges does not repeal by implication privileges not listed)]. Thus, federal statutes and treaties may supply the basis for a privilege recognized by California courts [*Union Bank of California v. Superior Court* (2005) 130 CA4th 378, 388-389, 29 CR3d 894 (giving effect to "suspicious activity report" privilege as statutory privilege created by federal statute and regulations implementing it)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGeneral Overview



43 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.27

2.27 Trier of Fact--Evid Code § 235

[1] Evid Code § 235 Text

- *Evid Code § 235.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

The definition is not exclusive; it also includes a referee, court commissioner, or other officer conducting proceedings governed by the Evidence Code [Cal Law Rev Com Comment].

[3] Case Notes

A magistrate is not a trier of fact. His role is limited and his findings are neither conclusive for purposes of res judicata nor binding on the superior court if unsupported by evidence [*People v. Tolbert* (1986) 176 CA3d 685, 222 CR 313] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility General Overview Civil Procedure Judicial Officers Referees General Overview Civil Procedure Judgments Preclusion & Effect of Judgments Res Judicata



44 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.28

2.28 Unavailable as a Witness--Evid Code § 240

[1] Evid Code § 240 Text

■ *Evid Code § 240.*

(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.

LegH: 1965 ch. 299, 1984 ch. 401, 1988 ch. 485.

 Cross Reference:

A number of exceptions to the hearsay rule require that the declarant be "unavailable as a witness." See *Evid Code* §§ 1230, 1251, 1291, 1292, 1310, 1311, and 1323, discussed in Ch. 21, Hearsay Rule and Exceptions.

For a practice-oriented discussion of the rules for introducing evidence, see California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence (Matthew Bender).

[2] Case Notes**[a] Unavailability in General**

The types of unavailability listed in *Evid Code* § 240(a) do not state the exclusive or exact circumstances under which a witness may be deemed unavailable for purposes of admission of former testimony [*People v. Reed* (1996) 13 C4th 217, 52 CR2d 106 (witnesses were legally "unavailable" as a matter of law because prosecution was precluded by judicial rule from presenting any evidence outside the record to prove circumstances of prior crime)].

Mere absence of a witness is not enough. The party claiming unavailability must make a showing of the facts required by *Evid Code* § 240; and the trial court, under *Evid Code* § 405, must be satisfied as to the unavailability of the witness before the witness will be deemed "unavailable as a witness" and the proffered evidence admitted [*In re Robert L.* (1980) 112 CA3d 401, 169 CR 354 (priest's refusal to reveal declarant's name insufficient proof of unavailability)].

Although witness's memory regarding certain details was weak, he recalled "far too much" to justify unavailability when he consistently told and retold the same basic story [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

[b] Death

Death of witness rendered him unavailable and permitted admission of his testimony from preliminary hearing [*People v. Harris* (2005) 37 C4th 310, 334, 33 CR3d 509] .

[c] Privilege

An invocation of the privilege against self-incrimination renders a witness unavailable for purposes of *Evid Code* § 240 [*People v. Marshall* (1996) 13 C4th 799, 55 CR2d 347 (witness who asserted *Fifth Amendment* rights was "unavailable"); *People v. Maxwell* (1979) 94 CA3d 562, 156 CR 630 (the rule is no different when the *Fifth Amendment* privilege is invoked based on exposure to charges of perjury)].

To be unavailable based on asserting the privilege against self-incrimination, the witness must not only intend to assert the privilege but be entitled to assert it because the testimony might lead to the witness's self incrimination [*People v. Cudjo* (1993) 6 C4th 585, 25 CR2d 390, 863 P2d 635] .

If a defendant makes an out-of-court statement, the defendant may not create the "unavailability of a witness" by invoking the privilege not to testify. The defendant is not unavailable to himself [*People v. Elliot* (2005) 37 C4th 453, 483, 35 CR3d 759, 122 P3d 968] .

[d] Physical Disability/Then Existing Illness

When physical disability is claimed as grounds for unavailability, the disability must exist at the time of trial [*Sanchez v. Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 76 CR 372] .

A witness's refusal to testify on the grounds of fear for the safety of his person and that of his family renders him "unavailable as a witness. The trial court may consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that renders the person harboring the fear unavailable as a witness" [*People v. Rojas* (1975) 15 C3d 540, 125 CR 357, 542 P2d 229] .

When the unavailability is caused by an incapacitating physical or mental condition existing at trial, the illness or infirmity must be of comparative severity; it must exist to such a degree as to render the witness's attendance or his testifying relatively impossible and not merely inconvenient [*People v. Gomez* (1972) 26 CA3d 225, 103 CR 80] .

Although lay witnesses may provide evidence of a present infirmity, expert testimony is required to demonstrate that the infirmity prevents the witness from testifying at trial [*People v. Gomez* (1972) 26 CA3d 225, 103 CR 80 ; *People v. Stritzinger* (1983) 34 C3d 505, 194 CR 431, 668 P2d 738 (preliminary hearing testimony erroneously admitted where child molestation victim's mother provided the only evidence of her daughter's trauma and psychological impairment); *People v. Turner* (1990) 219 CA3d 1207, 268 CR 686 (preliminary hearing testimony of absent witness was properly admitted where expert testimony concerning victim's rape-induced post-trauma stress disorder and victim's refusal to testify at trial rendered her unavailable)].

A witness who refuses to testify and who makes no claim of privilege may be found to be unavailable if the court takes reasonable steps to induce the witness to testify [*People v. Francis* (1988) 200 CA3d 579, 245 CR 923 (a physically available yet unwilling to testify witness should be included as an unavailable witness); *People v. Sul* (1981) 122 CA3d 355, 175 CR 893 (simply finding witness in contempt and jailing him does not satisfy right of confrontation)].

Witness's inability or refusal to testify at defendant's retrial justifies use of prior testimony since witness is considered unavailable [*People v. Alcala* (1993) 4 C4th 742, 15 CR2d 432, 842 P2d 1192] .

[e] Beyond Reach of Court Process

A witness is unavailable within the meaning of *Evid Code* § 240(a)(4) when beyond the reach of the court's process. Hence, videotaped testimony of a victim of sexual assault given at a preliminary hearing is properly admitted even though there is no showing of reasonable diligence to produce the witness at trial [*People v. Ware* (1978) 78 CA3d 822, 144 CR 354 (witness returned to home country)].

A foreign citizen out of the country and not subject to the court's compulsory process may be considered per se unavailable without violating the *Sixth Amendment* of the California Constitution [*People v. Denson* (1986) 178 CA3d 788, 224 CR 63 (rule in *Barber*, inapplicable where witness is a British subject residing in London; admission of her prior videotaped preliminary hearing testimony was proper)].

[f] Reasonable Diligence to Procure Attendance

"Reasonable diligence" within the meaning of *Evid Code* § 240(a)(5) means that the proponent has made untiring efforts in good earnest, efforts of a substantial character to secure the attendance of the witness. Factors relevant to deciding whether such efforts have been made include the timeliness of the effort, the importance of the testimony and whether all reasonable means were used to secure the attendance of the witness. In a rape prosecution in which the out-of-state material witness refused to come to California to testify, *CCP* § 1219(b) did not foreclose the prosecution from using the custody provisions of the Uniform Act to Secure Witnesses to secure the witness's attendance at trial. The failure to do so in this case amounted to a lack of reasonable diligence [*People v. Cogswell* (2007) 156 CA4th 698, 68 CR3d 28] .

In a murder prosecution, defendant's constitutional rights were not violated by the admission of admitting the preliminary hearing testimony of a witness whose U.S. visa expired after the preliminary hearing, and who was presently living and working in Canada without a passport, pending a hearing on his asylum claim, which would be jeopardized if he left Canada to testify in the U.S. The prosecution had no warning that the witness would leave the jurisdiction after the preliminary hearing and prior to trial. The prosecution has no affirmative duty to verify a witness's immigration status or take affirmative steps with federal authorities to ensure that such status does not change between the preliminary hearing and trial. The prosecution made adequately diligent efforts to arrange the witness's presence, involving many telephone calls to the witness in Canada, making trip arrangements for the witness, and completing Homeland Security paperwork for a special visa [*People v. Martinez* (2007) 154 CA4th 314, 64 CR3d 580 (affirming conviction)].

A witness's absence from a prosecution raises 6th and 14th Amendment concerns [*Barber v. Page* (1967) 390 US 719, 88 S Ct 1318, 20 L Ed2d 255, ruling upon the criminal defendant's right to confrontation under the Sixth and Fourteenth Amendments, in essence raises the rule of Section 240 to constitutional dimension].

Constitutional issues aside, under *Evid Code* § 240 it is now apparent that when a witness is absent because the prosecution was not active in attempting by subpoena to secure his presence at the trial in a timely fashion, his testimony given at the preliminary hearing may not be used [*People v. Nieto* (1968) 268 CA2d 231, 73 CR 844 (witness out of state); *People v. Harris* (1968) 266 CA2d 426, 72 CR 423 (witness apparently out of country)].

If, however, a defendant receives an offer by the prosecution to make a witness available, and the defendant declines such offer and refuses to agree to a continuance for this purpose, he cannot subsequently claim the denial of Sixth Amendment rights or failure of the prosecution to comply with the provisions of *Evid Code* § 240 [*People v. Cox* (1969) 269 CA2d 579, 75 CR 147 (witness vacationing out of state)].

Due diligence is not shown by casual indifference to the service of a warrant on a key witness [*People v. Enriquez* (1977) 19 C3d 221, 137 CR 171, 561 P2d 261; *People v. Ventura* (1985) 174 CA3d 784, 220 CR 269 (diligence requires persevering and substantial effort in good earnest)].

When the prosecution knows where the witness is located and interstate process under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases [*Pen Code* § 1334 et seq.] is available, then *Evid Code* § 240(a)(5) requires that the procedure be employed [*People v. Blackwood* (1983) 138 CA3d 939, 188 CR 359].

Although this concept is not absolutely clear on the face of the statute, in addition to intrastate process, "court process" includes interstate process through mutual statutory provisions (where available) [*People v. Joines* (1970) 11 CA3d 259, 89 CR 661 (victim witness out of state)].

[g] Good Faith Effort and Reasonable Diligence

The term "reasonable diligence" or "due diligence" under *Evid Code* § 240(a)(5) connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored. In a prosecution in which a detective made efforts over two days to locate a witness, including visiting his last known address, attempting to locate his known associates, and checking police, county, and state records with the witness's 15 different aliases, the prosecution exercised due diligence to locate a witness who was not otherwise known to be a substantial risk for flight, notwithstanding defendant's suggestions that the detective should have attempted to locate the witness's family, checked with the post office for a forwarding address, followed up with his visitors in prison, and determined whether he was a party in any civil actions [*People v. Wilson* (2005) 36 C4th 309, 340-341, 30 CR3d 513, 114 P3d 758 (no error in determination that witness was unavailable)].

The trial court erred in finding that the prosecution exercised due diligence in trying to locate a witness. Despite the prosecution's misplaced confidence that the witness was available on short notice, its excuse for waiting until the first day of trial to find her was the fear she would disappear if given advance warning. The inconsistency is fatal: If they feared she might be uncooperative and refuse to appear, then waiting until the morning the trial began arguably had merit. But if the prosecution had no reason to think she would try to avoid service, then waiting until the eleventh hour to contact her on the morning trial started was not due diligence [*People v. Avila (2005) 131 CA4th 163, 169-170, 31 CR3d 441* (trial court erred in admitting witness's testimony from prior trial; error not harmless)].

A witness is not "unavailable" for the purposes of the former testimony exception to the right of confrontation unless the prosecutorial authorities have made a good faith effort to obtain his or her presence at trial. The right of confrontation may not be dispensed with so lightly [*People v. Sandoval (2001) 87 CA4th 1425, 105 CR2d 504* (conviction reversed and matter remanded; prosecution was required to make a good faith effort to obtain some category of contemporary, live testimony, which meant contacting the Mexican authorities and determining what options were possible in obtaining the witness's testimony)].

If the diligent efforts of the prosecution have failed to procure a witness by the court's process, then the criminal defendant's constitutional right to confront requires that the prosecution additionally show a good-faith effort and reasonable diligence in trying to procure the witness's attendance. Whether reasonable diligence and a good-faith effort have been shown is a factual question dependent on the circumstances of each case. A determination of the reasonableness of efforts to procure attendance of a witness is based on an evaluation of factors such as whether the subpoena process was timely commenced. This must be judged by the trial court in light of the tentativeness of the trial date, obstacles that might have delayed the start of the trial, customary local subpoena practice and procedure, and exigencies that required more, or justified less, stringent efforts than normally employed [*People v. Smith (2003) 30 C4th 581, 134 CR2d 1*].

In an action for probation revocation, the trial court erred in admitting hearsay testimony from a probation officer, relating conversations with treatment house personnel confirming defendant's alleged alcohol consumption during his treatment. Defendant had no opportunity to cross-examine the treatment house employee, and the court had no opportunity to observe her demeanor. No justification was offered for her absence. No other evidence corroborated her alleged statements that defendant smelled of, and tested positive for, alcohol consumption. It was not even clear whether the declarant herself observed defendant's alleged probation violation, or whether she was simply reporting what she had been told by other, unidentified persons at the program. Such testimony was subject to the good cause standard, which the prosecution failed to meet [*People v. Shepherd (2007) 151 CA4th 1193, 60 CR3d 616* (reversing revocation of probation)].

Examples--Good Faith Effort

- Prosecution met burden of showing due diligence in trying to procure witness, and court properly found that witness was unavailable, notwithstanding that prosecution's reasonable conclusion that witness had gone to Japan was based on hearsay [*People v. Smith (2003) 30 C4th 581, 134 CR2d 1*].
- Due diligence shown when prosecution subpoenaed crime victim for trial, launched investigation into her whereabouts, had telephone calls not returned, and did not learn until eve of trial a possible address to which she had gone [*People v. Lopez (1998) 64 CA4th 1122, 76 CR2d 38*].
- Search was found diligent when commenced two months before trial, included DMV checks, arrest and incarceration checks, interviews with relatives, and various trips to alleged residences [*People v. Lepe (1997) 57 CA4th 977, 67 CR2d 525*].

- Diligence shown when subpoenas were issued eight days before trial date; trial date uncertain because of pending suppression motion; eight days of diligent searching once trial began [*People v. Saucedo* (1995) 33 CA4th 1230, 40 CR2d 153] .
- Police methods over one year and during trial demonstrate due diligence [*People v. Cummings* (1993) 4 C4th 1233, 18 CR2d 796, 850 P2d 1] .
- No obligation to keep track of citizen-victim; reasonable efforts to locate [*People v. Wise* (1994) 25 CA4th 339, 30 CR2d 413] .
- Subpoenas issued 24 days before trial date; significant efforts to locate witnesses [*People v. McElroy* (1989) 208 CA3d 1415, 256 CR 853] .
- Prosecution showed nothing more than desultory and indifferent search, relying almost entirely on the witness's own efforts in assuring his attendance at trial [*People v. Mendieta* (1986) 185 CA3d 1032, 230 CR 162] .
- Out-of-state witness's reluctant promise to appear preceded by a broken promise to maintain contact is not adequate showing of unavailability [*People v. Masters* (1982) 134 CA3d 509, 185 CR 134] .
- Defendant's search for witnesses four weeks before final trial date, after trial had been reset six times in six months, was not untimely, notwithstanding failure to give subpoenas to sheriff for service [*People v. Forgason* (1979) 99 CA3d 356, 160 CR 263] .
- Failure to procure victim-witness by interstate process [*People v. Joines* (1970) 11 CA3d 259, 89 CR 661] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Preliminary Proceedings Preliminary Hearings Evidence Evidence Privileges Self-Incrimination Privilege Exceptions Governments Federal Government Domestic Security



45 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.29

2.29 Writing Defined--Evid Code § 250

[1] Evid Code § 250 Text

■ *Evid Code § 250.*

"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.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 945.

[2] Commission Comments

"Writing" is defined very broadly to include all forms of tangible expression including pictures and sound recordings [Cal Law Rev Com Comment].

➡ **Cross Reference:**

Discussion of *Evid Code* §§ 1400-1605 on writings, see Ch. 22, Authentication, Ch. 23, Secondary Evidence, Ch. 24, Record of Document.

Practice-oriented discussion of the rules for introducing evidence, see California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence (Matthew Bender).

[3] Case Notes

[a] Examples of Writings

Video recording [*Ashford v. Culver City Unified Sch. Dist.* (2005) 130 CA4th 344, 349, 29 CR3d 728 ; *People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 ; *People v. Moran* (1974) 39 CA3d 398, 114 CR 413] .

Tape recording [*People v. Patton* (1976) 63 CA3d 211, 133 CR 533 ; *People v. Marcus* (1973) 31 CA3d 367, 107 CR

264] .

Phonograph record [*People v. Manson* (1976) 61 CA3d 102, 132 CR 265] .

Photographic transparency [*People v. Enskat* (1971) 20 CA3d Supp 1, 98 CR 646] .

Knife inscribed with owner's initials [*People v. Mastin* (1981) 115 CA3d 978, 171 CR 780] .

Credit card is inscribed chattel [*People v. Bizieff* (1991) 226 CA3d 1689, 277 CR 678] .

Computer magnetic tapes [*Aguimatang v. California State Lottery* (1991) 234 CA3d 769, 286 CR 57] .

[b] Rules for Admission of Writings

"Physical evidence" as defined by CC § 47 means evidence specified in *Evid Code* § 250 [*Moore v. Conliffe* (1993) 12 CA4th 234, 15 CR2d 791] .

Courts have discretion as to whether the best evidence rule applies; courts should consider whether the fact to be proven is critical, the inscription is lengthy, and the secondary evidence is weak [*People v. Mastin* (1981) 115 CA3d 978, 171 CR 780] .

Because *Evid Code* § 250 defines a writing to include a tape recording, a tape recording may be authenticated in the manner set forth in *Evid Code* §§ 1410-1421 pertaining to authentication of a writing [*People v. Fonville* (1973) 35 CA3d 693, 111 CR 53 ; *People v. Estrada* (1979) 93 CA3d 76, 155 CR 731 (tape recording of jailhouse conversation in Spanish was properly authenticated by non-Spanish-speaking investigator who monitored it)].

A reasonable continuance to transcribe tape recordings submitted in good faith by an indigent person should be granted [*Darley v. Ward* (1980) 28 C3d 257, 168 CR 481, 617 P2d 1113 (indigent had sought, but failed to have, six hours of tapes transcribed by the county)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceRecordingsEvidenceDocumentary
EvidenceWritingsGeneral Overview



46 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.30

2.30 Original--Evid Code § 255

[1] Evid Code § 255 Text

■ *Evid Code § 255.*

"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 print-out or other output readable by sight, shown to reflect the data accurately, is an "original."

LegH: 1977 ch. 708.

[2] Case Notes

Computer printout qualifies as "original" [*Aguimatang v. California State Lottery* (1991) 234 CA3d 769, 286 CR 57] .



47 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

A. Preliminary Provisions (Evid Code §§ 1-260)

Chapter 2 Words and Phrases Defined Evidence Code §§ 100-260

1-2 California Courtroom Evidence 2.31

2.31 Duplicate--Evid Code § 260

[1] Evid Code § 260 Text

■ *Evid Code § 260.*

"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.

LegH: 1977 ch. 708.



48 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
B. General Provisions (Evid Code §§ 300-320)
Chapter 3 Applicability of Code Evidence Code § 300

1-3 California Courtroom Evidence 3.syn

§ 3.syn Synopsis to Chapter 3: Applicability of Code Evidence Code § 300

3.01 Actions and Proceedings to Which Code Applies--Evid Code § 300

[1] Evid Code § 300 Text

[2] Commission Comments

[3] Case Notes

[a] Applicability to Evidentiary Hearings

[b] Procedural Aspects of Depositions

[c] General Reference Hearings

[d] Evidentiary Issues in Arbitration



49 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
B. General Provisions (Evid Code §§ 300-320)
Chapter 3 Applicability of Code Evidence Code § 300

1-3 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code § 300* on actions and proceedings to which the Evidence Code applies.



50 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
B. General Provisions (Evid Code §§ 300-320)
Chapter 3 Applicability of Code Evidence Code § 300

1-3 California Courtroom Evidence 3.01

3.01 Actions and Proceedings to Which Code Applies--Evid Code § 300

[1] Evid Code § 300 Text

■ *Evid Code § 300.*

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.

LegH: 1965 ch. 299, operative January 1, 1967, 1967 ch. 17, 1998 ch. 931, effective September 28, 1998, 2002 ch. 784.

[2] Commission Comments

Comment 2002. *Evid Code § 300* is amended to reflect unification of the municipal and superior courts pursuant to *Article VI, Section 5(e), of the California Constitution* [Cal Law Rev Com Comment].

Comment 1998. Section 300 is amended to reflect elimination of the justice court. *Cal. Const., art. VI, §§ 1, 5(b)* [Cal Law Rev Com Comment].

The provisions of the Code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them [Cal Law Rev Com Comment].

Various code sections in the Evidence Code as well as in other codes make the provisions of the Evidence Code applicable to a certain extent in proceedings other than court proceedings [see, for example, *Gov Code § 11513*, administrative proceedings; *Pen Code § 939.6*, grand jury; *CCP § 638 et seq.*, referees; *Evid Code § 910.*] [Cal Law Rev Com Comment].

Examples of Other Statutes Relaxing Rules for Specified Purposes:

- Small claims hearing [*CCP § 116.510 et seq.*].

- Conciliation proceedings [*Fam Code § 1838*].
- Discovery by deposition [*CCP § 2017*].
- Probation officer report [*Pen Code § 1203*].
- Juvenile court [*W&I Code § 706*].
- Referees [*CCP § 638 et seq.*].
- Administrative proceedings [*Gov Code § 11513*].
- Grand jury [*Pen Code § 939.6*].

Consider Arbitrator Status:

It would seem "arbitrator" would qualify as either an "other officer" or a "similar officer" under the Evidence Code unless "otherwise provided by statute."

[3] Case Notes

[a] Applicability to Evidentiary Hearings

The Evidence Code applies to every evidentiary hearing in the state, except as otherwise provided. It applies to proceedings authorized before and after its enactment [*Jauregi v. Superior Court* (1999) 72 CA4th 931, 85 CR2d 553 (Evidence Code applies to all evidentiary hearings unless exempted by statute); *Hewitt v. Superior Court* (1970) 5 CA3d 923, 85 CR 493 (applies to *Pen Code § 1538.5* hearing, enacted after the Evidence Code became effective)].

[b] Procedural Aspects of Depositions

Procedural aspects of recording and reporting depositions are not regulated by the Evidence Code, but by the Code of Civil Procedure [*Bailey v. Superior Court* (1977) 19 C3d 970, 140 CR 669, 568 P2d 394] .

[c] General Reference Hearings

Judicial reference as provided in *CCP §§ 638 through 645.1* sends a pending trial court action to a referee for hearing, determination, and a report back to the court. A general reference occurs when the court, with the parties' consent, directs a referee to try all of the issues in the action. The court appoints the referee, although the parties may choose the referee by agreement. The hearing before a referee is conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings [see *Evid Code § 300*]. In a general reference, the referee must prepare a statement of decision, which stands as the decision of the court and is reviewable in the same manner as if the court had rendered it. Thus, the primary effect of the provision is to require trial by a referee, as opposed to the court or a jury [*Trend Homes, Inc. v. Superior Court* (2005) 131 CA4th 950, 955-956, 32 CR3d 411 (finding that under instant facts, judicial reference provision in home purchase contract was valid and enforceable)].

A general reference hearing is subject to the rules of evidence as codified by *Evid Code § 300* [*In re Scott* (2003) 29 CA4th 783, 129 CR2d 605, 61 P3d 402 ; *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 CA4th 1334, 83 CR2d 340 (rules of evidence apply to reference hearing); *In re Fields* (1990) 51 C3d 1063, 275 CR 384, 800 P2d 862 (reference hearing following order to show cause)].

[d] Evidentiary Issues in Arbitration

Contractual arbitration is not subject to the Evidence Code unless stipulated to by the parties [*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 CA4th 1334, 83 CR2d 340 (parties stipulated to AAA arbitration rules, evidentiary issues not reviewable by court)].

Private arbitration generally dispenses with the rules of evidence, while judicial arbitration follows the evidence rules with certain modifications [*Porreco v. Red Top RV Center* (1989) 216 CA3d 113, 119-120, 264 CR 609, 612] . The rules of evidence for civil actions apply in hearings under the mandatory judicial arbitration statute [Cal Rules Ct, Rule 1613(b); see CCP § 1141.10 et seq.].

When a stipulation provided that the parties submitted to binding arbitration of all issues raised in the complaint and cross-complaint before a named retired superior court judge, that arbitration was to be conducted under the rules of evidence applicable to trial by a court, that judge's decision would be final and binding on all parties, filed with superior court, and treated as a judgment and would have same force and effect as a superior court judgment and would be appealable as such. The court treated the proceeding as being before a temporary judge rather than as arbitration, despite the fact that the parties labeled the proceeding as arbitration, and the judge's decision was labeled "Judgment Following Arbitration." The decision was not an arbitration award, but an appealable judgment [*City of Shasta Lake v. County of Shasta* (1999) 75 CA4th 1, 10-12, 88 CR2d 863, 867] .

The parties to contractual arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing, but the rules of evidence and rules of judicial procedure need not be observed, unless otherwise agreed [CCP § 1282.2(d)].

The parties are free to incorporate existing arbitration rules, such as the AAA Commercial Arbitration Rules, which provides that the rules of evidence do not apply (AAA R-31), into an arbitration agreement [*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 CA4th 1096, 1104-1105, 47 CR2d 650, 656] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Civil Procedure Alternative Dispute Resolution Arbitrations General Overview Family Law Alternative Dispute Resolution General Overview



51 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

B. General Provisions (Evid Code §§ 300-320)

Chapter 4 Province of Court and Jury Evidence Code §§ 310-312

1-4 California Courtroom Evidence 4.syn

§ 4.syn Synopsis to Chapter 4: Province of Court and Jury Evidence Code §§ 310-312

4.01 Determination of Questions of Law--Foreign Law--Evid Code § 310

[1] Evid Code § 310 Text

[2] Commission Comments

[3] Case Notes

[a] International Law

[b] Matter of Law (In General)

[c] Civil Law: Specific Instances

[i] Interpretation of Writings

[ii] Negligence

[iii] Statutory Liability

[iv] Jurisdiction

[d] Criminal Law

4.02 Determination of Foreign Law--Evid Code § 311

[1] Evid Code § 311 Text

[2] Assembly Committee Comments

[3] Case Notes

4.03 Determination of Questions of Fact--Value of Evidence--Evid Code § 312

[1] Evid Code § 312 Text

[2] Commission Comment

[3] Case Notes

[a] Submission of Evidence to Jury

[b] Matters Within Province of Jury



52 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

B. General Provisions (Evid Code §§ 300-320)

Chapter 4 Province of Court and Jury Evidence Code §§ 310-312

1-4 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 310 through 312* on the province of the court and jury.



Cross Reference:

For more discussion on the roles of the court and jury in determining questions of law and fact, see California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict (Matthew Bender).



53 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

B. General Provisions (Evid Code §§ 300-320)

Chapter 4 Province of Court and Jury Evidence Code §§ 310-312

1-4 California Courtroom Evidence 4.01

4.01 Determination of Questions of Law--Foreign Law--Evid Code § 310

[1] Evid Code § 310 Text

■ *Evid Code § 310.*

(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).

LegH: 1965 ch. 299.

[2] Commission Comments

Subdivision (a) of this section restates the first sentence of former *CCP* § 2102. *Subdivision (b)* restates the rule that foreign law is not a question of fact but is a question of law to be decided by the court [Cal Law Rev Com Comment].

[3] Case Notes

[a] International Law

Where the question to be determined arises on statutory law of foreign country and the statute itself is all that it is before court, the question becomes one of law [*Estate of Schluttig* (1950) 36 C2d 416, 224 P2d 695 (U.S. citizens' rights under German Nazi-era will); *Hawi Mill & Plantation Co. Ltd. v. Finn* (1927) 82 CA 255, 255 P 543] .

When treaties alone are before the court, construction thereof is a matter of law [*Estate of Arbulich* (1953) 41 C2d 86, 257 P2d 433] .

 Cross Reference:

For information on judicial notice of applicable foreign law see Ch. 12, Judicial Notice (discussion of *Evid Code* § 452).

[b] Matter of Law (In General)

To establish a fact as a matter of law the state of the evidence must be such that no other conclusion is legally deducible therefrom [*Dahl-Beck Electric Co. v. Rogge* (1969) 275 CA2d 893, 80 CR 440 (negligence action against owner of backhoe)].

To establish a fact as a matter of law the state of the record must be such that any finding to the contrary would be reversed on appeal because of the insufficiency of the evidence to sustain such a finding [*McBride v. Atchison, Topeka & S.F. Ry Co.* (1955) 44 C2d 113, 279 P2d 966 (no evidence of sufficient substantiality); *Coutts v. Grant* (1960) 184 CA2d 255, 7 CR 431 (conflicts in evidence present issues of fact)].

If evidence of a fact is clear, positive, uncontradicted and of such nature that it cannot rationally be disbelieved, the court must instruct that the fact has been established as a matter of law [*Roberts v. Del Monte Properties Co.* (1952) 111 CA2d 69, 243 P2d 914] .

When there is substantial evidence on an issue, the courts cannot resolve the issue as a matter of law by rejecting the evidence simply for being unreasonable or incredible [*People v. Burnham* (1985) 176 CA3d 1134, 222 CR 630 (incredible but substantial evidence)].

It is error to submit to the jury as a question of fact an issue that on the record is one of law [*People v. Walker* (1973) 32 CA3d 897, 108 CR 548 (burglary); *Lysick v. Walcom* (1968) 258 CA2d 136, 65 CR 406 (causality is not a jury issue where reasonable minds cannot differ)].

The construction of a statute and its applicability to a given situation are matters of law to be determined by the court [*Priest v. Housing Authority* (1969) 275 CA2d 751, 80 CR 145 (exercise of discretionary authority improper); *Bakersfield Community Hospital v. Department of Health* (1977) 77 CA3d 193, 142 CR 773 (construction of word must be in accordance with legislative intent)].

Testimonies or opinions of individual members of a legislative body are inadmissible for purposes of interpreting a statute or ordinance upon the principle that the judiciary is precluded from delving into the subjective mental processes of individual legislators [*County of Santa Cruz v. City of Watsonville* (1985) 177 CA3d 831, 223 CR 272] .

Construction of a municipal ordinance is a question of law [*Welshans v. City of Santa Barbara* (1962) 205 CA2d 304, 23 CR 108 (overtime for firemen); *Evola v. Wendt Construction Co.* (1959) 170 CA2d 21, 338 P2d 498 (Subdivision Map Act) ; *Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 CA2d 60, 285 P2d 364 (fire code)].

 Cross Reference:

Discussion of when preliminary proof is necessary to the introduction of evidence (the sufficiency of which is determined by the trial court), see Ch. 10, Preliminary Determination on Admissibility (discussion of *Evid Code* §§ 400-406).

[c] Civil Law: Specific Instances

[i] Interpretation of Writings

Unless the interpretation turns upon the credibility of extrinsic evidence, it is solely a judicial function to interpret a written instrument [*US Leasing Corp. v. du Pont* (1968) 69 C2d 275, 70 CR 393, 444 P2d 65 (interpretation of contract with extrinsic evidence); *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 C2d 713, 73 CR 213, 447 P2d 325 (union contract required extrinsic evidence for interpretation)].

Whether a contract is ambiguous or uncertain is a question of law [*Heppler v. J.M. Peters Co.* (1999) 73 CA4th 1265, 87 CR2d 497 (interpretation of a written contract is a question of law for trial court); *Kerr Land & Timber Co. v. Emmerson* (1965) 233 CA2d 200, 43 CR 333 (ambiguous instrument granting easement); *Gardiner v. Gaither* (1958) 162 CA2d 607, 329 P2d 22 (if it is not ambiguous, interpretation is matter of law); *Nuland v. Pruyn* (1950) 99 CA2d 603, 222 P2d 261 (extrinsic evidence admissible to explain ambiguities)].

Interpretation of a writing where extrinsic evidence is unnecessary is a question of law [*Temple v. Velcro USA, Inc.* (1983) 148 CA3d 1090, 196 CR 531] .

Whether a writing is the complete expression of the parties' agreement is a question of law [*Larsen v. Johannes* (1970) 7 CA3d 491, 86 CR 744] .

► Cross Reference:

More discussion on the interpretation of a contract see California Forms of Pleading and Practice, Ch. 140, Contracts (Matthew Bender).

[ii] Negligence

The determination of whether a duty of care had been owed in a particular situation is a question of law for the trial judge [*Wilson v. All Service Ins. Corp.* (1979) 91 CA3d 793, 153 CR 121] .

Negligence and proximate cause become questions of law where the facts are not disputed and there is only one deduction or inference that can reasonably be drawn from them [*Whinery v. Southern Pac. Co.* (1970) 6 CA3d 126, 85 CR 649] .

Whether the defendant had produced sufficient evidence to sustain a finding that the proximate cause of the injury was not the defendant's negligence was a question for the court, not the jury, to determine [*Frantz v. San Luis Medical Clinic* (1978) 81 CA3d 34, 146 CR 146] .

► Cross Reference:

Discussion of related matters concerning acting or failing to act below a statutory standard under *Evid Code* § 669, see Ch. 15, Presumptions and Inferences.

Complete discussion of negligence and questions of fact and law, see California Forms of Pleading and Practice, Ch 380, Negligence (Matthew Bender).

[iii] Statutory Liability

The statutory liability of a manufacturer of a poison for injuries sustained by a person who uses the poison for purposes not mentioned on the label is generally a question of law to be decided by the judge [*John Norton Farms v. Todagco* (1981) 124 CA3d 149, 177 CR 215] .

[iv] Jurisdiction

In a civil case, personal and subject matter jurisdiction ordinarily are issues for the court, not the jury [*People v. Betts* (2005) 34 C4th 1039, 1049 n2, 23 CR3d 138, 103 P3d 883 (dicta)].

The question of in personam jurisdiction is a matter of law [*Long v. Mishicot Modern Dairy, Inc.* (1967) 252 CA2d 425, 60 CR 432] .

When appellate decisions are in conflict, the trial court has the jurisdiction to make a choice among the conflicting decisions [*Auto Equity Sales, Inc. v. Superior Ct.* (1962) 57 C2d 450, 20 CR 321, 369 P2d 937] .

When a California court has jurisdiction, it can rule on the constitutionality of the statute of a sister state [*Pac. Diamond Co., Inc. v. Superior Court in and for San Francisco County* (1978) 85 CA3d 871, 149 CR 813] .

[d] Criminal Law

Whether a defendant has waived his right to counsel and to remain silent is primarily a question for the trial judge, and his determination thereon should not be disturbed by a reviewing court unless it is palpably erroneous [*People v. Escobedo* (1967) 250 CA2d 417, 58 CR 426] .

Whether there is reasonable or probable cause for the arrest of defendant is a question of law for the trial court [*People v. Sherman* (1967) 251 CA2d 849, 60 CR 198] .

The question of whether a punishment is cruel or unusual is a matter of law to be resolved by the court [*People v. Williams* (1986) 180 CA3d 922, 225 CR 842] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewCriminal Law & ProcedureCounselRight to CounselGeneral Overview



54 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

B. General Provisions (Evid Code §§ 300-320)

Chapter 4 Province of Court and Jury Evidence Code §§ 310-312

1-4 California Courtroom Evidence 4.02

4.02 Determination of Foreign Law--Evid Code § 311

[1] Evid Code § 311 Text

■ *Evid Code § 311.*

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.

LegH: 1965 ch. 299.

[2] Assembly Committee Comments

Section 311 comes into operation if the applicable out-of-state law "cannot be determined." This language emphasizes that every effort should be made by the court to determine the applicable law before the case is otherwise disposed of under Section 311 [Assembly Committee on Judiciary Comments].

The reason why the court cannot determine the applicable foreign or sister-state law may be that the parties have not provided the court with sufficient information to make such a determination. In such a case, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. If they fail to obtain such information and the court is not satisfied that they made a reasonable effort to do so, the court may dismiss the action without prejudice. On the other hand, where counsel have made reasonable efforts and when all sources of information as to the applicable foreign or sister-state law are exhausted and the court cannot determine it, the court may apply California law, within constitutional limits, or dismiss the action without prejudice [Assembly Committee on Judiciary Comments].

[3] Case Notes

California's connections to the plaintiffs were insufficient to create an interest in applying California law to the plaintiffs' defamation and emotional distress claims; thus, Saudi Arabian law applies with respect to employee's defamation and intentional infliction of emotional distress claims [*McGhee v. Arabian American Oil Co.* (9th Cir 1989) 871 F2d 1412] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDismissalsGeneral OverviewTortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral Overview



55 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

B. General Provisions (Evid Code §§ 300-320)

Chapter 4 Province of Court and Jury Evidence Code §§ 310-312

1-4 California Courtroom Evidence 4.03

4.03 Determination of Questions of Fact--Value of Evidence--Evid Code § 312

[1] Evid Code § 312 Text

■ *Evid Code § 312.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

Section 312 restates the substance of and supersedes Section 2101 and the first sentence of *Section 2061 of the Code of Civil Procedure*. The rule stated in Section 312 is subject to such exceptions as are otherwise provided by statutory or decisional law. See e.g., *Evidence Code sections 310, 311, and 457* [Cal Law Rev Com Comment].

Consider--Additional § 312 Interpretation:

It would appear reference is intended to determination of fact "as a matter of law," judicial notice of a fact, and stipulations of fact by the parties.

[3] Case Notes

[a] Submission of Evidence to Jury

In order for a question of fact to be submitted to the jury, there must be proof sufficient to raise more than just a conjecture or surmise that the fact is as it is alleged. The proof must be adequate for a rational mind reasonably to reach the conclusion that the fact exists. When the evidence is insufficient to support such an inference, the question should not be submitted to the jury [*Haft v. Lone Palm Hotel* (1970) 3 C3d 756, 91 CR 745, 478 P2d 465] .

To justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists; otherwise, the court should refuse to submit the question to the jury [*Wigodsky v. Southern Pacific Co.* (1969) 270 CA2d 51, 75 CR 419 ; *Ghera v. Ford Motor Co.* (1966) 246 CA2d 639, 55 CR 94 (evidence must support a logical inference)].

If the evidence is such that reasonable persons might fairly differ as to the answer to the question posed, the issue is one of fact for the jury to determine [*College Hospital Inc. v. Superior Court* (1994) 8 C4th 704, 34 CR2d 898, 882 P2d 894 ; *Greyhound Lines, Inc. v. Superior Court of Shasta County* (1970) 3 CA3d 356, 83 CR 343] .



Cross Reference:

More information on laying a proper foundation to submit evidence to a jury, see Ch. 26, Documentary Evidence, Ch. 27, Demonstrative and Experimental Evidence.

[b] Matters Within Province of Jury

In an action by an insurer for reimbursement of legal costs of defense, and a counteraction by defendants for malicious prosecution, the reprehensibility of the insured's conduct, which was determined by considering the presence or absence of a number of aggravating factors, involved questions of fact that a jury is qualified to consider under *Evid Code* § 312 [*Century Surety Co. v. Polisso* (2006) 139 CA4th 922, 960, 43 CR3d 468 (approving use of standard jury instructions)].

To judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, and to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom are matters within the province of the trier of fact [*People v. Mobley* (1999) 72 CA4th 761, 85 CR2d 474 (credibility of witnesses and weight to be accorded to evidence are matters exclusively within province of trier of fact); *People v. Jackson* (1992) 10 CA4th 13, 12 CR2d 541 (trier of fact is sole judge of credibility of witnesses because only trier of fact has opportunity to observe witnesses); *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 CA3d 1431, 279 CR 533 (breach of warranty action, weight of mechanic's opinion testimony within province of trier of fact); *People v. Burnham* (1985) 176 CA3d 1134, 222 CR 630 (apparently unreasonable or incredible evidence must be referred to jury); *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 CA2d 675, 39 CR 64 (reviewing court will not substitute its deductions for those of jury)].

The credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact under *Evid Code* § 312. The appellate court simply considers whether any rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt. Unless it is clearly shown that on no hypothesis whatever is there sufficient substantial evidence to support the verdict, the conviction will not be reversed [*People v. Quintero* (2006) 135 CA4th 1152, 1161-1162, 37 CR3d 884] .

When the statements are believed by the trier of fact, the reviewing court may not reject them unless it is physically impossible that they are true or it is apparent that they are false without resort to inference or deduction [*People v. Thomas* (1986) 180 CA3d 47, 225 CR 277] .

Motive instruction, allowing jury to ascribe to the presence or absence of motive evidence the weight to which it is entitled, is an accurate statement of the law under *Evid Code* § 312 [*People v. Daya* (1994) 29 CA4th 697, 34 CR2d 884] .

Legal Topics:

1-4 California Courtroom Evidence 4.03

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Witnesses Credibility Evidence Procedural Considerations Weight & Sufficiency Evidence Testimony General Overview



56 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
B. General Provisions (Evid Code §§ 300-320)
Chapter 5 Order of Proof Evidence Code § 320

1-5 California Courtroom Evidence 5.syn

§ 5.syn Synopsis to Chapter 5: Order of Proof Evidence Code § 320

5.01 Order of Proof--Evid Code § 320

[1] Evid Code § 320 Text

[2] Commission Comments

[3] Case Notes

[a] Order of Proof in Civil Cases

[b] Order of Proof in Criminal Cases

[c] Reopening Case

[d] Appeals



57 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
B. General Provisions (Evid Code §§ 300-320)
Chapter 5 Order of Proof Evidence Code § 320

1-5 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code* § 320 on order of proof.



Cross References:

Complete discussion of order of proof, see California Civil Trial Guide, Ch. 20, Procedural Rules for Presentation of Evidence (Matthew Bender).

California Forms of Pleading and Practice, Ch. 550, Trial (Matthew Bender).



58 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
B. General Provisions (Evid Code §§ 300-320)
Chapter 5 Order of Proof Evidence Code § 320

1-5 California Courtroom Evidence 5.01

5.01 Order of Proof--Evid Code § 320

[1] Evid Code § 320 Text

■ *Evid Code § 320.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

The order of proof ordinarily should be as prescribed in *CCP* § 607 or 631.7, or in *Pen Code* §§ 1093 and 1094 [Cal Law Rev Com Comment].

Directions of the trial judge which control the order of proof should be distinguished from those which actually exclude evidence. Obviously, it is not permissible, through repeated directions of the order of proof, to prevent a party from presenting relevant evidence on a disputed fact [Cal Law Rev Com Comment].

Consider:

The trial court has discretion to set the order of presenting evidence in a trial [*Evid Code* § 320]. In most cases, the order should be as set forth in *CCP* § 607 or 631.7 (civil cases) or in *Pen Code* § 1093 or 1094 (criminal cases).

[3] Case Notes

[a] Order of Proof in Civil Cases

If there are several civil defendants and each appears by separate counsel and has a separate defense, it is up to the trial court's discretion to determine the order of presenting evidence [*Diamond Springs Lime Co. v. American River Constructors* (1971) 16 CA3d 581, 94 CR 200] .

Cross Reference:

Discussion of order of proof, see *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence*, § 20.01 (Matthew Bender).

[b] Order of Proof in Criminal Cases

In a capital case, the court granted defense counsel's request to permit an expert witness to leave at midday Friday before the doctor's cross-examination could be completed. The witness was able to return on Monday for further cross-examination. Reluctant to waste half a day, the court inquired whether defendant would testify Friday afternoon, and he did. On appeal, defendant contended he was denied the right to make a fully informed decision whether to testify at the close of the defense case, because he did not hear all the expert's testimony on cross-examination. However, defendant was not forced to testify before his expert. The trial court merely exercised its discretion to regulate the order of proof under *Evid Code* § 320 in response to defense counsel's desire to accommodate a witness's vacation plans [*People v. Lancaster* (2007) 41 C4th 50, 103, 58 CR3d 608, 158 P3d 157] .

Ordinarily, proof of corpus delicti (the body of the offense; the essence of the crime) precedes evidence of the accused's statements and confessions. However, the order of proof is within the trial court's discretion. The trial court will not be reversed unless the defendant was clearly prejudiced by the order of proof [*People v. Kilborn* (1970) 7 CA3d 998, 87 CR 189] .

Pursuant to the corpus delicti rule, the corpus delicti of a crime must be proved independently from an accused's extrajudicial admissions. The corpus delicti of a crime consists of two elements: (1) the fact of the injury or loss or harm, and (2) the existence of a criminal agency as its cause. The proof, however, may be circumstantial and need only be a slight or prima facie showing permitting the reasonable inference that a crime was committed. If the People have established the corpus delicti of murder, a defendant's extrajudicial statements may be admitted to prove an underlying felony for felony-murder purposes, even if the felony cannot be proved by evidence other than those statements [*People v. Crew* (2003) 31 C4th 822, 3 CR3d 733 (corpus delicti of murder was established by apparent victim's statements of apprehension, victim's failure to keep promises to contact friends after trip with defendant, and defendant's sale of victim's car, horse, trailer, and clothes); *People v. Weaver* (2001) 26 C4th 876, 111 CR2d 2 (corpus delicti rule did not prohibit permitting jury to rely on felony-murder theory to elevate degree of homicide to first degree if only evidence of sole qualifying felony (in this case, rape) came from defendant's own statements)].

The corpus delicti rule is inapplicable to felonies used to establish the degree of a homicide. If the corpus delicti of the crime of murder has been established by independent evidence, the accused's extrajudicial statements may be used to establish the degree of the crime committed [*People v. Weaver* (2001) 26 C4th 876, 111 CR2d 2 (corpus delicti rule did not prohibit permitting jury to rely on felony-murder theory to elevate degree of homicide to first degree when only evidence of sole qualifying felony (in this case, rape) came from defendant's own statements)].

Proposition 8, *Cal Const*, art I, § 28(d), abrogated any corpus delicti basis for excluding a defendant's extrajudicial statements from evidence, but did not abrogate the corpus delicti rule insofar as it provides that every conviction must be supported by some proof of the corpus delicti aside from or in addition to such statements, and that the jury must be so instructed [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554 (evidence of defendant's repeated threats to woman, and his possession of firearms and silencer when he arrived to meet her, was sufficient evidence of corpus delicti of attempted murder, assuming corpus delicti rule applies to penalty phase of capital case); *People v. Alvarez* (2002) 27 C4th 1161, 119 CR2d 903 (independent proof of corpus delicti may be circumstantial and need not be beyond reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if noncriminal explanation is also plausible)].

Slight or prima facie proof suffices to establish the corpus delicti [*People v. Horning* (2004) 34 C4th 871, 22 CR3d 305] .

The corpus delicti of an uncharged crime may be established by testimony of an accomplice without any further corroboration [*People v. Williams* (1988) 44 C3d 883, 245 CR 336, (1989) (robbery was uncharged offense)].

The trial court has discretion to postpone cross-examination of a party [*People v. Johnson* (1968) 68 C2d 646, 68 CR 599 ; *People v. McDermid* (1984) 162 CA3d 770, 211 CR 773 (but not for purpose of making prosecution's cross-examination more effective)].

The trial court has discretion to regulate the order of proof in an offer of proof [*People v. Roybal* (1998) 19 C4th 481, 79 CR2d 487, 966 P2d 521] .

While it is preferable first to offer proof on the substantive charge and then permit evidence of prior similar offenses, such an order of proof is not inflexible [*People v. Enos* (1973) 34 CA3d 25, 109 CR 876 (no showing that outcome would have been different had preferred order of proof been followed)].

The order of proof rests largely in the sound discretion of the trial court, and the fact that certain evidence may have tended to support the prosecution's case-in-chief does not make it improper rebuttal. When the evidence in question meets the requirements for impeachment, it may be admitted on rebuttal to meet the evidence on a point the defense has put into dispute [*People v. Coffman and Marlow* (2004) 34 C4th 1, 17 CR3d 710 (murder prosecution)].



Cross Reference:

Discussion of order of proof, see California Criminal Defense Practice, Ch. 83, Evidence, § 83.03 (Matthew Bender).

[c] Reopening Case

Reopening a case after both sides have rested for the purpose of introducing further proof is discretionary with the trial court. The court's decision will not be disturbed on appeal absent a clear abuse of discretion [*People v. Gaines* (1966) 247 CA2d 141, 55 CR 283] .

A court may in its discretion refuse to reopen an issue when there is no showing that the witness would give further material, reliable testimony [*Koorstad v. Wash. National Ins. Co.* (1967) 257 CA2d 399, 64 CR 882].

[d] Appeals

On appeal, review of a trial court's ruling as to order of proof is subject to abuse of discretion standard [*People v. Alvarez* (1996) 14 C4th 155, 58 CR2d 385 (objection to lack of foundation)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesHomicideMurderFelony MurderElementsCriminal Law & ProcedureAppealsStandards of ReviewAbuse of DiscretionGeneral OverviewEvidenceHearsayExemptionsConfessionsCorpus Delicti Doctrine



59 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 6 Relevancy Evidence Code §§ 350-351.1

1-6 California Courtroom Evidence 6.syn

§ 6.syn Synopsis to Chapter 6: Relevancy Evidence Code §§ 350-351.1

Introduction

6.01 Evidence Limitation--Evid Code § 350

[1] Evid Code § 350 Text

[2] Commission Comments

[3] Case Notes

[a] Relevance Generally

[b] Previous Accidents

[c] Eminent Domain

[d] Experimental Evidence

[e] Prior Crimes

[f] Subsequent Conduct

[g] Prior Statements

[h] Penalty Phase

[i] Photographs

[j] Motive

6.02 Relevant Evidence Admissible--Evid Code § 351

[1] Evid Code § 351 Text

[2] Commission Comments

[3] Case Notes

[a] Relevance Generally

[b] Rebuttal of Recent Fabrication Charge

[c] Evidence Raising Reasonable Doubt as to Defendant's Guilt

[d] Effect of Proposition 8 (Cal Const, art I, § 28(d))

6.03 Polygraph Examinations--Admissibility--Evid Code § 351.1

[1] Evid Code § 351.1 Text

[2] Case Notes



60 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 6 Relevancy Evidence Code §§ 350-351.1

1-6 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 350-351.1* on relevancy of evidence.



Cross Reference:

Discussion of related matters regarding admitting and excluding evidence under *Evid Code §§ 353-406*, see:

- Ch. 7, Discretion of Court to Exclude.
- Ch. 8, Preserving Objections and Reversible Error.
- Ch. 9, Limited Admissibility and Clarification of Evidence.
- Ch. 10, Preliminary Determination on Admissibility.

Complete discussion of the procedures to introduce evidence at trial, see California Civil Trial Guide (Matthew Bender):

- Ch. 21, Procedures for Determining Admissibility of Evidence.
- Ch. 22, Rules Affecting Admissibility of Evidence.

See also California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).



61 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 6 Relevancy Evidence Code §§ 350-351.1

1-6 California Courtroom Evidence

Introduction

All relevant evidence is admissible [*Evid Code § 351*]. Relevance has two elements: (1) it must relate to a matter at issue; and (2) it must have probative value. The latter element, often referred to as the weight of the evidence, is not a factor in determining admissibility; rather the weight of the evidence is determined by the trier of fact in arriving at a decision. Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the trier of fact. The weight of such evidence is for the trier of fact [*In Re Ernesto H. (2005) 124 CA4th 647, 660 n.4* (considering slight but uncontradicted evidence)].

"Relevant evidence" is 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 [*Evid Code § 210*].

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. If relevant, evidence is admissible unless some counterbalancing factors of extrinsic policy require its exclusion [*People v. Basuta (2001) 94 CA4th 370, 114 CR2d 285* (improper mention of a polygraph test in combination with the error in excluding evidence that defendant's mother had jerked or shaken the child was prejudicial in a child abuse case; evidence of the mother's actions would have been probative that another person had committed the crime); *P. Chang & Sons Associates v. La Casa Novato (1986) 177 CA3d 159, 222 CR 800* (receipt of increased revenue is probative on issue of damages)].

The results of a polygraph examination are not admissible into evidence in any criminal proceeding unless all parties stipulate to the admission of such results [*Evid Code § 351.1*].



Cross Reference:

Discussion of relevance of evidence, see *California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence, 22.20 et seq.* (Matthew Bender).

Further discussion of relevance, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 4, Logical Relevance; Personal Knowledge and Authentication (Matthew Bender), and Matthew Bender(R) *Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, Questioning Witnesses and Objections.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceRelevanceRelevant
EvidenceEvidenceScientific EvidencePolygraphs



62 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 6 Relevancy Evidence Code §§ 350-351.1

1-6 California Courtroom Evidence 6.01

6.01 Evidence Limitation--Evid Code § 350

[1] Evid Code § 350 Text

- *Evid Code § 350.*

No evidence is admissible except relevant evidence.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is based on former *CC § 1868* which provided in part, "evidence must correspond with the substance of the material allegations and be relevant to the questions in dispute" [Cal Law Rev Com Comment].

[3] Case Notes

[a] Relevance Generally

The first rule of admissibility of evidence is its relevancy, and the only test of relevancy is logic and common sense [*Traxler v. Thompson* (1970) 4 CA3d 278, 84 CR 211 (relevant substantial evidence must support verdict)].

The test of relevancy for credibility evidence is whether it reasonably tends to aid the trier of fact in assessing the probative value of the witness's testimony [*People v. Medina* (1990) 51 C3d 870, 274 CR 849] .

Irrelevant evidence must be excluded and a trial court has no discretion to admit it. Evidence that is offered to prove a fact that is not genuinely disputed is irrelevant and inadmissible under *Evid Code §§ 210 and 350* [*People v. Scheid* (1997) 16 C4th 1, 65 CR2d 348 ; *People v. Hall* (1980) 28 C3d 143, 167 CR 844, 616 P2d 826 (where defendant offers to admit an element of the charge, the prosecutor may not introduce evidence of other crimes to prove that element)].

If an issue is not disputed, evidence presented on that issue is irrelevant and, therefore, inadmissible [*People v. Coleman* (1979) 89 CA3d 312, 152 CR 407] .

Lack of dispute on one issue does not prevent the same evidence from being relevant and admissible on a disputed issue [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131] .

Evidence that produces only speculative inferences is not relevant and should be excluded [*People v. De La Plane* (1979) 88 CA3d 223, 151 CR 843] .

In determining the admissibility of evidence, wide discretion is left to the trial court whose ruling will not be disturbed unless there is a clear showing of abuse [*People v. Basuta* (2001) 94 CA4th 370, 114 CR2d 285 ; *People v. Warner* (1969) 270 CA2d 900, 76 CR 160] .

The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive [*People v. Benavides* (2005) 35 C4th 69, 90, 24 CR3d 507, 105 P3d 1099 (murder prosecution)].

A party may not circumvent the relevancy rule by allowing objectionable matter into evidence without objection and thereby gain the right to explore related but irrelevant subject matter further. This so-called "open the gates" argument is a fallacy [*People v. Gambos* (1970) 5 CA3d 187, 84 CR 908 (declarations against penal interest of nonparty concerning narcotics); *People v. Johnson* (1964) 229 CA2d 162, 40 CR 105 (party may not introduce incompetent evidence under the guise of cross or redirect); *Fortner v. Bruhn* (1963) 217 CA2d 184, 31 CR 503 (legitimate cross-examination does not extend to matters improperly admitted on direct)].

Evidence relevant for one purpose but inadmissible for another requires a statement of purpose by the offering party and the exercise of discretion by the court [*McDonald v. Filice* (1967) 252 CA2d 613, 60 CR 832 ; see *Evid Code* § 352].

The pursuit of a line of questioning on an irrelevant issue may be reversible error even when the court is sustaining objections [*Garfield v. Russell* (1967) 251 CA2d 275, 59 CR 379] .

Secondary evidence that satisfies the requirements of *Evid Code* §§ 1501 and 1505 is admissible if it is logically relevant to the issues in dispute [*People v. Kirk* (1974) 43 CA3d 921, 117 CR 345] .

Evidence that has a tendency to either support or rebut the presumption of innocence is relevant in criminal cases. However, evidence that simply affords a possible ground of suspicion against a third person is generally excluded [*People v. Whitney* (1978) 76 CA3d 863, 143 CR 301] .

Evidence is irrelevant and, hence, inadmissible when it is offered to prove an undisputed issue of fact [*People v. Swearington* (1977) 71 CA3d 935, 140 CR 5] .

A fact "of consequence" to the prosecution's case is not "disputed" within the statute even though the accused has pleaded not guilty. When a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant [*People v. Thomas* (1992) 2 C4th 489, 7 CR2d 199, 828 P2d 101 (defendant's strong interest in firearms tended to make the truthfulness of his claim of theft of gun used in crime a disputed fact of consequence because it is more likely that he would have reported theft of his gun); *People v. Hall* (1980) 28 C3d 143, 167 CR 844, 616 P2d 826 (defendant stipulated he was a convicted felon)].

In a prosecution for forcible rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible [*People v. Kipp* (2001) 26 C4th 1100, 113 CR2d 27, 33 P3d 450 (death penalty was affirmed for murder, rape, and robbery when defendant's letters admitting crimes and professing satanic thoughts were relevant and thus properly admitted)].

The trial court in a murder prosecution properly permitted the prosecutor to cross-examine the defendant about his having formerly practiced with a buck knife, despite the claim that evidence of his past practice was irrelevant because there was no evidence he used a buck knife to stab the victims. The testimony on this issue was inconclusive and therefore did not foreclose that possibility. Moreover, evidence of defendant's earlier efforts to perfect his ability to quickly retrieve and open a pocketknife tended to undermine defendant's version of his attack on the victims [*People v. Lewis* (2001) 25 C4th 610, 106 CR2d 629, 22 P3d 392] .

If evidence is remote, exclusion does not offend the defendant's due process rights [*People v. Roberts* (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274 (evidence that before his death victim stabbed and killed a prison guard was too remote in time and therefore properly excluded)].

Police officers' opinions of child's truthfulness during their limited contacts with her did not have a reasonable tendency to prove or disprove her credibility and were therefore not relevant [*People v. Sergill* (1982) 138 CA3d 34, 187 CR 497 ; but see *People v. Medina* (1990) 51 C3d 870, 274 CR 849 (officer may give opinion as to whether defendant appeared to understand conversation)].

Evidence of solvency is relevant to issue of actual intent to defraud [*Hansford v. Lassar* (1975) 53 CA3d 364, 125 CR 804] .

The fact of an arrest or conviction on criminal charge is inadmissible in a civil action [*Ungefug v. D'Ambrosia* (1967) 250 CA2d 61, 58 CR 223] .

In an action for damages, photographs of a worker's injuries are relevant on the issue of the nature and extent of the injuries so as to guide the jury in determining adequate compensation [*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 CA3d 626, 151 CR 399] .

In reviewing the decision of an administrative agency, admissibility of extra-record evidence turns on whether the existence of substantial evidence is a question of fact that may be disputed by contradictory evidence or whether it is instead purely a question of law [*Western States Petroleum Assn. v. Superior Court* (1995) 9 C4th 559, 38 CR2d 139, 888 P2d 1268] .

A stipulation may not abrogate the judicial function. The court has the power to admit all relevant evidence applicable to a cause [*Robinson v. Wilson* (1974) 44 CA3d 92, 118 CR 569] .

Evid Code § 350 does not abrogate the rule based on public policy considerations that excludes evidence in a wrongful death suit of the surviving spouse's remarriage [*Cavallaro v. Michelin Tire Corp.* (1970) 96 CA3d 95, 157 CR 602] .



Cross Reference:

Discussion of relevance of evidence, see *California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence*, § 22.20 et seq. (Matthew Bender).

[b] Previous Accidents

Evidence of the nonexistence of prior accidents was properly admissible on defendant's foreseeability of an unreasonable risk of harm but not to prove the absence of a dangerous condition [*Beauchamp v. Los Gatos Golf Course* (1969) 273 CA2d 20, 77 CR 914] .

The requirement of similarity of conditions for the admissibility of previous accidents is "much relaxed" when the evidence is offered to show notice [*Hilts v. County of Solano* (1968) 265 CA2d 161, 71 CR 275] .

Evidence of prior accidents may be admitted on the issue of dangerous condition, but substantial similarity must be shown unless the evidence is offered to show notice, in which event the requirement is relaxed [*Post v. Camino Del Properties, Inc.* (1959) 173 CA2d 446, 343 P2d 294 (indefinite evidence erroneously admitted; no limiting instruction was given)].

If the circumstances are similar, and the happenings are not too remote in time, other accidents may be proved to show a defective or dangerous condition, to show knowledge or notice of it, or to establish the cause of an accident. The rule applies if the accidents are similar and occurred under substantially the same circumstances. Substantial similarity is enough, because no two accidents happen in precisely the same way. Moreover, the requirement of similarity may vary in strictness according to the purpose for which the evidence is introduced. Thus, if offered to show a dangerous condition of a particular thing, the other accident must be connected in some way with that thing, but if offered only to show knowledge or notice of a dangerous condition, an accident at the place may be sufficient [*Sambrano v. City of San Diego* (2001) 94 CA4th 225, 114 CR2d 151 (park fire ring on beach was not dangerous condition of public property); *Dragash v. Western P. R. Co.* (1958) 161 CA2d 233, 326 P2d 649 (prior collisions, but some under different circumstances, not admitted)].

[c] Eminent Domain

In eminent domain proceedings, the value of other land is admissible as relevant evidence to establish the value of real property [*City of Santa Cruz v. Wood* (1967) 252 CA2d 52, 60 CR 26 (remote, speculative, or conjectural evidence not admissible); *People ex rel. Dept. of Public Works v. Wasserman* (1966) 240 CA2d 716, 50 CR 95 (price to be paid must be sufficiently voluntary to be a reasonable index of value)].

The application of *Evid Code* §§ 813 and 816 is limited to condemnation proceedings; they do not apply to proceedings generally. Therefore, properly qualified evidence of comparable sales of real property in proceedings and civil actions other than condemnation actions is admissible [*In re Smith* (1978) 79 CA3d 725, 145 CR 205] .

[d] Experimental Evidence

Experimental evidence must be relevant. Accident reconstruction experiments are relevant if conducted under the same or substantially similar conditions as those existing at the time the accident occurred [*Culpepper v. Volkswagen of America, Inc.* (1973) 33 CA3d 510, 109 CR 110] .

[e] Prior Crimes

Prior convictions of crimes involving moral turpitude other than dishonesty provide some relevant basis, however tenuous, for inferring dishonesty and may be used to impeach [*People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111] .

Evidence of another crime should be received with caution, and if the connection with the crime in question is not clearly shown, any doubt should be resolved in the defendant's favor [*In re Jones* (1996) 13 C4th 552, 54 CR2d 52 ; *People v. Paxton* (1967) 255 CA2d 62, 62 CR 770).

To be relevant to show a common design or plan, or modus operandi, evidence of uncharged misconduct must demonstrate not merely similar results, but such a concurrence of common features that the various acts are naturally explained as caused by a general plan of which they are a part [*People v. Catlin* (2001) 26 C4th 81, 109 CR2d 31, 26 P3d 357 ; *People v. Grant* (2003) 113 CA4th 579, 6 CR3d 560] .

If the connection between the uncharged offense and the ultimate fact in question is unclear, the evidence should be excluded [*People v. Thompson* (1980) 27 C3d 303, 165 CR 289, 611 P2d 883] .

If a criminal defendant attempts to prove his or her credibility by testifying to relevant specific conduct designed to show his or her recent good moral and law abiding character, the prosecution may impeach the defendant with evidence of relevant specific instances of [bad] conduct to the contrary. When a defendant testifies in his or her own behalf, his or her character as a witness may be impeached in the same manner as any other witness [*People v. Lankford* (1989) 210 CA3d 227, 258 CR 322 (after defendant in direct examination testified that he "didn't have no incident yet since I've been out," the prosecutor was properly allowed to impeach the statement with the fact that defendant was scheduled to stand trial for five counts of armed robbery)].

[f] Subsequent Conduct

Evidence of any conduct of defendant subsequent to the commission of a crime tending to show consciousness of guilt is relevant and admissible [*People v. Terry* (1970) 2 C3d 362, 85 CR 409, 466 P2d 961 (escape from jail pending trial); *In re Anthony M.* (1981) 116 CA3d 491, 172 CR 153 (circumstantial evidence of flight, burglary)].

Evidence of conduct of a defendant subsequent to the charged offense is relevant if at issue is the perpetrator's identity, the defendant's state of mind, or the defendant's motive, or if the defendant admits some or all of the charged conduct but disputes its criminal implications [*People v. Turner* (1990) 50 C3d 668, 268 CR 706, 789 P2d 887 (flight instruction when defendant claimed self-defense); *People v. Hill* (1995) 34 CA4th 727, 41 CR2d 39 (subsequent attempt to suppress evidence by solicitation to murder victim of charged offense)].

[g] Prior Statements

A statement that is not hearsay and that can be proven false is relevant and admissible if it has a tendency to prove consciousness of guilt [*People v. Garcia Mendoza* (1987) 192 CA3d 667, 238 CR 1 (falsity does not have to be proved by declarant's own statement)].

As a general rule, false statements made by a defendant at the time of arrest are admissible, not for the truth of the statements, but to show consciousness of guilt. The rule is not subject to the limitation that the falsity of the defendant's prior statements be demonstrated by the fact that they are contrary to the defendant's own trial testimony. False statements, whether or not the defendant testifies at trial, are admissible to show consciousness of guilt [*People v. Kimble* (1988) 44 C3d 480, 244 CR 148 (in prosecution for murders related to burglary of stereo store, the prosecution was properly permitted to introduce defendant's exculpatory statements and contradict them with contrary physical evidence)].

A defendant's pre-trial false statements may be admitted as relevant to show the defendant's consciousness of guilt [*People v. Jackson* (1996) 13 C4th 1164, 56 CR2d 49 (codefendant's extrajudicial statements could have been admitted to show consciousness of guilt and initial attempts to conceal truth, but error was harmless); *People v. Edwards* (1992) 8 CA4th 1092, 10 CR2d 821].

[h] Penalty Phase

At the penalty phase of a capital trial, jurors may consider all evidence presented at both phases of the trial unless otherwise instructed [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554 (no prejudice from admission of defendant's letter containing threat, absent request for limiting instruction)].

At the penalty phase of a capital trial, background and family history evidence is commonly introduced as mitigating evidence [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145 (sympathetic evidence of defendant's asserted untreated hyperactivity was admissible and need not correlate with any propensity to commit violent crimes as an adult, but exclusion was harmless error)].

[i] Photographs

Gruesome autopsy photographs were relevant on the issue of malice, and hence, were admissible [*People v. Clair* (1992) 2 C4th 629, 7 CR2d 564, 828 P2d 705] .

Police videotape of the crime scene was relevant to help clarify extensive, potentially confusing evidence about the scene [*People v. Clair* (1992) 2 C4th 629, 7 CR2d 564, 828 P2d 705] .

Photographs of murder victims were relevant to corroborate and illustrate autopsy surgeon's testimony [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131 ; *People v. Allen* (1986) 42 C3d 1222, 232 CR 849, 729 P2d 115] .

The trial court did not abuse its discretion in admitting photographs of the victims and a videotape of the crime scene, despite their possible prejudicial effect. Although some of the photographs were unpleasant to view (showing the bloodied bodies of defendant's victims), they were not unduly gruesome or inflammatory, and each bore some relevance to issues in the case [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131 ; *People v. Taylor* (2001) 26 C4th 1155, 113 CR2d 827, 34 P3d 937] .

Generally, photographs that show the manner in which a victim was wounded are relevant for determining malice, aggravation, and penalty [*People v. Burgener* (2003) 29 C4th 833, 129 CR2d 747] .

[j] Motive

Evidence of motive is admissible even though it may prejudice the accused [*People v. Matlock* (1959) 51 C2d 682, 336 P2d 505 ; *People v. Phillips* (1981) 122 CA3d 69, 175 CR 703 (psychiatric testimony relevant to motivation admissible even though defendant had not made her mental state an issue)].

Even circumstantial evidence is admissible if relevant to the question of identity and motive [*People v. Clark* (1992) 3 C4th 41, 10 CR2d 554 ; *People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554 (evidence that defendant had been offered money to kill one victim and acquired \$10,000 after death of another victim was sufficient at penalty phase to prove special circumstance that murder was committed for financial gain)].

In a conspiracy action, any evidence showing common design or existence of conspiracy is admissible [*People v. Calhoun* (1958) 50 C2d 137, 323 P2d 427 (acts of conspirator not present at trial admissible); *People v. Osslo* (1958) 50 C2d 75, 323 P2d 397] .

Evidence of gang membership is relevant on the issue of motive [*People v. Frausto* (1982) 135 CA3d 129, 185 CR 314] .

Evidence of mere motive or opportunity to commit the crime relating to another person, without more, will not raise a reasonable doubt about defendant's guilt. Direct or circumstantial evidence must link the third person to the crime [*People v. Pride* (1992) 3 C4th 195, 10 CR2d 636, 833 P2d 643] .

Evidence of motive or "state of mind" is relevant because the circumstantial evidence reasoning process accepts as valid that one tends to act in accordance with one's state of mind [*People v. De La Plane* (1979) 88 CA3d 223, 151 CR 843] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesWeaponsUseGeneral OverviewCriminal Law &

Procedure Appeals Standards of Review Substantial Evidence General Overview Evidence Procedural
Considerations Objections & Offers of Proof Objections



63 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 6 Relevancy Evidence Code §§ 350-351.1

1-6 California Courtroom Evidence 6.02

6.02 Relevant Evidence Admissible--Evid Code § 351

[1] Evid Code § 351 Text

- *Evid Code § 351.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

The Evidence Code contains a number of provisions that exclude relevant evidence either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact [Cal Law Rev Com Comment]:

Evid Code

§ 352 (cumulative, prejudicial)

§§ 900-1070 (privileges)

§§ 1100-1156 (extrinsic policy)

§ 1200 et seq. (hearsay)

In addition, other state codes contain provisions that may result in exclusion of relevant evidence. For example [Cal Law Rev Com Comment]:

Fam Code

§ 1818 (Closed Files; Privacy of Hearings)

§ 9000 (Adoption)

F&G Code

§ 7923 (Confidential Record of Fish Taken)

Gov Code

§ 15619 (Unlawful Divulgence of Information)

§ 18973 (Confidential Information; Inadmissible)

§ 18934 (Forms Not Open to Inspection)

§ 18952 (Written Appeals Confidential)

§ 20230 (Confidential Nature of Data)

§ 31532 (Confidential Nature of Statements and Records)

H&S Code

§ 100330 (Confidential Nature of Patient's Identity)

§ 103900 (Reports on Persons With a Disorder Characterized by Lapses of Consciousness Confidential)

Ins Code

§ 855 (Writings Open to Public Inspection)

§ 10381.5 (Requirements for Use of Statements in Application as Evidence)

Lab Code

§ 6309 (Complaints Regarding Unsafeness Kept Confidential)

Pen Code

§ 25 (Diminished Capacity Abolished)

§ 28 (Mental Disease Only Admissible to Show Formation of Specific Intent Impossible)

§ 29 (Expert May Not Testify About Ultimate Issue of Mental State During Guilt Phase)

§ 290 (Records Not Open for Inspection Except by Peace or Other Law Enforcement Officer)

§ 938.1 (Indictment; Secrecy of Transcript)

§ 11105 (Duty to Furnish Information)

PR Code

§ 3234 (Inspection of Records)

R&T Code

§ 16563 (Punishment for Disclosure)

§§ 19542-19566 (Punishment for Disclosure)

UI Code

§ 1094 (Privacy of Information; Exception)

§ 2111 (Information Private; Punishment)

§ 2714 (Confidential Nature of Medical Records)

Veh Code

§ 1808 (Records Open to Public Inspection)

§ 16005 (Reports)

§§ 20012-20014 (Disclosure of Confidential Information)

§ 40803 (Speed Trap Evidence Inadmissible)

§ 40804 (Incompetent Witnesses)

§ 40832 (Suspension or Revocation of Driving Privilege Inadmissible)

§ 40833 (Report or Action of Department as Evidence Inadmissible)

Water Code

§ 12516 (Unauthorized Information Confidential)

W&I Code

§ 827 (Limitation on Right to Inspect)

§ 10850 (Grants-in-Aid Records Confidential)

** Consider:**

Evid Code § 351 abolishes all limitations on the admissibility of relevant evidence except those that are based on statute, including constitutional provisions.

[3] Case Notes**[a] Relevance Generally**

Exclusion of relevant evidence that results in a denial of due process and a miscarriage of justice mandates reversal of the judgment [*Kardly v. State Farm Mut. Auto. Ins. Co. (1995) 31 CA4th 1746, 37 CR2d 612*] .

In a murder prosecution, the pretrial defense motions raised no "preliminary fact" concerning the admissibility of the witness's testimony beyond the undisputed fact that he was a jailhouse informant. Defendant's challenges to the reliability of the jailhouse informant therefore went to the weight of the testimony rather than its admissibility [*Evid Code* § 351]. Therefore, at the time the trial court ruled on the defense's in limine motions, the defense had raised no admissibility issues concerning the witness that warranted an evidentiary hearing. The trial court correctly denied the motion [*People v. Hoyos* (2007) 41 C4th 872, 897, 63 CR3d 1, 162 P3d 528 , cert den 2008 U.S. LEXIS 1571] .

Failure to follow precise regulatory or statutory requirements for laboratory tests generally does not render the test results inadmissible, but instead goes to the weight accorded to the evidence [*People v. Sangani* (1994) 22 CA4th 1120, 28 CR2d 158 (testing hazardous waste)].

Even if scientific examination of evidence is inconclusive, it is not irrelevant. It was relevant for the jury to learn that the evidence was tested, and that similarities among the items showed that both bullets might have been fired from the barrel, but that it was impossible to say for certain, due to their condition. Excluding the evidence might have unfairly prejudiced the prosecution. It would have been truly odd, and would only have puzzled the jury, to inform it that testing had been done, yet to withhold the results [*People v. Horning* (2004) 34 C4th 871, 22 CR3d 305] .

Results of a breath test are admissible even if the test is not administered in compliance with procedures required by H&S Code § 436.53 or Cal Admin Code §§ 1221, 1221.4. Noncompliance with the regulations goes only to the weight of the evidence, and the validity of the test itself is thus to be determined in accordance with general scientific standards as to the foundational elements of properly functioning equipment, properly administered test, and qualified operator [*People v. Williams* (2002) 28 C4th 408, 121 CR2d 854, 49 P3d 203] .

A videotape reenactment of a traffic accident was admissible when, in the discretion of the trial judge, the conditions depicted on the tape were found to be substantially similar to those at the time of the accident [*DiRosario v. Havens* (1987) 196 CA3d 1224, 242 CR 423] .



Cross Reference:

Discussion of relevance generally, see Imwinkelried et al., California Evidentiary Foundations, Ch. 4, Logical Relevance; Personal Knowledge and Authentication (Matthew Bender).

[b] Rebuttal of Recent Fabrication Charge

In sex cases involving minor victims when, as a result of cross-examination of the minor, the jury may believe the charges have been fabricated, evidence of the circumstances of the minor's complaint, made within a reasonable time of the alleged sex offenses, is admissible to rebut the inference of recent fabrication [*People v. Deletto* (1983) 147 CA3d 458, 195 CR 233 (minor's bizarre sexual behavior led foster mother to question her)].

[c] Evidence Raising Reasonable Doubt as to Defendant's Guilt

Any relevant evidence that raises a reasonable doubt as to a defendant's guilt, including evidence tending to show that a party other than the defendant committed the offense charged, is admissible. However, evidence of mere motive or opportunity to commit the crime, without more, will not suffice. Such evidence may be excluded only when the court properly exercises its discretion under *Evid Code* § 352 to reject evidence that creates a substantial danger of undue consumption of time or prejudice, or confusing or misleading the jury [*People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186 ; *People v. Hall* (1986) 41 C3d 826, 226 CR 112, 718 P2d 99] .

The California Supreme Court has clarified the misapprehension generated by the so-called *Mendez-Arline* test abstracted from case law, and rejected the rule in *Arline* to the extent that it created the elevated standard of "substantial

probability." "Courts should simply treat third party culpability evidence like any other evidence: it is relevant, it is admissible unless probative value is substantially outweighed by risk of prejudice or confusion" [*People v. Hall* (1986) 41 C3d 826, 226 CR 112, 718 P2d 99] .

A defendant may present evidence that another person committed the charged offense. To be admissible, evidence of the culpability of a third party--offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt--must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to this evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under *Evid Code* § 352. The evidence must do more than merely show a motive or opportunity to commit the crime [*People v. Basuta* (2001) 94 CA4th 370, 114 CR2d 285 (improper mention of a polygraph test in combination with the error in excluding evidence that defendant's mother had jerked or shaken the child was prejudicial in a child abuse case; evidence of the mother's actions would have been probative that another person had committed the crime)].

In a murder prosecution, the court properly exercised its discretion to exclude testimony about an unknown caller's obscene telephone message to the victims, which had substantial potential to distract the jury from the issues and to confuse their understanding of the facts. Notwithstanding defendant's theory of defense that a specific other man killed the victims, any inference that the other man left the obscene message would have been entirely speculative [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164] .

[d] Effect of Proposition 8 (Cal Const, art I, § 28(d))

Under Proposition 8, federal, not state, constitutional law is to be applied to resolve questions of admissibility of illegally seized evidence [*United States v. Leon* (1984) 468 US 897, 104 S Ct 3405, 82 L Ed2d 677] .

Under *Leon*, the *Fourth Amendment* does not bar use of evidence obtained by the police acting in objectively reasonable reliance on a search warrant later found to be unsupported by probable cause [*In re Lance W.* (1985) 37 C3d 873, 210 CR 631, 694 P2d 744] .

Under *Cal Const, art I, § 28(d)*, the only evidence that California courts must suppress as illegally obtained is that evidence which would be suppressed under federal constitutional standards [*New York v. Belton* (1981) 453 US 454, 101 S Ct 2860, 69 L Ed2d 768 (police may search contents of containers incident to arrest and within arrestee's immediate control); *People v. Gutierrez* (1984) 163 CA3d 332, 209 CR 376 (warrantless search of cardboard box on defendant's person at time of field sobriety test)].

Before Proposition 8, relevant evidence illegally seized was excludable and a defendant could assert, vicariously, the illegality of a search of a third person and the exclusion of evidence illegally seized from such a person. Under Proposition 8, because all relevant evidence is now admissible in any criminal proceeding except evidence that violates the directions of the U.S. Constitution, and because the U.S. Supreme Court has not recognized a vicarious exclusionary rule in its explication of *Fourth Amendment* restraints on searches and seizures, such a rule may not be asserted [*People v. Daan* (1984) 161 CA3d 22, 207 CR 228] .

Once police have probable cause to believe that a crime is being committed, they may search a car and any closed container inside it without a warrant [*California v. Acevedo* (1991) 500 US 565, 111 S Ct 1982, 114 L Ed2d 619] .

Evidence of illegality tossed aside before a physical seizure of a suspect cannot be excluded as tainted by unreasonable seizure. The refusal to yield after a show of authority means there has been no seizure; thus, the evidence is untainted and admissible [*California v. Hodari D.* (1991) 499 US 621, 111 S Ct 1547, 113 L Ed2d 690 (evidence discarded by a fleeing suspect may be used against that suspect in court)].

Proposition 8 added *Pen Code* § 25, which explicitly abolishes the defense of diminished capacity. Thus, in criminal and juvenile court proceedings, "evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive ... or other mental state required for commission of the crime charged." However, evidence of diminished capacity may be considered at the time of sentencing [*People v. Whitler* (1985) 171 CA3d 337, 214 CR 610] .

Pen Code § 28 states that evidence of mental disease or defect is admissible solely on the issue of whether the accused actually formed a specific intent when such a crime is charged [*People v. Jackson* (1984) 152 CA3d 961, 199 CR 848] .

Pen Code § 29 does not allow testimony by an expert in the guilt phase of a trial regarding the ultimate fact of a defendant's mental state [*People v. Jackson* (1984) 152 CA3d 961, 199 CR 848] .

Because it is more specific, *Pen Code* § 29 prevails over *Evid Code* § 805 [*People v. Whitler* (1985) 171 CA3d 337, 214 CR 610] .



Cross Reference:

Discussion of Proposition 8, see California Criminal Defense Practice, Ch. 83, Evidence, 83.04 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Search & Seizure Exclusionary Rule General Overview Evidence Privileges Government Privileges Official Information Privilege Informer Privilege Evidence Procedural Considerations Exclusion & Preservation by Prosecutor



64 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 6 Relevancy Evidence Code §§ 350-351.1

1-6 California Courtroom Evidence 6.03

6.03 Polygraph Examinations--Admissibility--Evid Code § 351.1

[1] Evid Code § 351.1 Text

● Evid Code § 351.1.

(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.

LegH: 1983 ch. 202 urgency eff. July 12, 1983.

[2] Case Notes

In a murder prosecution, defendant's refusal to take a polygraph test was included in defendant's statement to the police, which the court admitted into evidence. Although the portion of defendant's statement in which he refused to take the test was subject to exclusion on proper objection under *Evid Code § 351.1*, the defense did not object, and the prosecutor was free to comment on it once it was admitted into evidence [*People v. Leonard (2007) 40 C4th 1370, 1408, 58 CR3d 368, 157 P3d 973*, cert den *2007 US LEXIS 12044*] .

After defense refused to stipulate to deletion of word "polygraph" from transcript used to examine prosecution witness, judge's admonition was sufficient to correct any prejudice when witness referred to polygraph [*People v. Sapp (2003) 31 C4th 240, 2 CR3d 554*] .

Evid Code § 351.1 is constitutional and does not abridge a defendant's due process right to produce crucial exculpatory evidence [*United States v. Scheffer (1998) 523 US 303, 118 S Ct 1261, 140 L Ed2d 413* (criminal defendant has no constitutional right to use favorable polygraph evidence as part of his or her defense); *People v. Wilkinson (2005) 33 C4th 821, 846-852, 16 CR3d 420, 94 P3d 551* (categorical exclusion of polygraph evidence, absent stipulation, is not

unconstitutional); *People v. Maury* (2003) 30 C4th 342, 133 CR2d 561 , (no error in refusing to admit results of polygraph test); *People v. Espinoza* (1992) 3 C4th 806, 12 CR2d 682, 838 P2d 204 (no error in rejecting evidence of offer to take polygraph defendant made before making statement to police)].

Firm and broad exclusion of polygraph tests is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact or the outcome of a polygraph examination, and because the introduction of polygraph evidence can negatively affect the jury's appreciation of its exclusive power to judge credibility [*People v. Basuta* (2001) 94 CA4th 370, 114 CR2d 285 (improper mention of polygraph test in combination with the error in excluding evidence that defendant's mother had jerked or shaken child was prejudicial in child abuse case; evidence of mother's actions would have been probative that another person had committed crime)].

A stipulation to a polygraph examination cannot include provisions for conclusive effect to be given to the results, nor can it control the action of the court in the reception of other evidence or to determine the effect to be given it [*Robinson v. Wilson* (1974) 44 CA3d 92, 118 CR 569] .

In a prosecution for driving under the influence and battery on an officer, the trial court did not err in declining to hold a *Kelly/Frye* hearing regarding the evidence proffered by the defendant, notwithstanding the defendant's offer of proof [*People v. Wilkinson* (2005) 33 C4th 821, 16 CR3d 420, 94 P3d 551 ; *In re Aontae D.* (1994) 25 CA4th 167, 30 CR2d 176 (in criminal juvenile proceeding, no error in exclusion of minor's evidence of favorable polygraph test)].

If a defendant makes no offer to prove the acceptance of polygraphs in the scientific community, such evidence may be properly excluded [*People v. Burgener* (2003) 29 C4th 833, 129 CR2d 747 ; *People v. Jackson* (1996) 13 C4th 1164, 56 CR2d 49 (sole witness to testify in support of motion to admit test was police sergeant who administered the test and who was not competent to testify as to polygraph's acceptance in relevant scientific community); *People v. Morris* (1991) 53 C3d 152, 279 CR 720, 807 P2d 949] .

A party has no due process rights to present evidence of test results if the results used scientific techniques not generally accepted as reliable in the scientific community [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

Although the prosecution has a duty to inform the defense of a polygraph test which casts doubt on the credibility of the prosecution's witness, the test results are still inadmissible [*People v. Price* (1991) 1 C4th 324, 419, 3 CR2d 106, 821 P2d 610] .

A trial court may not compel a polygraph examination [*People v. Ayala* (2000) 23 C4th 225, 96 CR2d 682, 1 P3d 3] .

The use of polygraph examination results to impeach a witness's credibility is disfavored [*People v. Ayala* (2000) 23 C4th 225, 96 CR2d 682, 1 P3d 3 (refusing defense request for polygraph of witness for purpose of discrediting witness and convincing court to grant motion to dismiss special circumstances in capital case)].

There is no "state of mind" exception to the ban on polygraph evidence. Unlike hearsay evidence, which is only banned if it is offered "to prove the truth of the matter stated," polygraph evidence may not be admitted into evidence in any criminal proceeding [*People v. Lee* (2002) 95 CA4th 772, 115 CR2d 828 (trial court committed prejudicial error in admitting evidence that key prosecution witness took and failed lie detector test before changing his story to incriminate defendant)].

Changes in the Evid Code are not ex post facto unless they deprive a defendant of a substantial protection or right. *Evid Code* § 351.1 merely changes the type of evidence that is admissible [*People v. Seldomridge* (1984) 154 CA3d 362, 201 CR 377] .

According to the Assembly Committee on Criminal Law and Public Safety, *Evid Code* § 351.1 is intended to create an

exception to the Truth-in-Evidence section of Proposition 8 (*Cal Const, art I, § 28(d)*) that bars the exclusion of any relevant evidence [*People v. Kegler* (1987) 197 CA3d 72, 242 CR 897 ; *People v. Espinoza* (1992) 3 C4th 806, 12 CR2d 682, 838 P2d 204 (defendant's offer to take polygraph test properly excluded)].

Evid Code § 351.1 applies to juvenile hearings for criminal offenses under *W&I Code § 602* [*In re Aontae D.* (1994) 25 CA4th 167, 30 CR2d 176 (in criminal juvenile proceeding, no error in excluding minor's evidence of favorable polygraph test)].

Evid Code § 351.1 does not cover use of results of a polygraph test in civil or noncriminal juvenile matters. In the latter situation, an evidentiary hearing pursuant to *Evid Code §§ 400-405* to determine the admissibility of the polygraph evidence must be granted [*In re Kathleen W.* (1987) 190 CA3d 68, 235 CR 205] .

Evid Code § 351.1(a) is equally applicable to the penalty phase of a capital murder prosecution [*People v. Koontz* (2002) 27 C4th 1041, 119 CR2d 859, 46 P3d 335 (not error for trial court to exclude as mitigating evidence during penalty phase of prosecution defendant's willingness to take polygraph test)].



Cross Reference:

Discussion of use of polygraph results, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 4, *Limitations on Credibility Evidence*, Pt. H (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceProcedural ConsiderationsJudicial Intervention in TrialsInterrogation of WitnessesFamily LawFamily Protection & WelfareChildrenProceedings



65 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 7 Discretion of Court to Exclude Evidence Code §§ 352-352.1

1-7 California Courtroom Evidence 7.syn

§ 7.syn Synopsis to Chapter 7: Discretion of Court to Exclude Evidence Code §§ 352-352.1

7.00 Introduction

[1] Exclusion When Prejudice Outweighs Probative Value

[2] Exclusion of Victim's Address and Telephone Number

7.01 Exclusion of Evidence--Time-Consuming, Prejudicial, Confusing, Misleading--Evid Code § 352

[1] Evid Code § 352 Text

[2] Commission Comment

[3] Case Notes

[a] Court Must Make Determination on the Record

[b] Penalty Phase

[c] Standard on Appeal

[d] Objection Based on Evid Code § 352 Must be Made or is Waived

[e] Effect of Proposition 8: Victims' Bill of Rights

[f] Limiting Number of Witnesses or Documents

[g] Balancing Probative Value Against Prejudicial Impact

[i] Civil Cases--Evidence admissible

[ii] Civil Cases--Evidence more prejudicial than probative

[iii] Criminal Cases--Evidence admissible

[iv] Criminal Cases--Evidence more prejudicial than probative

[h] Admission of Photographs

[i] Balancing Use of Expert/Scientific Testimony

[j] Effect of Stipulations

[k] Excluding Cumulative Evidence

[l] Excluding Time-Consuming or Confusing Evidence

[m] Defendant's Due Process Rights

[n] Evidence of Gang Affiliation

[o] Witness's Fear

[p] Victim Impact Evidence

7.02 Conditions to Exclude Victim's Phone, Address--Evid Code § 352.1

[1] Evid Code § 352.1 Text

[2] Legislative Note



66 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 7 Discretion of Court to Exclude Evidence Code §§ 352-352.1

1-7 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code* §§ 352-352.1 on the trial court's discretion to exclude evidence that is time-consuming, prejudicial, confusing, or misleading.



Cross Reference:

Discussion of related matters regarding admitting and excluding evidence under *Evid Code* §§ 350-406, see:

- Ch. 6, Relevancy.
- Ch. 8, Preserving Objections and Reversible Error.
- Ch. 9, Limited Admissibility and Clarification of Evidence.
- Ch. 10, Preliminary Determination on Admissibility.

For a detailed discussion of the impact of the Victims' *Bill of Rights* (Proposition 8) on the court's discretion to admit prior felony convictions to impeach, including the issue of moral turpitude, see Ch. 16, Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis.

For detailed discussion of the procedures to introduce evidence at trial, see California Civil Trial Guide (Matthew Bender):

- Ch. 21, Procedures for Determining Admissibility of Evidence.
- Ch. 22, Rules Affecting Admissibility of Evidence.

See also California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender), and Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses

and Objections (Matthew Bender).



67 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 7 Discretion of Court to Exclude Evidence Code §§ 352-352.1

1-7 California Courtroom Evidence 7.00

7.00 Introduction

[1] Exclusion When Prejudice Outweighs Probative Value

Evid Code § 352 gives trial courts considerable discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial effect [*Michail v. Fluor Mining and Metals, Inc. (1986) 180 CA3d 284, 225 CR 403*] . Courts have discretion to admit evidence of such things as prior misconduct, gang affiliation, and crime photos if their probative value is substantial and is not largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury [*People v. Lewis (2001) 25 C4th 610, 106 CR2d 629, 22 P3d 392*] .



Cross Reference:

Discussion of limitations on credibility evidence under *Evid Code § 352*, see Imwinkelried et al., California Evidentiary Foundations, Ch. 5, Limitations on Credibility Evidence (Matthew Bender).

[2] Exclusion of Victim's Address and Telephone Number

Courts also have discretion to exclude evidence of a crime victim's address and telephone number [*Evid Code § 352.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceRelevanceConfusion, Prejudice & Waste of Time



68 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 7 Discretion of Court to Exclude Evidence Code §§ 352-352.1

1-7 California Courtroom Evidence 7.01

7.01 Exclusion of Evidence--Time-Consuming, Prejudicial, Confusing, Misleading--Evid Code § 352

[1] Evid Code § 352 Text

■ *Evid Code § 352.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

Evid Code § 352 expresses a rule recognized by statute and in several California decisions [Cal Law Rev Com Comment].

[3] Case Notes

[a] Court Must Make Determination on the Record

The record must show that the court discharged its statutory duty to weigh a statement's potential for prejudice against its probative value when circumstances require it. A silent record is insufficient. The reason for this rule is to furnish the appellate courts with the record necessary for meaningful review of any ensuing claim of abuse of discretion; an additional reason is to ensure that the ruling on the motion is the product of a mature and careful reflection on the part of the judge [*People v. Ford* (1964) 60 C2d 772, 36 CR 620, 388 P2d 892] .

However, "a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under *Evidence Code section 352*" [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123 ; *People v. Johnson* (1987) 193 CA3d 1570, 239 CR 245 (prior conviction); *People v. Wright* (1985) 39 C3d 576, 217 CR 212, 703 P2d 1106 (purported prejudice to prosecution cannot be based on speculation and conjecture); *People v. Meacham* (1984) 152 CA3d 142, 199 CR 586 (probative value of evidence of troubled sexual behavior of children far outweighed prejudice,

failure to make balancing test was harmless error); *Hilliard v. A. H. Robins Co.* (1983) 148 CA3d 374, 196 CR 117 (on punitive damages issue, exclusion of relevant evidence against Dalkon Shield defendant as unduly prejudicial without a balancing test was error)].

On a motion invoking *Evid Code* § 352, the record must affirmatively show that the court made a determination that the evidence's probative value outweighed its potential for prejudice [*People v. Tamborrino* (1989) 215 CA3d 575, 263 CR 731 ; *People v. Burgener* (1986) 41 C3d 505, 224 CR 112, 714 P2d 1251 ; *People v. Green* (1980) 27 C3d 1, 164 CR 1] .

If a proper objection under *Evid Code* § 352 is raised, the trial court must in fact weigh prejudice against probative value. The trial court need not make findings or expressly recite its weighing process, or even expressly recite that it has weighed the factors, so long as the record as a whole shows the court understood and undertook its obligation to perform the weighing function [*Boeken v. Philip Morris, Inc.* (2005) 127 CA4th 1640, 1686, 26 CR3d 638 (affirming judgment of defective product and fraudulent misrepresentation; reducing punitive damage award)].

The failure of the record to show the court's weighing of probative value against prejudicial impact has been held to be harmless error if the prejudicial impact was negligible [*People v. Martinez* (1980) 106 CA3d 524, 165 CR 160] .

There is no particular formula for engaging in the weighing process as long as the record reflects in some fashion that the court has done so [*People v. Thompson* (1988) 45 C3d 86, 246 CR 245] .

Even though proffered evidence may satisfy the requirements of a hearsay exception, when an *Evid Code* § 352 objection is raised, the court must make an on-the-record determination of the probative value of the evidence versus its prejudicial impact [*People v. Leonard* (1983) 34 C3d 183, 193 CR 171 (admission of codefendant's guilty plea as a declaration against penal interest without a balancing test was reversible error)].

Exclusion of a tape recording of defendant's statement after arrest could not properly be based on the exercise of the court's discretion because the court did not listen to the recording and did not know its contents [*People v. Filson* (1994) 22 CA4th 1841, 28 CR2d 335] .

[b] Penalty Phase

Due process does not bar the application of *Evid Code* § 352 at the penalty phase of capital trials [*People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186] .

Court does not have discretion to exclude evidence when offered at penalty phase of capital homicide prosecution when question for jury is not one of fact in determining guilt [*People v. Freeman* (1994) 8 C4th 450, 34 CR2d 558, 882 P2d 249] .

The trial court's discretion under *Evid Code* § 352 to exclude evidence of circumstances of capital crime is more limited at the penalty phase than at the guilt phase. However, in evaluating defendants' moral culpability for a capital crime, the jury is entitled to have a complete picture of the brutal manner in which the victim was killed [*People v. Luke* (2006) 39 C4th 970, 1055-1056, 47 CR3d 467, 140 P3d 775 (no error in admission of photographs)].

During the penalty phase of a capital homicide prosecution, the prosecutor can, under *Pen Code* § 190.3(b), offer evidence in aggravation of criminal violence that occurred at any time. In a murder prosecution in which the penalty retrial was conducted in 1990-1991, the trial court properly admitted evidence of another murder committed by the defendant in 1978, despite a claim of "staleness." The evidence should not have been excluded as more prejudicial than probative since a capital defendant's other violent crimes are admissible to determine a penalty. The trial court was not permitted to exclude from a capital penalty trial all evidence of such a crime on grounds that the jury's consideration of

the episode would be more prejudicial than probative [*People v. Anderson (2001)* 25 C4th 543, 106 CR2d 575, 22 P3d 347] .

If it is offered at the penalty phase of capital homicide prosecution, the trial court lacks discretion to exclude all evidence under *Pen Code* § 190.3(a) on the ground that it is inflammatory or lacking in probative value. Although the trial court's discretion to exclude evidence showing the circumstances of the crime is more circumscribed than at the guilt phase, neither *Pen Code* § 190.3(a) nor *Pen Code* § 190.3(b) deprives the trial court of its traditional discretion to exclude particular items of evidence by which the prosecution seeks to demonstrate either the circumstances of the crime or violent criminal activity in a manner that is misleading, cumulative, or unduly inflammatory [*People v. Staten (2000)* 24 C4th 434, 101 CR2d 213, 11 P3d 968 (trial court did not abuse discretion in admitting autopsy photographs of victim in penalty phase of capital prosecution)].

Evidence irrelevant and prejudicial to determining guilt may be relevant to judging the appropriate punishment once guilt is established [*People v. Cox (1991)* 53 C3d 618, 280 CR 692] .

Exception:

Evidence of criminal activity of which a defendant was acquitted is not admissible in the penalty phase of a capital homicide prosecution [*People v. Hernandez (2003)* 30 C4th 835, 134 CR2d 602 (trial court should have excluded all evidence of attack of which defendant had been acquitted; judgment of death reversed)].

[c] Standard on Appeal

On appeal from a trial court's refusal to exclude certain evidence under *Evid Code* § 352, the complaining party has the burden to show a clear case of abuse of discretion, and that such abuse was sufficiently grave to amount to a manifest miscarriage of justice [*Simon v. San Paolo United States Holding Co. (2003)* 113 CA4th 1137, 7 CR3d 367 (appellant's citations to record were insufficient to support argument)].

In criminal cases, the trial court abused its discretion under *Evid Code* § 352 only when the appellate court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error [*People v. Stewart (2004)* 33 C4th 425, 15 CR3d 656, 93 P3d 271 (murder prosecution); *People v. Sapp (2003)* 31 C4th 240, 2 CR3d 554 (defendant was not prejudiced by prosecutor's suggestive comment about interrogation transcript, when redacted material was extensive); *People v. Watson (1956)* 46 C2d 818, 299 P2d 243] .

[d] Objection Based on Evid Code § 352 Must be Made or is Waived

When counsel makes no objection based on *Evid Code* § 352, the appellate court need not decide whether there was a breach of discretion [*People v. Mayfield (1997)* 14 C4th 668, 60 CR2d 1 ; *People v. Ghent (1987)* 43 C3d 739, 239 CR 82, 739 P2d 1250] .

Generally, questions of admissibility will not be reviewed on appeal in the absence of a specific timely objection in the trial court [*People v. Raley (1992)* 2 C4th 870, 8 CR2d 678, 830 P2d 712] .

When the court rules in limine that evidence is admissible, the party seeking exclusion of the evidence must also object when the evidence is actually offered in order to preserve the issue for appeal, although a sufficiently definite and express ruling on a motion in limine may also serve to preserve a claim [*People v. Brown (2003)* 31 C4th 518, 3 CR3d 145] .

An attorney is not incompetent merely for failing to make a motion to exclude a writing on the basis that the court might have exercised its discretion to exclude otherwise admissible evidence under *Evid Code* § 352 [*People v. Kelley*

(1990) 220 CA3d 1358, 269 CR 900 (constitutional guarantee of effective assistance of counsel does not require that counsel make every conceivable motion to avoid being deemed incompetent)].

The record must show that a party requested the court to exercise its discretion [*People v. Quaintance* (1978) 86 CA3d 594, 150 CR 281] .

In the absence of a request, the trial court was not required to weigh the prejudicial value of testimony against the probative value of the evidence; in any case, a correctional officer's testimony was admissible in the guilt phase of a capital murder trial under *Evid Code* § 352 because it was relevant and was neither inflammatory or misleading [*People v. Farnam* (2002) 28 C4th 107, 121 CR2d 106, 47 P3d 988 (testimony describing defendant's initial defiance with respect to court-ordered blood and hair samples did not suggest his actions were criminal or violent, and officer also testified that defendant was never cited for any security or disciplinary violation as a result of incident)].

When no objection was made calling on the trial judge to exercise discretion, the appellate court limited its inquiry into the relevance of the evidence [*People v. Deletto* (1983) 147 CA3d 458, 195 CR 233] .

The fact that counsel did not specifically refer to *Evid Code* § 352 in his objection does not mean that the trial court may not exclude evidence under that section [*People v. Roscoe* (1985) 168 CA3d 1093, 215 CR 45] .

When counsel never specifically moved to exclude an admission under *Evid Code* § 352, the court was not required to perform sua sponte an on-the-record test weighing the admission's probative value against its prejudicial impact [*People v. Williams* (1991) 228 CA3d 147, 278 CR 801 (in view of defense counsel's concessions, trial court was under no obligation to conduct balancing test); *People v. Smith* (1984) 151 CA3d 89, 198 CR 623 (not prejudicial error to admit admission of defendant without balancing test)].

The "sine qua non" for invocation of *Evid Code* § 352 protection is a request of a party to the trial court for protection [*Gherman v. Colburn* (1977) 72 CA3d 544, 140 CR 330] .

When the defense did not attempt to invoke the court's discretion, it is not an abuse of discretion for the judge to refuse to admit information concerning the nature and extent of plaintiff's insurance coverage [*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173, 465 P2d 61] .

[e] Effect of Proposition 8: Victims' Bill of Rights

Under *Evid Code* § 352, which is an express exception to Proposition 8, *Cal Const, art I, § 28(d)*, a trial court has discretion to exclude evidence when its probative value is outweighed by concerns of undue prejudice, confusion, or consumption of time. In a murder trial, even if the trial court abused its discretion by excluding the victim's alleged statement of grievance against the codefendant, there was no prejudice since the victim was unarmed when the codefendant and the armed defendant came to the victim's door and shot her [*People v. Tafuya* (2007) 42 C4th 147, 173-174, 64 CR3d 163, 164 P3d 590] .

Proposition 8 did not abolish *Evid Code* § 352 discretion concerning impeachment with prior felony convictions. To be used for impeachment purposes, the prior conviction must involve dishonesty or other type of moral turpitude [*People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111] .

The "clear and absolute meaning" of Proposition 8, *Cal Const, art I, § 28(f)*, admitting "any prior conviction ... without limitation" is applicable in sentence enhancement situations [*People v. Prather* (1990) 50 C3d 428, 267 CR 605] .

[f] Limiting Number of Witnesses or Documents

Limiting the number of impeachment, expert, or character witnesses or the number of witnesses or documents to be introduced in order to prove a link in the chain of evidence is a matter within the court's discretion [*State of Cal. ex rel. State Public Works Board v. Wherity* (1969) 275 CA2d 241, 75 CR 591 (expert witnesses)].

[g] Balancing Probative Value Against Prejudicial Impact

Cross Reference:

Discussion of balancing probative value and possible prejudice, see Imwinkelried et al., California Evidentiary Foundations, Ch. 6, Limitations on Evidence That Is Relevant to the Merits of the Case (Matthew Bender).

[i] Civil Cases--Evidence admissible

"Prejudicial" is not synonymous with "damaging." The stronger the evidence, the more it is prejudicial. The prejudice referred to in *Evid Code* § 352 applies to evidence that uniquely tends to evoke an emotional bias against the party as an individual and that has very little effect on the issues [*Vorse v. Sarasy* (1997) 53 CA4th 998, 62 CR2d 164 (judge erred by striking witness' testimony as "not to be believed"); *Smothers v. General Motors Corp.* (1995) 34 CA4th 629, 40 CR2d 618] .

Exclusion of evidence under *Evid Code* § 352 is reserved for those cases where the proffered evidence has little evidentiary value and creates an emotional bias against the defendant [Ajaxo, Inc. v. E* *Trade Group Inc.* (2005) 135 CA4th 21, 45-46, 37 CR3d 221 (evidence of investments by one company in another, after alleged misappropriation of trade secret, was relevant and probative to show how companies were entangled and to show defendant's motive to misappropriate plaintiff's trade secret; defendant failed to show on appeal how evidence created emotional bias)].

Discretion under *Evid Code* § 352 is not absolute. If the probative value of evidence is great, the danger of prejudice must be very substantial before the court may exclude the evidence [*Kelly v. New West Federal Savings* (1996) 49 CA4th 659, 56 CR2d 803 (trial court may not exclude evidence which is directly relevant to primary issue of case because evidence is prejudicial to opponent); *In re Marianne R.* (1980) 113 CA3d 423, 169 CR 848 (admission of testimony highly probative on critical issue--here, father's sexual abuse of child--is not abuse of discretion); *Kessler v. Gray* (1978) 77 CA3d 284, 143 CR 496] .

In a civil case in which the prejudice to one party in admitting evidence is substantially outweighed by the probative value of the evidence on the issue of malice, it is an abuse of discretion not to admit the evidence [*Hilliard v. A. H. Robins Co.* (1983) 148 CA3d 374, 196 CR 117] .

Evidence of unrelated defects in the manufacturing process created a substantial danger of prejudice, confusing the issue, and misleading the jury, and was improperly admitted [*Marocco v. Ford Motor Co.* (1970) 7 CA3d 84, 86 CR 526] .

The trial court did not abuse its discretion in admitting a videotape of the "Day in the Life" of a paraplegic victim of an automobile accident for the purpose of establishing damages [*Jones v. City of Los Angeles* (1993) 20 CA4th 436, 24 CR2d 528] .

In a medical malpractice case, when the court considered all relevant factors, the court did not abuse its discretion in admitting evidence that a patient received disability benefits during part of the time after his injury [*Lafayette v. County of Los Angeles* (1984) 162 CA3d 547, 208 CR 668 (collateral insurance payments more probative than prejudicial concerning defendant's depression)].

Remoteness in time is only one factor to consider in making an *Evid Code* § 352 determination whether to exclude

evidence of a prior similar incident. In general, prior similar incidents are relevant to the foreseeability of the criminal acts of third persons against invitees, and thus relevant to establish the duty of the landlord [*Isaacs v. Huntington Memorial Hospital* (1985) 38 C3d 112, 211 CR 356, 695 P2d 653] .

[ii] Civil Cases--Evidence more prejudicial than probative

Well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury [*Holmes v. South Carolina* (2006) 547 US 319, 126 S Ct 1727, 1732, 164 L Ed2d 503 (citing Fed R Evid § 403)].

California trial judges have considerable discretion under *Evid Code* § 352 to exclude evidence if its probative value is substantially outweighed by its prejudicial effect [*Michail v. Fluor Mining and Metals, Inc.* (1986) 180 CA3d 284, 225 CR 403 (adjudication by EEOC on same claim properly excluded)].

Inquiry into collateral source payments to impeach reasonableness of medical treatment was properly excluded where attorney refused to develop proof out of presence of jury so court could determine prejudice in advance. This was a matter for the court's discretion [*Lund v. San Joaquin Valley Railroad* (2003) 31 C4th 1, 1 CR3d 412, 71 P3d 770 (trial court correctly told jury that plaintiff was ineligible for workers' compensation benefits under unusual circumstances where evidence could have created jury misconception that plaintiff was seeking double recovery); *Hrnjak v. Graymar, Inc.* (1971) 4 C3d 725, 94 CR 623, 484 P2d 599 (admission of evidence of collateral source payments requires balancing test); *Acosta v. Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 19, 84 CR 184, 465 P2d 72 (defendant may not mitigate by showing insurance)].

The trial court erred in admitting evidence of settlement agreements that plaintiff had obtained in other misappropriation cases in other states for the purpose of establishing his damages in this case. Those settlement agreements and amounts were irrelevant; they had no tendency to prove the amount of damages sustained as a consequence of the unauthorized use in this case [*O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 CA4th 491, 9 CR3d 342 (remanding for new trial)].

Trial court correctly did not allow defendant to prove mitigation by showing that plaintiff had received compensation from insurance [*Acosta v. Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 19, 84 CR 184, 465 P2d 72] .

In a medical malpractice action, the plaintiff's residency status was irrelevant and inadmissible because the plaintiff claimed no lost earnings, past or future [*Hernandez v. Paicius* (2003) 109 CA4th 452, 134 CR2d 756] .

In an action for breach of contract, rescission, fraud, and misrepresentation in the sale of a parcel of commercial property on an "as is" basis, the trial court did not abuse its discretion in excluding, as irrelevant and prejudicial under *Evid Code* § 352, letters from the attorney for earlier tenants concerning water damage and other problems that the buyers were either aware of or had been expressly told of, or that were readily observable on inspection [*Shapiro v. Hu* (1986) 188 CA3d 324, 233 CR 470] .

Unfair surprise is not a valid ground for exclusion under *Evid Code* § 352; the proper remedy is a continuance [*Kelly v. New West Federal Savings* (1996) 49 CA4th 659, 674, 56 CR2d 803] .

[iii] Criminal Cases--Evidence admissible

Evidence is substantially more prejudicial than probative under *Evid Code* § 352 if, broadly stated, it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome [*People v. Jablonski* (2006) 37 C4th 774, 38 CR3d 98, 126 P3d 938 (in competency hearing before murder trial, trial court did not abuse its discretion by admitting two-year-old tape recording of defendant recounting prior murders, as highly probative and directly relevant

to issue of whether defendant was feigning incompetence to avoid trial, notwithstanding availability of less prejudicial and more recent relevant evidence)].

"Prejudicial" is not synonymous with "damaging." The stronger the evidence, the more it is prejudicial. The prejudice referred to in *Evid Code* § 352 applies to evidence that uniquely tends to evoke an emotional bias against the party as an individual and that has very little effect on the issues [*People v. Crew* (2003) 31 C4th 822, 3 CR3d 733, 74 P3d 820 (evidence of defendant's stepfather's attempt to establish alibi was not unduly prejudicial and would not arouse emotional bias, while evidence of defendant's generic threat to "kill someone" was damaging to defendant but probative of guilt and not unduly prejudicial); *People v. Smith* (2003) 30 C4th 581, 134 CR2d 1, 68 P3d 302 (trial court did not abuse discretion in admitting testimony of victim's condition, medical treatment, and cause of death; evidence did not have great probative value but had little prejudicial effect); *People v. Kipp* (2001) 26 C4th 1100, 113 CR2d 27, 33 P3d 450 (stating doctrine); *People v. Karis* (1988) 46 C3d 612, 250 CR 659, 758 P2d 1189 (no abuse of discretion in admitting testimony of defendant's statement made before crime)].

Generally, criminal defendants may offer evidence to show that someone else committed the crime with which they are charged, provided that the evidence is not too remote or speculative [*Holmes v. South Carolina* (2006) 547 US 319, 126 S Ct 1727, 1733, 164 L Ed2d 503] .

The trial court acted within its discretion to permit impeachment as to only one incident in witness's juvenile record, notwithstanding that trial court had told jury that witness had been charged in juvenile court with two homicides, two robberies, burglary, and other offenses [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224 (prosecution for murder and theft)].

A trial court reasonably determined that the murder victim's prior out-of-court hearsay statement, that defendant had been fondling her and that she intended to confront him if he did it again, was not unduly prejudicial. Although the victim's statement, of course, was damaging to defendant's position by suggesting that he murdered her willfully and with premeditation and deliberation, such damage does not amount to undue prejudice for purposes of exclusion of evidence. Relevant as it was to the circumstances of the murder, the victim's statement carried a probative value that was not substantially outweighed by any threat to the fairness of the trial or the reliability of the outcome [*People v. Griffin* (2004) 33 C4th 536, 15 CR3d 743, 93 P3d 344] .

Graphic evidence in murder cases is always disturbing and never pleasant. Evidence of a victim's suffering was indeed disturbing but not unduly shocking or inflammatory, especially considering that proof of the torture-murder special circumstance required evidence of commission of a kind of act calculated to cause extreme pain, and that both murder by torture and the torture-murder special circumstance, as defined by statute before amendment in 1990, required evidence of an intent to inflict extreme pain [*People v. Cole* (2004) 33 C4th 1158, 17 CR3d 532, 95 P3d 811] .

Evidence of a generic threat is admissible when other evidence brings the actual victim within the scope of the threat [*People v. Crew* (2003) 31 C4th 822, 3 CR3d 733, 74 P3d 820 (defendant's extrajudicial statement that "I would like to kill someone, just to see if I could get away with it" was admissible when other evidence pertained to specific victim)].

The court did not abuse its discretion by admitting evidence of a futile five-day, multi-jurisdictional air and ground search for the defendant. It was relevant for the jury to know that despite a major manhunt, the defendant had the presence of mind to elude capture [*People v. Edwards* (1991) 54 C3d 787, 1 CR2d 696, 819 P2d 436] .

Whether the probative value of evidence outweighs its possible confusion on collateral issues or prejudicial effect is a question for the court in the exercise of its judicial discretion.

Examples:

1-7 California Courtroom Evidence 7.01

- Because jury knew victim's body had not been recovered, any error in admitting defendant's extrajudicial statement, that victim's father "might as well forget about finding" her body, was harmless [*People v. Crew* (2003) 31 C4th 822, 3 CR3d 733, 74 P3d 820] .
- Defendant's statements, which did not implicate him in uncharged murders, were properly admitted [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554, 73 P3d 433] .
- Poor driving record admitted to prove knowledge of risks in reckless driving not prejudicial in light of defendant's admissions and facts of case [*People v. Whitson* (1998) 17 C4th 229, 70 CR2d 321, 949 P2d 18] .
- Admitting gang paraphernalia was not overly prejudicial despite highly inflammatory impact juvenile gang evidence may have on jury [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123, 940 P2d 710] .
- Any undue prejudice from inference that defendant carried a knife despite warnings was outweighed by probative value of the evidence to prove that, before the robbery/murder, he understood and accepted the lethal possibilities of carrying and using knife [*People v. Arias* (1996) 13 C4th 92, 51 CR2d 770, 913 P2d 980] .
- Putrid odor of murder victim's clothing displayed to jury did not violate *Evid Code* § 352 [*People v. Osband* (1996) 13 C4th 622, 55 CR2d 26, 919 P2d 640] .
- In murder prosecution, no error in allowing witness to testify that one defendant previously tried to kill the witness [*People v. Feagin* (1995) 34 CA4th 1427, 40 CR2d 918] .
- Defendant's incriminating statements were outweighed by probative value of his testimony that his wife had no idea how easy it would be for him to hire someone to "really take care of her" [*People v. Gionis* (1995) 9 C4th 1196, 40 CR2d 456, 892 P2d 1199] .
- In robbery prosecution, evidence of prior recent crime of misdemeanor sexual battery admissible to impeach defendant's veracity on basis that prior was crime of moral turpitude [*People v. Chavez* (2000) 84 CA4th 25, 100 CR2d 680] .
- In murder prosecution, no abuse of discretion in admitting evidence of defendant's marital discord and prior assaults on wife [*People v. Linkenauger* (1995) 32 CA4th 1603, 38 CR2d 868] .
- In penalty phase of capital prosecution, no abuse of discretion in denying defendant's motion to edit tapes to omit any reference to defendant's third wife, who had disappeared, and his rape of his last wife, who was the murder victim [*People v. Stanley* (1995) 10 C4th 764, 42 CR2d 543, 897 P2d 481] .
- Testimony of victim's parents that victim was talented baker, and that parent was reading victim's last letter when informed by police of victim's death, did not prejudice defendant [*People v. Thomas* (1992) 2 C4th 489, 7 CR2d 199, 828 P2d 101] .
- Victim's ability to recall that male defendant wore women's underwear was highly relevant to central issue of victim's credibility; although defendant's behavior was unusual, it was not devastating [*People v. Harlan* (1990) 222 CA3d 439, 271 CR 653] .

- Probative value of police officer's testimony as to rape victim's spontaneous utterance outweighed prejudice [*People v. Mota* (1981) 115 CA3d 227, 171 CR 212] .

The trial court can properly admit body parts (teeth and bone fragments) found at murder scene for purposes of identity [*People v. Thomas* (1992) 2 C4th 489, 7 CR2d 199, 828 P2d 101] .

In an attempted murder prosecution, the trial court did not err in showing the jury three-plus minutes of a videotape recorded by a reality TV show, *COPS*, accompanying the police rescue of a by-then-unconscious victim from defendant. The videotape was probative of defendant's intent to murder, the victim's condition after the attack, and the force police needed to exert to rescue her. Although the force and violence of the victim's rescue might have also been conveyed to the jury by way of testimony and still photographs, this did not bar the trial court from admitting the videotape. The most graphic portions of the video simply recorded officers carrying an unconscious and bloody victim out of the kitchen following the officers' struggle to release her. These aspects of the video were directly related to the testimony offered by the victim and the police officers and were not unduly prejudicial. The fact the videotape was recorded by a professional film crew did not make it any more or less prejudicial. Their technical skill did not affect whether it was relevant and helpful to the jury [*People v. Ibarra* (2007) 151 CA4th 1145, 61 CR3d 22 (conviction affirmed)].

Evidence of prior or uncharged crimes is admissible to prove motive, opportunity, intent, identity, or scheme, but not criminal disposition. The relevant probative value of evidence of other crimes should be weighed against the prejudicial effect of such evidence.

Examples:

- In capital case, evidence of prior conviction of murder 17 years before second murder was not too remote to have significant probative value; although trial court should consider remoteness in exercising its discretion, given similarities of killings, time factor did not compel court to exercise its discretion in only one way [*People v. Steele* (2002) 27 C4th 1230, 120 CR2d 432, 47 P3d 225] .
- Cross-examining witness regarding knowledge of defendant's prior charge of rape found proper [*People v. Clair* (1992) 2 C4th 629, 7 CR2d 564, 828 P2d 705] .
- Motive shown by evidence that defendant enjoyed game of "stalk," which involved sneaking up on person then sneaking away without person's knowledge [*People v. Thomas* (1992) 2 C4th 489, 7 CR2d 199, 828 P2d 101] .
- In prosecution for sex offenses with a minor, testimony by defendant's adult stepdaughter of prior sexual acts many years earlier was admissible because it was highly probative and because defendant did not demonstrate that he would be unduly prejudiced or that any potential prejudice would substantially outweigh the probative value of the evidence [*People v. Branch* (2001) 91 CA4th 274, 109 CR2d 870] .
- Cord found in defendant's dresser was the same type used to tie up victims; logical inference of guilt or motive [*People v. Raley* (1992) 2 C4th 870, 8 CR2d 678, 830 P2d 712] .
- Probative value of prior uncharged sex offenses admissible under *Evid Code* § 1101, weighed against its prejudicial effect [*Robinson v. Superior Court* (1986) 181 CA3d 746, 226 CR 724] .
- In sexual assault case, prior similar acts admissible to prove intent and rebut defense of consent [*People v. Jackson* (1980) 110 CA3d 560, 167 CR 915] .

- Similar nonremote sex offenses involving similar victims may show common design or scheme [*People v. Pendleton* (1979) 25 C3d 371, 158 CR 343, 599 P2d 649] .
- Sufficient similarity despite defendant's differing degrees of "success" in prior rape attempts [*People v. Wills-Watkins* (1979) 99 CA3d 451, 160 CR 289] .

The precise probative value to be accorded evidence of uncharged sexual misconduct in sex crimes cases depends on various considerations, such as the frequency of the uncharged acts and their similarity and temporal proximity to the charged acts [*People v. Smith* (2003) 30 C4th 581, 134 CR2d 1, 68 P3d 302 (evidence of defendant's use of racial epithets in four sexual attacks was admissible to demonstrate aggravated nature of defendant's crimes and to show facts surrounding crimes; it was not constitutionally protected speech); *People v. Mabini* (2001) 92 CA4th 654, 112 CR2d 159 (for purposes of statute extending statute of limitations for child molestation, testimony by a single victim about an uncharged similar offense was independent evidence that clearly and convincingly corroborated the victim's allegation)].

In a prosecution for forcible rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible [*People v. Kipp* (2001) 26 C4th 1100, 113 CR2d, 27 P3d 450 (death penalty was affirmed for murder, rape, and robbery; defendant's letters admitting crimes and professing satanic thoughts were properly admitted)].

In a prosecution arising out of a violent assault during a domestic dispute, the admission under *Evid Code* § 1109 of prior acts of domestic violence to show propensity does not deprive the defendant of his or her constitutional right to a fair trial under the due process clause, if the trial court balances factors in accordance with *Evid Code* § 352 [*People v. Brown* (2000) 77 CA4th 1324, 92 CR2d 433] .

The court does not have discretion to exclude, as unduly prejudicial, all evidence of prior crimes of violence by defendant, although it does have discretion to regulate the manner in which the evidence is presented [*People v. Raley* (1992) 2 C4th 870, 8 CR2d 678, 830 P2d 712] .

In a prosecution for multiple counts of first degree murder, a handwritten document purported to be a coded list of victims was more probative than prejudicial [*People v. Kraft* (2000) 23 C4th 978, 99 CR2d 1, 5 P3d 68] .

The trial court has discretion to allow rebuttal evidence of juvenile misconduct in mitigation of defendant's good character, despite lack of prior notice and failure to relate evidence to any specific aggravating factor and lack of criminal convictions [*People v. Mitcham* (1992) 1 C4th 1027, 5 CR2d 230, 824 P2d 1277] .

Evidence relevant to the identity of the perpetrator is relevant and its admissibility is within the discretion of the trial judge [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145, 73 P3d 1137 (court carefully weighed potentially prejudicial effect of defendant's nickname with the prosecutor's assertion that many witnesses knew defendant only by the nickname, and properly instructed the prosecution to minimize its use); *People v. Clark* (1992) 3 C4th 41, 10 CR2d 554, 833 P2d 561 (evidence that defendant told police that he had to have kinky sex was admissible as corroborating features he shared with murderer)].

The trial court abused its discretion under *Evid Code* § 352 in refusing to allow the state an opportunity to establish the admissibility of various incriminating statements made by the defendant when his explanation of his activities was of vital importance as it fully corroborated the testimony of the state's witnesses [*People v. Osuna* (1986) 187 CA3d 845, 848, n. 2, 232 CR 220, 222] .

Because disclosure of uncharged offenses can be highly prejudicial, the trial court should use particular care in

performing weighing analysis [*People v. Millwee* (1998) 18 C4th 96, 74 CR2d 418, 954 P2d 990 (no abuse of discretion where transcript was highly probative on limited credibility issue for which it was offered, defendant's credibility was crucial issue at trial, and potential for undue prejudice was slight)].

Evidence of prior uncharged acts of sexual molestation of victim's sister, to establish the existence of a common design or plan, was admissible because its probative value outweighed possible prejudice [*People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757] .

Whatever prejudicial effect a prior uncharged crime might have is decreased if the prior incident is no more inflammatory than the testimony concerning the charged offenses [*People v. Ewoldt* (1994) 7 C4th 380, 405, 27 CR2d 646, 867 P2d 757 (superseded on another point by enactment of *Evid Code* § 1108); *People v. Morton* (2008) 159 CA4th 239, 70 CR3d 827 (testimony about prior uncharged molestation was not more inflammatory than charged offense of molestation); *People v. Cabrera* (2007) 152 CA4th 695, 61 CR3d 373 (domestic violence)].

In a prosecution for lewd and lascivious acts on a minor, evidence of prior acts committed 20 years earlier is admissible as propensity evidence and to show a common scheme or plan, when (1) the priors were not any more inflammatory than the evidence of the current molestations; and (2) the similarities between the prior and the current acts balanced out the remoteness [*People v. Waples* (2000) 79 CA4th 1389, 95 CR2d 45] .

In a murder case, evidence that the victims were close friends provided background information to the circumstances surrounding the shooting. The court did not abuse its discretion in "allowing this slight touch of humanity" [*People v. Edwards* (1991) 54 C3d 787, 1 CR2d 696, 819 P2d 436] .

Evidence of a defendant's prior acts of domestic violence in a prosecution for an offense involving domestic violence, is admissible under *Evid Code* § 1109; the court's discretion to exclude "prior acts" evidence under *Evid Code* § 352 saves *Evid Code* § 1109 from a due process challenge [*People v. Jennings* (2000) 81 CA4th 1301, 97 CR2d 727; *People v. Johnson* (2000) 77 CA4th 410, 91 CR2d 596] .

In a prosecution for committing a lewd act on a child, evidence of a prior lewd act is admissible to show defendant's predisposition to commit the charged offense, because the evidence is admissible under *Evid Code* § 1108 [*People v. Regalado* (2000) 78 CA4th 1056, 93 CR2d 83] .

A jailhouse admission that defendant committed the murder with which he or she was charged is admissible when (1) the probative value is obvious; (2) there is no danger of undue consumption of time or of confusion of the issues; and (3) the evidence is not likely to provoke emotional bias against a party or to cause the jury to prejudge the issues on the basis of extraneous factors [*People v. Jenkins* (2000) 22 C4th 900, 95 CR2d 377, 997 P2d 1044] .

Evidence of a prior conviction of robbery was admissible to prove defendant's state of mind during a killing immediately following another robbery [*People v. Schader* (1969) 71 C2d 761, 80 CR 1, 457 P2d 841] .

In cases involving sex crimes, evidence of other not too remote sex offenses with the prosecuting witness is admissible to show a lewd disposition or the intent of the defendant towards the prosecuting witness [*People v. Stanley* (1967) 67 C2d 812, 63 CR 825, 433 P2d 913] .

In a robbery trial, when evidence of prior uncharged robbery is introduced not to show that defendant had a propensity to commit crime but to rebut defendant's claim that he had not seen his alleged companions for several years, its probative value outweighed its possible prejudice [*People v. Benson* (1982) 130 CA3d 1000, 180 CR 921 (defendant's claim was key issue in case)].

In a prosecution for burglary, testimony that defendant was on prison work crew at time of crime was relevant to show

that appellant did in fact know of the house, although witnesses could have testified to defendant's activities without disclosing that defendant was on a prison work crew at the time [*People v. Perkins* (1970) 7 CA3d 593, 86 CR 585] .

In a murder case, a showing that defendant was a pimp whose henchman did the shooting was admissible [*People v. Randolph* (1970) 4 CA3d 655, 84 CR 559] .

Wide latitude is granted in offering evidence of motive because its probative value generally exceeds its prejudice [*People v. Lopez* (1969) 1 CA3d 78, 81 CR 386] .

[iv] Criminal Cases--Evidence more prejudicial than probative

Well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury [*Holmes v. South Carolina* (2006) 547 US 319, 126 S Ct 1727, 1732, 164 L Ed2d 503 (citing Fed R Evid § 403)].

Evidence may be excluded if it is prejudicial to either the prosecution or the defense [*People v. Claxton* (1982) 129 CA3d 638, 181 CR 281] . Whether the probative value of evidence outweighs its possible confusion on collateral issues or prejudicial effect is a question for the court in the exercise of its judicial discretion.

The evidence barred by *Evid Code* § 352 is "evidence that uniquely causes the jury to form an emotion-based bias against a party and that has very little bearing on the issues of the case" [*People v. Thornton* (2007) 41 C4th 391, 427, 61 CR3d 461, 161 P3d 3 , cert den 2007 US LEXIS 12579 (in murder-kidnapping prosecution, admission of fact that defendant had violated his probation for juvenile auto burglary did not change outcome of case; its admission was harmless and relevant to his intent in leaving the area)].

In a prosecution for felony murder and rape, the trial court properly admitted several color autopsy photographs depicting hemorrhaging at the entrance of the victim's vagina, after defense counsel brought into issue the size of the trauma during cross-examination of the prosecution's medical witness. Defense counsel also put the witness in the position of relying on the larger 16 x 20 photograph, although the court initially only admitted an 8 x 10 inch print [*People v. Howard* (2008) 42 C4th 1000, 71 CR3d 264 (conviction affirmed)].

In a prosecution for shoplifting, the trial court erred in admitting defendant's false out-of-court statement to police that he had never previously been involved in shoplifting. Defendant did not testify at trial, and thus never placed his credibility in issue. The false statement related to a collateral matter (prior shoplifting), rather than the incidents at issue. When the slight probative effect of the statement is balanced against the highly prejudicial effect of establishing its falsity--through evidence demonstrating he had committed the same type of crime in the past--the latter substantially outweighed the former [*People v. Fritz* (2007) 153 CA4th 949, 62 CR3d 885 (conviction reversed, in absence of supporting evidence)].

Examples:

- In murder prosecution, trial court acted within its discretion to permit impeachment as to only one incident in a witness's juvenile record, where there was much evidence, including the witness's own testimony, that witness was no stranger to criminal justice system [*People v. Smith* (2007) 40 C4th 483, 512-513, 54 CR3d 245, 150 P3d 1224 , cert den 2007 US LEXIS 11906] .
- In murder trial, witness's misdemeanor conviction for possession of concealed handgun might reflect crime of moral turpitude, but its slight relevance and probative value was properly outweighed by prospect of confusing jury, in light of third party culpability aspect, notwithstanding availability of

limiting instruction [*People v. Robinson (2005)* 37 C4th 592, 624-625, 36 CR3d 760, 124 P3d 363] .

- Witnesses' failure to reveal incomes as prostitutes when applying for welfare considered collateral matter [*People v. Jennings (1991)* 53 C3d 334, 279 CR 780, 807 P2d 1009] .
- Prejudicial effect of handwriting exemplar executed by criminal defendant in courtroom would outweigh its probative value [*People v. Becerra (1987)* 188 CA3d 772, 233 CR 679] .
- Defense counsel not permitted to inquire whether witness was married to defendant's sister and had taken children of that marriage to North Carolina in violation of court order [*People v. Morse (1992)* 2 CA4th 620, 3 CR2d 343] .
- No error in excluding testimony concerning nature or details of crimes committed by witness's boyfriend [*People v. Hill (1995)* 34 CA4th 727, 41 CR2d 39] .

In a murder prosecution, the trial court did not abuse its discretion in excluding evidence that another man (S) raped another person earlier on the same night and in the same location where defendant's victim was raped. While this evidence might have shown that S had the motive or opportunity to rape defendant's victim, it was insufficient to raise a reasonable doubt about defendant's guilt, inasmuch as the evidence in this case showed that more than one individual was responsible for the rape/murders at issue. Defendant's argument that S's involvement in an earlier rape raised an inference that S killed the two rape/murder victims is too speculative to raise a reasonable doubt about defendant's guilt of the murders [*People v. Avila (2006)* 38 C4th 491, 578, 43 CR3d 1, 133 P3d 1076] .

The trial court acted within its discretion to permit impeachment as to only one incident in witness's juvenile record, notwithstanding that trial court had told jury that witness had been charged in juvenile court with two homicides, two robberies, burglary, and other offenses [*People v. Smith (2007)* 40 C4th 483, 54 CR3d 245, 150 P3d 1224 (prosecution for murder and theft)].

In a wrongful death suit, allowing a criminalist to testify that the deceased passenger had an equivalent 0.10 percent blood alcohol level was not sufficiently probative of his comparative negligence because he was not the driver of the vehicle [*Wineinger v. Bear Brand Ranch (1988)* 204 CA3d 1003, 251 CR 681] .

It was error for the court to admit, even in the face of defense counsel's failure to object, the transcript of a witness's tape recorded statements without editing them to delete highly prejudicial allegations of offenses with little relevance to the issue [*People v. Guizar (1986)* 180 CA3d 487, 225 CR 451] .

Evidence of prior or uncharged crimes is admissible to prove motive, opportunity, intent, identity, or scheme, but not criminal disposition. The relevant probative value of evidence of other crimes should be weighed against the prejudicial effect of such evidence.

Examples:

- Evidence of uncharged murder inadmissible to prove defendant killed victim or to prove victim's state of mind or conduct [*People v. Hernandez (2003)* 30 C4th 835, 134 CR2d 602, 69 P3d 446] .
- Admission of evidence of charged crimes of which defendant was not convicted was harmless error [*People v. Jackson (1996)* 13 C4th 1164, 56 CR2d 49, 920 P2d 1254] .
- Uncharged crime evidence excluded if connection between uncharged offense and ultimate fact in

dispute is not clear [*People v. Hawkins* (1995) 10 C4th 920, 42 CR2d 636, 897 P2d 574] .

- Prior bad acts were too remote in time [*People v. Hempstead* (1983) 148 CA3d 949, 196 CR 412] .
- Earlier forgeries witnessed but not perpetrated by defendant should not have been admitted [*People v. Long* (1970) 7 CA3d 586, 86 CR 590 (forgery prosecution)].



Cross Reference:

Discussion of value of prior crimes, see Imwinkelried et al., California Evidentiary Foundations, Ch. 5, Limitations on Credibility Evidence, Pt. J (Matthew Bender).

The trial court has discretion to exclude evidence of the victim's tendency to violence on the basis of relevance, remoteness, and the victim's questionable mental state [*People v. Roberts* (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274] .

Negligence of victim inadmissible to show that victim was partly responsible for his death [*People v. Morse* (1992) 2 CA4th 620, 3 CR2d 343 (exclusion of victim's negligence in dismantling bomb)].

Evidence regarding a witness's involvement in prostitution properly excluded; such evidence was degrading and had an obvious potential for embarrassing or unfairly discrediting a witness [*People v. Hayes* (1992) 3 CA4th 1238, 5 CR2d 105 ; *People v. Phillips* (1985) 41 C3d 29, 222 CR 127, 711 P2d 423] .

Admission of prior arrests is an abuse of discretion when the danger of extreme prejudice is great [*People v. Anderson* (1978) 20 C3d 647, 143 CR 883, 574 P2d 1235] .

Evidence of an accomplice's sentence, or the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole, is irrelevant because it does not relate to the defendant's character, culpability, or the circumstances of the offense [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145, 73 P3d 1137 (penalty phase)].

The court may restrict cross-examination of an adverse witness on the grounds stated in *Evid Code* § 352 [*People v. Quartermain* (1997) 16 C4th 600, 66 CR2d 609, 941 P2d 788 (witness credibility sufficiently impeached; further cross-examination unnecessary)].

The trial court erred in admitting evidence of a damaging hearsay statement of a key witness, that the defendant enlisted him in a scheme to create a false sales slip for his gun predating the murder. Such a statement was clearly more prejudicial than probative. It should not have been admitted even for impeachment and with a limiting instruction [*People v. Coleman* (1969) 71 C2d 1159, 80 CR 920, 459 P2d 248 , overruled on other grounds *Garcia v. Superior Court* (1997) 14 C4th 953, 59 CR2d 858, 928 P2d 572] .

The court properly exercised its discretion in excluding evidence of the defendant's refusal of a plea in exchange for his testimony against co-perpetrators as irrelevant [*People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249] .

Because of the general rule against admission of evidence of poverty as a motive for serious offenses and because of the slight probative value of the evidence of defendant's out-of-state debts, the evidence should have been excluded [*People v. Hogan* (1982) 31 C3d 815, 183 CR 817, 647 P2d 93] .

In a sodomy and oral copulation case, evidence of the victim's prior sexual intercourse with another person had little relevance on the issue of consent [*People v. Belmontes* (1983) 34 C3d 335, 193 CR 882, 667 P2d 686] .

Evid Code § 352 cannot be invoked to defeat proper use of the doctrine of collateral estoppel; such application

necessarily results in the ultimate prejudice [*Leader v. State* (1986) 182 CA3d 1079, 226 CR 207] .

[h] Admission of Photographs

Evidence of photographs of a criminal victim is admissible when the probative value outweighs possible prejudice and is not an abuse of discretion.

The trial court's discretion under *Evid Code* § 352 to exclude evidence of circumstances of capital crime is more limited at the penalty phase than at the guilt phase. However, in evaluating defendants' moral culpability for a capital crime, the jury is entitled to have a complete picture of the brutal manner in which the victim was killed [*People v. Luke* (2006) 39 C4th 970, 1055-1056, 47 CR3d 467, 140 P3d 775 (no error in admission of photographs)].

A court may admit even gruesome photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony of a medical examiner. The photographs may be gruesome because the charged offenses are gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors [*People v. Ramirez* (2006) 39 C4th 398, 453-454, 46 CR3d 677, 139 P3d 64 (trial judge carefully weighed prejudicial effect of coroner's photographs against their probative value, before admitting them)].

A trial judge may properly exclude gory photographs of a victim during the guilt phase of a murder trial, as likely to be prejudicial, and properly admit them later during the penalty phase of the same trial, as relevant to the determination of special circumstances [*People v. Moon* (2005) 37 C4th 1, 34-35, 32 CR3d 894, 117 P3d 591] .

Courts should be cautious in the guilt phase of a criminal trial about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. But the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant [*People v. Harris* (2005) 37 C4th 310, 334, 33 CR3d 509, 118 P3d 545 (approving admission of videotape of child's birthday party to establish that victim habitually wore items of jewelry that were not recovered after her murder)].

Cross Reference:

Discussion of use of photographs, see Imwinkelried et al., California Evidentiary Foundations, Ch. 6, Limitations on Evidence That Is Relevant to the Merits of the Case, Pt. A (Matthew Bender).

Examples:

- Courts have consistently upheld the introduction of autopsy photographs disclosing manner in which victim was wounded as relevant not only to question of deliberation and premeditation but also aggravation of crime and appropriate penalty [*People v. Ramirez* (2006) 39 C4th 398, 453-454, 46 CR3d 677, 139 P3d 64 (no error in admitting photographs of victims)].

- Photographs of murder victims are highly relevant. The victims' wounds tend to prove, among other things, the kind and degree of force used on the victim [*People v. Ramirez* (2006) 39 C4th 398, 453-454, 46 CR3d 677, 139 P3d 64 (no error in admitting photographs of victims)].

- Photographs of victims of uncharged murders admissible, despite gruesome nature, to show similarity to charged crimes, intent to kill, and premeditation [*People v. Carpenter* (1997) 15 C4th 312, 63 CR2d 1, 935 P2d 708] .

- Trial court did not err in excluding graphic and shocking close-up photograph of murder victim during guilt phase of trial but admitting it during penalty phase of trial [*People v. Griffin (2004)* 33 C4th 536, 15 CR3d 743] .
- Videotape and photographs of murder victim and crime scene are always relevant to prove how crime occurred; trial court correctly exercised discretion and excluded some photos as cumulative or unduly prejudicial [*People v. Pollock (2004)* 32 C4th 1153, 13 CR3d 34] .
- Trial court did not abuse discretion in admitting photographs of murder victim and instruments of torture [*People v. Heard (2003)* 31 C4th 946, 4 CR3d 131] .
- Trial court did not abuse its discretion in admitting photographs of victims and videotape of crime scene, despite possible prejudicial effect [*People v. Taylor (2001)* 26 C4th 1155, 113 CR2d 827, 34 P3d 937] .
- Death penalty affirmed for murder, rape, and robbery; admitting photograph showing position of victim's clothing on her body, some of her injuries, and position of her body in small hatchback area behind rear seat of car, was relevant to assist jury in assessing aggravating force of murder and rape or attempted rape of another [*People v. Kipp (2001)* 26 C4th 1100, 113 CR2d, 27, 33 P3d 450].
- Trial court did not abuse its discretion in admitting autopsy photographs of victim in penalty phase of capital prosecution [*People v. Staten (2000)* 24 C4th 434, 101 CR2d 213, 11 P3d 968] .
- Photographs of murder victim with blood splatters indicated victim was fleeing when shot; evidence was more probative on intent to kill than it was prejudicial [*People v. Bolin (1998)* 18 C4th 297, 75 CR2d 412] .
- Photographs of murder scene corroborated witness testimony in felony murder case [*People v. Scheid (1997)* 16 C4th 1, 65 CR2d 348] .
- Gruesome photographs of murder victims admitted despite damage to bodies made by wild animals after murders [*People v. Carpenter (1997)* 15 C4th 312, 63 CR2d 1] .
- "Gruesome" photograph of victim lying on her own brains was properly admitted to refute defendant's statement that he was splattered when she was shot lying down [*People v. Jackson (1996)* 13 C4th 1164, 56 CR2d 49] .
- Photographs of murder victims were not unduly gruesome or inherently inflammatory, and were relevant to prosecution contentions [*People v. Cain (1995)* 10 C4th 1, 40 CR2d 481, 892 P2d 1224] .
- Photographs of murder victims were highly probative; such victim photographs are always disturbing [*People v. Crittenden (1994)* 9 C4th 83, 36 CR2d 474, 885 P2d 887] .
- Photographs of murder victims to show killings were premeditated or perpetrated during rape properly admitted [*People v. Pride (1992)* 3 C4th 195, 10 CR2d 636, 833 P2d 643] .
- Admission of photographs showing murder victims while they were alive were relevant to establish witness's ability to identify [*People v. DeSantis (1992)* 2 C4th 1198, 9 CR2d 628, 831 P2d 1210] .
- Photographs of victim in ravine were proper to demonstrate circumstances of crime and

appropriateness of death penalty [*People v. Raley* (1992) 2 C4th 870, 8 CR 678, 830 P2d 712] .

- Admission of crime scene autopsy photographs [*People v. Clair* (1992) 2 C4th 629, 7 CR2d 564, 828 P2d 705] .

- Post-mortem photographs and slides of victims' bodies were admissible although gruesome and extremely unpleasant when they clarified location and nature of wounds and tended to show murder weapon could have been high-powered rifle [*People v. Thomas* (1992) 2 C4th 489, 7 CR2d 199, 828 P2d 101] .

- Photograph of child victim as she appeared at the time of crime was admissible to aid jury in judging size, age, and vulnerability [*People v. Edwards* (1991) 54 C3d 787, 1 CR2d 696, 819 P2d 436] .

- Photographs of stab wound were admissible to impeach testimony of defendant [*People v. Visciotti* (1992) 2 C4th 1, 5 CR2d 495, 825 P2d 388] .

- Photograph showing body position and condition were relevant when actual malice-premeditation was charged [*People v. Melton* (1988) 44 C3d 713, 244 CR 867, 750 P2d 741] .

- Photograph depicting charred remains of victim in car was relevant to support prosecution's case [*People v. Phillips* (1985) 41 C3d 29, 222 CR 127, 711 P2d 423] .

- Admission of photographs of shotgun wounds that were cumulative of detailed and uncontested testimony was not clearly abuse of discretion [*People v. Allen* (1986) 42 C3d 1222, 232 CR 849, 729 P2d 115] .

- Error to admit photograph of victim taken while victim was alive when it has no bearing on any contested issue [*People v. Ramos* (1982) 30 C3d 553, 180 CR 266, 639 P2d 908] .

- Photograph relevant on issue of malice [*People v. Jackson* (1980) 28 C3d 264, 168 CR 603, 618 P2d 149] .

- Photographs aided understanding of pathologist's testimony [*People v. Robles* (1970) 2 C3d 205, 85 CR 166, 466 P2d 710] .

- Hideous photographs were not prejudicial in light of overwhelming evidence of guilt [*People v. Terry* (1970) 2 C3d 362, 85 CR 409, 466 P2d 961] .

- Color photographs showed wounds more clearly than black and white [*People v. Brawley* (1969) 1 C3d 277, 82 CR 161, 461 P2d 361] .

- Admission of gruesome photographs can deprive defendant of fair trial when they inflame, not enlighten, the jury [*People v. Marsh* (1985) 175 CA3d 987, 221 CR 311] .

- Photograph of murder victim's perforated heart taken during autopsy was properly admitted [*People v. Polley* (1983) 147 CA3d 1088, 195 CR 496] .

- Photograph of victim of alleged great bodily injury was admissible to prove special allegation [*People v. Orozco* (1981) 114 CA3d 435, 170 CR 604] .

- Photograph of police officer with extensive amount of blood running down his face was probative on issue of severity of injury [*People v. Jones (1981) 119 CA3d 749, 174 CR 218*] .
- Error in admission of gruesome photographs with minimal probative value was nonprejudicial because of other overwhelming evidence of guilt [*People v. Willis (1980) 104 CA3d 433, 163 CR 718*] .
- Hundreds of nude photographs of complaining witness boy and other boys were admissible in lewd and lascivious conduct case because they were part of offense and tended to discredit defendant [*People v. Reeves (1980) 105 CA3d 444, 164 CR 426*] .
- Photographs and short film of exhumation of grave were admissible to corroborate coroner's testimony [*People v. Moran (1974) 39 CA3d 398, 114 CR 413*] .

Evid Code § 352 imposes no duty on the trial court to order the alteration of relevant photographic evidence so as to lessen potential prejudice or diminish their impact [*People v. Jackson (1996) 13 C4th 1164, 56 CR2d 49* (trial court did not err in denying defendant's motion to have gruesome photographs of victim converted to black and white)].

Given the strong circumstantial evidence of defendant's guilt, and the small format of the challenged photographs admitted into evidence, which, in comparison with exhibits the court had seen and approved in other cases, were not unduly shocking or inflammatory, it was not reasonably probable that the jury would have reached a different result if the challenged photographs had been excluded [*People v. Stewart (2004) 33 C4th 425, 15 CR3d 656, 93 P3d 271* (murder prosecution)].

Courts have often rejected the argument that photographs of a murder victim should be excluded as cumulative to other evidence. Photographs of the victim, which depicted numerous burns on specific parts of her body, were obviously relevant to show the extent of injury and the condition of her body as it related to the issue of intent to inflict extreme pain, as well as to prove commission of an act calculated to cause such pain [*People v. Cole (2004) 33 C4th 1158, 17 CR3d 532* (murder-torture prosecution)].

[i] Balancing Use of Expert/Scientific Testimony

It is reversible error for the trial court to admit the testimony of a police expert on rape to the effect that the conduct of the victim in ceasing to resist defendant was reasonable, where the case is close and the victim's credibility is pitted against that of the defendant and the defendant makes an objection under *Evid Code* § 352 [*People v. Clark (1980) 109 CA3d 88, 167 CR 51*] .

Although wide latitude must be given the cross examination of experts, the trial court must still exercise discretion to limit use of inadmissible hearsay that is not related to the expert's opinion [*People v. Coleman (1985) 38 C3d 69, 211 CR 102, 695 P2d 189*] .

In a rape trial, admission of expert testimony on the classification of rapists was not unduly prejudicial when the testimony was not speculative or conjectural and was relevant on a matter beyond common knowledge [*Delia S. v. Torres (1982) 134 CA3d 471, 184 CR 787*] .

Profile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt [*People v. Smith (2005) 35 C4th 334*] .

In a lawsuit by residents for nuisance and constructive eviction, alleging ailments from exposure to mycotoxins at a

residence, the trial court correctly excluded environmental samples that, apart from numerous chain of custody deficiencies, had not been tested for mycotoxins and therefore were not probative on the issue of plaintiffs' potential exposure to mycotoxins [*Geffcken v. D'Andrea* (2006)0].

It was reversible error to admit profile evidence demonstrating that the defendant's behavior during a sexual encounter was consistent with a behavior pattern common to rapists. The expert's testimony prejudicially bolstered the victim's credibility [*People v. Robbie* (2001) 92 CA4th 1075, 112 CR2d 479].

The court may limit or reject expert testimony when its reception will take undue time, or create danger of prejudice, confusion, or mislead the jury [*People v. Sanders* (1995) 11 C4th 475, 46 CR2d 751 (expert testimony on reliability of eyewitness identification excluded as taking undue time where identification fairly certain and other evidence linked defendant to crime); *State of Cal. ex rel. State Public Works Board v. Wherity* (1969) 275 CA2d 241, 75 CR 591 (expert testimony in condemnation)].

► **Cross Reference:**

Discussion of use of photographs, see Imwinkelried et al., California Evidentiary Foundations, Ch. 6, Limitations on Evidence That Is Relevant to the Merits of the Case, Pt. B (Matthew Bender).

[j] Effect of Stipulations

A party's willingness to stipulate to elements of the case to avoid prejudice does not render evidence on those elements inadmissible under *Evid Code* § 352 [*People v. Scheid* (1997) 16 C4th 1, 65 CR2d 348 (prosecution refused to stipulate to cause and circumstances of death; prosecutor was not obligated to prove details solely from testimony of live witnesses or to accept antiseptic stipulations in lieu of photographic evidence)].

► **Cross Reference:**

Discussion stipulations, see Imwinkelried et al., California Evidentiary Foundations, Ch. 12, Substitutes for Evidence, Pt. B (Matthew Bender).

At the federal level, there are developments concerning Fed R Civ P 403, the federal equivalent to *Evid Code* § 352, about the extent to which a defendant can stipulate to a prior felony conviction that is part of the charged offense or other elements of an offense in order to avoid unfair prejudice [*Old Chief v. U.S.* (1998) 519 US 172, 117 S Ct 644, 136 L Ed2d 574 (abuse of discretion for trial judge, in balancing probative value against danger of unfair prejudice, to spurn defendant's offer and to admit full record of prior conviction, when (1) name and nature of prior offense raise risk of verdict tainted by improper considerations, and (2) purpose of government's introduction of such evidence is solely to prove element of prior conviction)].

Exception:

Defendant's offer to stipulate to intent was denied; prosecution's refusal to stipulate was not prejudicial because offer was ambiguous, conditional, and tentative [*U.S. v. Crowder*, 137 F3d 823 (D.C. Cir. 1998) ; *U.S. v. Grimmond* 137 F3d 823 (4th Cir. 1998) (*Old Chief* limited to stipulations involving prior felony convictions)].

[k] Excluding Cumulative Evidence

If there is considerable evidence concerning a fact, evidence on the same fact could only be cumulative and its exclusion does not constitute error.

Examples:

1-7 California Courtroom Evidence 7.01

- Exclusion of defendant's aunt's testimony as cumulative, if error, was harmless; jurors could have inferred that previous defense witnesses preferred defendant be spared the death penalty [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145] .
- Court's exclamation, "No. Too much, folks," may be construed as ruling that offered evidence was cumulative or unduly time-consuming [*People v. Thuss* (2003) 107 CA4th 221, 133 CR2d 149] .
- Stipulation to issue may render other evidence cumulative [*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 CA4th 563, 69 CR2d 389] .
- Refusal to admit additional experts and films was within court's discretion [*Horn v. General Motors Corp.* (1976) 17 C3d 359, 131 CR 78, 551 P2d 398] .
- Eleven out-of-state alibi witnesses were reduced to two [*People v. Cavanaugh* (1968) 69 C2d 262, 70 CR 438, 444 P2d 110] .

Physical testimony will not be excluded as cumulative, even if the facts for which the physical evidence is offered have already been established by testimony [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131 , cert. denied, 541 US 910 (photographs of murder victim); *People v. Smith* (2003) 30 C4th 581, 134 CR2d 1 (testimony about victim's wound and photograph of victim's scar)].

It is a matter of the court's discretion whether or not to exclude collateral evidence offered for impeachment purposes [*People v. Laverne* (1971) 4 C3d 735, 94 CR 405, 484 P2d 77] .

The trial court in a capital prosecution may refuse to allow cross-examination of a prosecution witness about whether he or she had committed murder and assaults in prison if the court finds that the evidence would have been collateral [*People v. Ayala* (2000) 23 C4th 225, 96 CR2d 682, 1 P3d 3] .

Cumulative evidence is excludable when its admission would necessitate undue consumption of time [*People v. Burgener* (1986) 41 C3d 505, 224 CR 112, 714 P2d 1251 (sufficient evidence on credibility); *People v. Raley* (1992) 2 C4th 870, 8 CR2d 678, 830 P2d 712 (evidence of lewd acts with children in murder case); *People v. Mincey* (1992) 2 C4th 408, 6 CR2d 822, 827 P2d 388 (evidence of mother's prior abuse of child victim in murder trial)].

Threats were not cumulative to evidence of other bad acts when the threats tended to prove design or intent and the other bad acts tended to show motive [*People v. Rodriguez* (1986) 42 C3d 730, 230 CR 667, 726 P2d 113] .

Admitting defendant's statement that he had used heroin before was not cumulative in establishing that defendant had knowledge of the nature of the substance alleged to be in his possession, even though a hypodermic syringe found in his shaving kit was sufficient to prove knowledge [*People v. Thornton* (2000) 85 CA4th 44, 101 CR2d 824] .

The testimony of a witness who was the only observer to investigate a plane crash site was unique and should not have been excluded on the grounds that it was cumulative [*McGee v. Cessna Aircraft Co.* (1983) 139 CA3d 179, 188 CR 542 (FAA investigator)].

Evidence that defendant was a member of a youth gang was cumulative and unduly prejudicial [*People v. Cardenas* (1982) 31 C3d 897, 184 CR 165, 647 P2d 569 (accused of attempted murder and robbery)]. However, if the criminal behavior involves group action by gang members, gang membership is relevant for identity and motivation [*People v.*

Contreras (1983) 144 CA3d 749, 192 CR 810 .

[I] Excluding Time-Consuming or Confusing Evidence

In a murder investigation, the victim's wife gave three statements to police. In the first statement, she said she came home from work, was unable to find her husband, and knew nothing of his death. In a second statement, she suggested that defendant and another man had killed her husband on their own initiative to obtain insurance money. In a third statement, she told police that she alone had killed her husband because he had hurt their daughter. Defendant called her to the stand, but she asserted her privilege against self-incrimination and was declared by the trial court to be unavailable. Defendant then sought to introduce a videotape of the third statement as a statement against penal interest under *Evid Code* § 1230. The trial court did not abuse its discretion in finding that the statement was barred by *Evid Code* § 352. Given the witness's contradictory statements and the complexity of her possible motives for making them, the questionable value of that evidence would have been substantially outweighed by the probability that its admission would have necessitated undue consumption of time or confused the issues and misled the jury [*People v. Geier (2007) 41 C4th 555, 583-585, 61 CR3d 580, 161 P3d 104* , petition for cert (11/14/2007)].

At a dependency hearing involving termination of parental rights, the trial court prejudicially and erroneously refused to let the parents cross-examine the social workers on the issue of the children's adoptability and the strength of the foster parents' desire to adopt. This was not a reasonable exclusion of time-consuming evidence, but the exercise of the parents' due process right to present evidence relevant to the issues before the court. Legitimate concerns about avoiding undue consumption of time on irrelevant issues could be addressed in other ways [*In re Thomas R. (2006) 145 CA4th 726, 734, 51 CR3d 864*] .

Notwithstanding the trial court's inherent ability to control the time taken by trial, a trial judge manifestly abused her discretion by declaring a mistrial in a dissolution action after only two days of testimony, based apparently on her own reassignment, a matter of internal judicial administration and convenience. The parties had not made any representation that trial would require an unusual amount of time, nor had they spent excessive time by any objective standard, nor was there any local rule warning the litigants that mistrial was a possible sanction for excessive use of court resources. The trial judge articulated no reason she could not complete the case in her new assignment, as against the recognized need for continuity in family law cases and a strong presumption that trials, once begun by a judge, should, if at all possible, be completed by that judge [*Blumenthal v. Superior Court (2006) 137 CA4th 672, 687, 40 CR3d 509* (issuing peremptory writ to compel judge to finish trial)].

When evidence on an issue has already been presented, further evidence to prove the same issue is properly excluded as unduly time-consuming [*Cubic Corp. v. Marty (1986) 185 CA3d 438, 229 CR 828*] .

Exhibits that have marginal probative value may be excluded on grounds that they may unduly consume time or confuse the jury. A garage sued car owner for unpaid bill; the car owner's proffered evidence about collections from other customers was properly excluded because it was only marginally relevant and would have been unduly time-consuming and confusing [*Gouskos v. Aptos Village Garage, Inc. (2001) 94 CA4th 754, 114 CR2d 558*] .

[*People v. Cornwell (2005) 37 C4th 50, 81, 33 CR3d 1, 117 P3d 622* (trial court acted within its discretion in concluding that limited and speculative relevance of doctor's testimony as to maladies certain drug might be prescribed for, and its marginal probative value in showing defendant's actual diagnosis, was outweighed by time necessary to explain it and by potential that evidence would confuse jury)].

Factual expert testimony is subject to the trial court's discretionary power to exclude time-consuming or confusing evidence [*People v. Rodrigues (1994) 8 C4th 1060, 36 CR2d 235, 885 P2d 1* ; *People v. McDonald (1984) 37 C3d 351, 208 CR 236, 690 P2d 709*] .

No abuse of discretion in excluding surrebuttal testimony [*People v. Lamb* (2006) 136 CA4th 575, 582] .

When surrebuttal evidence would have taken much time and confused the issue for the jury, it was properly excluded [*People v. McGhee* (1987) 193 CA3d 1333, 239 CR 28] .

The trial court properly excluded impeachment evidence of a rape charge pending against the witness, a minor, on the grounds that exploring the propriety of the rape charge would be unduly time-consuming and the witness did not expect leniency in return for testimony [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145] .

In a personal injury action, the collateral source rule did not prevent the plaintiff from showing that his medical expenses had not been compensated by any third party. It was relevant to the case that plaintiff had paid medical expenses that were as yet uncompensated, and such evidence did not run the risk of emotionally inflaming the jury against defendants on any material point [*Smalley v. Baty* (2005) 128 CA4th 977, 985, 27 CR3d 575 (judgment for defendant reversed)].

A plaintiff should be allowed to rebut an anticipated claim of malingering by showing that he has not received collateral payments, but has shouldered his own expenses, which he is not certain to collect in a lawsuit. In a case where a defense expert was allowed to speculate that plaintiff was padding his expenses in hopes of monetary gain for nonexistent injuries, it was seriously damaging to plaintiff that he could not show he had lost more already by continuing treatment than he would have by discontinuing it [*Smalley v. Baty* (2005) 128 CA4th 977, 987, 27 CR3d 575 (judgment for defendant reversed)].

Evidence of prior accidents may be excluded based on risk of prejudice from undue consumption of time [*Brake v. Beech Aircraft Corp.* (1986) 184 CA3d 930, 229 CR 336] .

When a matter has so little relevance to the issues of the case and opens up so many other avenues, it is within the court's discretion to exclude testimony concerning it [*People v. Rummler* (1975) 44 CA3d 638, 118 CR 872] .

In a murder prosecution, the court properly exercised its discretion to exclude testimony about an unknown caller's obscene telephone message to the victims, which had substantial potential to distract the jury from the issues and to confuse their understanding of the facts. Notwithstanding defendant's theory of defense that a specific other man killed the victims, any inference that the other man left the obscene message would have been entirely speculative [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164] .

In an action for damages brought against a liability insurer by a newspaper publisher for the improper conduct in defense of an antitrust action, undertaken under a reservation of rights, the trial court did not abuse its discretion in excluding evidence of an excess coverage policy by another insurer where the evidence was of minimal probative value and would have been confusing, time-consuming, and inconclusive [*Travelers Insurance Co. v. Leshner* (1986) 187 CA3d 169, 192, 231 CR 791] .

Evidence of defendant's alleged refusal to plead guilty for reduced sentence has the potential to confuse and mislead the jury [*People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249] .

Although capital defendant must be allowed to present all relevant mitigating evidence to jury, trial court retains discretion to exclude evidence that is confusing or misleading [*People v. Jones* (1998) 17 C4th 279, 70 CR2d 793 (past statements and criminal activity of co-perpetrator excluded as misleading and undue consumption of time); *People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249] .

In a capital case, the trial court properly found that there was no evidence beyond mere speculation that a named individual or some other third party was either with the victim on the day of her murder or had been shown to be

connected with the crime in some other way, and the court was further within its discretion in excluding such evidence on the basis that the probative value of the proffered evidence was outweighed by the potential prejudice and confusion it would likely engender [*People v. Gutierrez* (2002) 28 C4th 1083, 124 CR2d 373, 52 P3d 572 (trial court did permit defendant to testify at trial about victim's past involvement in narcotics dealings, and about an asserted aborted transaction that had been scheduled to occur on evening before her murder)].

Evidence that defendant suffered from "confusional arousal syndrome" should not have been excluded on the basis of confusion of issues, since such evidence was central to defendant's case [*People v. Cegers* (1992) 7 CA4th 988, 9 CR2d 297] .

When self-defense was defendant's primary case, trial court erred in excluding reputation evidence concerning a third party's violent disposition on the grounds of undue consumption of time [*People v. Minifie* (1996) 13 C4th 1055, 56 CR2d 133] .

The trial court may exclude defense evidence in a capital prosecution that the key prosecution witness was armed during a prior narcotics offense, if the conviction is stale, and the evidence would not reveal any character trait relevant for impeachment purposes [*People v. Ayala* (2000) 24 C4th 243, 99 CR2d 532, 6 P3d 193 (noting that one might conclude that the excluded evidence would not unduly consume time or confuse the jury, but deferring to trial court)].

[m] Defendant's Due Process Rights

The exclusion balancing test is especially critical when a defendant's liberty is at stake. If the evidence is relevant and has more than slight probative value, the discretion of the court should favor the defendant who seeks to have the evidence admitted because of the defendant's due process right to a fair trial [*People v. Burrell-Hart* (1987) 192 CA3d 593, 237 CR 654 (evidence of victim's prior allegedly false accusations of rape)].

A defendant's right to present evidence in his or her own defense is so fundamental that it constitutes an element of due process of law. Several California cases have expressly recognized the tension between this fundamental right and any exercise of discretion under *Evid Code* § 352, which tends to limit the defendant's presentation [*People v. Lavergne* (1971) 4 C3d 735, 94 CR 405, 484 P2d 77 ; *People v. Mayfield* (1972) 23 CA3d 236, 100 CR 104 ; *People v. Reeder* (1978) 82 CA3d 543, 147 CR 275 ; *People v. Stevenson* (1978) 79 CA3d 976, 145 CR 301] .

Defendant has no constitutional right to use all relevant evidence no matter how probative so as to preclude the court from using *Evid Code* § 352 [*People v. Shoemaker* (1982) 135 CA3d 442, 185 CR 370] .

When defendant was the only defense witness, it was reversible error not to admit a five-minute police tape recording of the defendant that was of substantial probative value to the defense [*People v. Miles* (1985) 172 CA3d 474, 218 CR 378 (recording arguably corroborated defense that defendant was "loaded")].

If the defendant takes the stand and denies guilt, thus putting his or her reputation for truth and honesty at issue, it is an abuse of discretion to exclude defendant's highly relevant proffered evidence on credibility [*People v. Taylor* (1986) 180 CA3d 622, 225 CR 733] .

In criminal trials, evidence offered by the defendant that simply affords a possible ground of suspicion on a third person is generally unduly prejudicial and therefore excludable [*People v. Guillebeau* (1980) 107 CA3d 531, 166 CR 45] .

Evidence of similar crimes committed by third persons put forward by the defendant to prove innocence may be excluded when the probative value of the evidence is minimal compared with its potential for undue prolongation of the trial. Such evidence must offer more than a "possible ground of a possible suspicion" [*People v. Jones* (1998) 17 C4th 279, 70 CR2d 793 (past statements and criminal activity of co-perpetrator to prove who was trigger man properly

excluded); *People v. Bradford* (1997) 15 C4th 1229, 65 CR2d 145 (no error to exclude victim's statements that she feared "a man"; evidence insufficient to link someone other than defendant to murder); *People v. Blankenship* (1985) 167 CA3d 840, 213 CR 666] .

Defendant's right to present a defense was not denied because the court excluded expert testimony in defendant's sexual assault prosecution. The proffered evidence of the victim's emotional problems was speculative and had little probative value [*People v. Espinoza* (2002) 95 CA4th 1287, 116 CR2d 700] .

[n] Evidence of Gang Affiliation

Evidence of gang affiliation has been allowed when it is relevant to a disputed issue. However, because of its possible prejudicial effect, courts should exercise caution in allowing such evidence [see *People v. Cardenas* (1982) 31 C3d 897, 184 CR 165, 647 P2d 569] .

Examples:

- After evaluating risk of prejudice, court properly admitted, as highly probative, evidence that defendant swore oath "on his gang" that he had shot victim [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145] .
- Admitting gang paraphernalia was not overly prejudicial despite highly inflammatory impact juvenile gang evidence may have on jury [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123] .
- Trial court properly exercised discretion in allowing expert testimony of police officer on street gangs [*People v. Olguin* (1994) 31 CA4th 1355, 37 CR2d 596] .
- Consciousness of guilt, motive, and intent [*People v. Burns* (1987) 196 CA3d 1440, 234 CR 547] .

When probative value of gang membership is minimal and danger of substantial undue prejudice is great, it is an abuse of discretion to admit such evidence [*People v. Cardenas* (1982) 31 C3d 897, 184 CR 165, 647 P2d 569 ; *People v. Bojorquez* (2002) 104 CA4th 335, 128 CR2d 411 (prejudicial effect of police officer's testimony outweighed its probative value, which was minimal, if nonexistent, as to testimony concerning ethnic makeup of gangs, gang's involvement in tagging and robbery, gang members' refusal to testify against one another and tendency to protect each other by killing potential witnesses, and ascribing guilt of criminal behavior to defendant's gang); *People v. Perez* (1981) 114 CA3d 470, 170 CR 619 (record did not show balancing test before admission of such evidence; abuse of discretion)].

Weak testimony of gang membership that was cumulative and inflammatory should not have been admitted when the reason for the crime was not gang-related [*People v. Maestas* (1993) 20 CA4th 1482, 25 CR2d 644] .

When the defendant had affiliation with the gang in question, no fundamental unfairness resulted from permitting introduction of evidence of gang activity [*People v. Pinholster* (1992) 1 C4th 865, 4 CR2d 765, 824 P2d 571 (defendant was not prejudiced by evidence tending to show his membership in prison gang); *People v. Roberts* (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274] .

When the crime involved group action by gang members, evidence of gang membership is relevant to both a defendant's identity and his motive for participating in the conspiratorial scheme [*People v. Champion* (1995) 9 C4th 879, 39 CR2d 547, 891 P2d 93 (expert testimony regarding gang membership tended to establish identity as perpetrators of

murder); *People v. Contreras* (1983) 144 CA3d 749, 192 CR 810] .

The defense wanted to exclude the name "Aryan Brotherhood" from the trial. The court held that "to litigate the existence and character of an organization without naming it would have been a practical impossibility and might have caused the jury to speculate about why the name was being withheld" [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

In gang-related murder prosecution, no abuse of discretion in admitting rap lyrics found in a defendant's home after killing, which demonstrate defendant's membership in a specific gang, loyalty to such gang, and familiarity with gang culture, where the lyrics are adequately authenticated as defendant's creation [*People v. Olguin* (1994) 31 CA4th 1355, 37 CR2d 596] .

[o] Witness's Fear

Fear of eyewitness to make an in-court identification of defendant was relevant to the witness' credibility. Since on cross-examination the defense counsel clarified that her fear did not reflect on the defendant but was due only to the nature and gravity of her testimony, prejudicial impact was avoided [*People v. Avalos* (1984) 37 C3d 216, 207 CR 549 ; *People v. Williams* (1997) 16 C4th 153, 66 CR2d 153, (evidence of witness intimidation was admissible to show fear and reason for initial failure to identify defendant and for inconsistent statements)].

[p] Victim Impact Evidence

In a murder prosecution, in which defendant allegedly killed the victim to prevent the victim's testimony on another matter, evidence that other potential witnesses suffered not only severe acute trauma, but also substantial long-term deficits and disabilities, as the result of defendant's vicious physical attack was not unduly prejudicial for purposes of *Evid Code* § 352. The testimony was logically related to the issues of whether defendant inflicted great bodily injury and was presented in a nonsensational way, through the testimony of an expert witness. The evidence was not cumulative. The court acted well within its broad discretion. The probative value of this testimony so clearly exceeded its prejudicial effect that the court might well have abused its discretion by *excluding* the evidence [*People v. Zambrano* (2007) 41 C4th 1082, 1138-1139, 63 CR3d 297, 163 P3d 4 (emphasis in original)].

In a murder prosecution, the prosecution was not required to withhold evidence of the full extent of beating victims' injuries once a minimum threshold necessary to prove the great bodily harm allegation had been passed. The prosecution need not sap the force of its case by presenting only the most antiseptic evidence, even in the face of a defense offer to stipulate. When the prosecution must convince the fact finder, beyond reasonable doubt, of charges and allegations the defendant has not conceded, it need not sanitize its case by presenting only enough evidence to meet bare legal sufficiency [*People v. Zambrano* (2007) 41 C4th 1082, 1138, 63 CR3d 297, 163 P3d 4] .

"If the State chooses to permit the admission of victim impact evidence and the prosecutorial argument on that subject, the *Eighth Amendment* erects no per se bar. A state may legitimately conclude that evidence about the victim and about the impacts of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed" [*Payne v. Tennessee* (1991) 501 US 808, 111 S Ct 2597, 115 L Ed2d 720 (photographs of child victim showing stature at time of crime); *People v. Crew* (2003) 31 C4th 822, 3 CR3d 733 ; *People v. Brown* (2003) 31 C4th 518, 3 CR3d 145 ("victim impact" evidence in capital trial is not limited to victim's blood relatives); *People v. Smith* (2003) 30 C4th 581, 134 CR2d 1 (at penalty phase of capital homicide prosecution, court properly admitted evidence of prior victims' ongoing pain, depression, and fear--foreseeable effects of defendant's sexual attacks--as bearing on defendant's culpability)].

Pen Code § 190.3(a) allows evidence and argument on the specific harm caused by the defendant, including the impact on the victim's family. However, the holding only encompassed evidence that logically shows the harm caused by the

defendant [*People v. Edwards* (1991) 54 C3d 787, 1 CR2d 696, 819 P2d 436] .

Emotion must not reign over reason; therefore, the trial court must strike a careful balance between probative and prejudicial value [*People v. Edwards* (1991) 54 C3d 787, 1 CR2d 696, 819 P2d 436] .

A victim of an attempted murder may testify regarding the psychological and emotional trauma suffered. The fact that the suffering continued long after the crime does not alter the fact that it constituted a circumstance of the crime [*People v. Mitcham* (1992) 1 C4th 1027, 5 CR2d 230, 824 P2d 1277] .

Although the defendant argued that the victim's family members were not direct witnesses to the murder and for that reason should not have been permitted to testify, there is no authority for such a rule, which would eliminate the vast majority of victim impact evidence in murder cases. Nor did the fact that the retrial occurred 20 years after the crimes make irrelevant or prejudicial the additional testimony as to how the witnesses were coping or were still suffering [*People v. Brown* (2004) 33 C4th 425, 15 CR3d 656], 93 P.3d 271 .

The purpose of victim impact evidence is to demonstrate the immediate harm caused by the defendant's criminal conduct. This harm is not limited to the effect of the victims' deaths on the members of their immediate family; it extends also to the suffering and loss inflicted on close personal friends [*People v. Pollock* (2004) 32 C4th 1153, 13 CR3d 34] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsRobberyGeneral OverviewEvidenceGeneral OverviewTrade Secrets LawCivil ActionsStatutes of Limitations



69 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 7 Discretion of Court to Exclude Evidence Code §§ 352-352.1

1-7 California Courtroom Evidence 7.02

7.02 Conditions to Exclude Victim's Phone, Address--Evid Code § 352.1

[1] Evid Code § 352.1 Text

● *Evid Code § 352.1.*

In any criminal proceeding under Section 261, 262, or 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 the hearing.

The court may order that evidence of the victim's current address and telephone number be excluded from any hearings conducted pursuant to the criminal proceeding if the court finds that the probative value of the 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 the information.

LegH: 1985 ch. 335, 1996 ch. 1075.

[2] Legislative Note

The Legislature finds and declares that the provisions of *Evid Code § 352.1* have been in continuous effect since the passage of Proposition 8 and this bill is a reaffirmation of that fact [1985 ch. 335, § 1].



70 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 8 Preserving Objections and Reversible Error Evidence Code §§ 353-354

1-8 California Courtroom Evidence 8.syn

§ 8.syn Synopsis to Chapter 8: Preserving Objections and Reversible Error Evidence Code §§ 353-354

8.00 Introduction

8.01 No Reversal on Error in Admitting Evidence--Exceptions--Evid Code § 354

[1] Evid Code § 353 Text

[2] Commission Comments

[3] Case Notes

[a] Timely Objection Required

[b] Exceptions to Timely Objection Requirement

[c] Necessity for Exception in Criminal Proceedings (Pen Code § 1259)

[d] Motion to Strike Preserves Right to Appeal

[e] Miscarriage of Justice

8.02 No Reversal in Excluding Evidence--Exceptions--Evid Code § 354

[1] Evid Code § 354 Text

[2] Commission Comments

[3] Case Notes

[a] Miscarriage of Justice

[b] Necessity of Offer of Proof

[c] Elements of Offer of Proof



71 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 8 Preserving Objections and Reversible Error Evidence Code §§ 353-354

1-8 California Courtroom Evidence Scope

Scope

Scope

This chapter covers preserving objections to evidence and what constitutes reversible error under *Evid Code* §§ 353, 354.



Cross Reference:

Discussion of related matters regarding admitting and excluding evidence under *Evid Code* §§ 350, 406, see Ch. 6, Relevancy, Ch. 7, Discretion of Court to Exclude, Ch. 9, Limited Admissibility and Clarification of Evidence, and Ch. 10, Preliminary Determination on Admissibility.

Complete discussion of the procedures to introduce evidence at trial, see California Civil Trial Guide, Ch. 21, Procedures for Determining Admissibility of Evidence, Ch. 22, Rules Affecting Admissibility of Evidence (Matthew Bender). See also California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender), Imwinkelried et al., California Evidentiary Foundations, Ch. 2, Objections and Offers of Proof (Matthew Bender), and Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.



72 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 8 Preserving Objections and Reversible Error Evidence Code §§ 353-354

1-8 California Courtroom Evidence 8.00

8.00 Introduction

A judgment may not be set aside or a new trial granted in any case on the grounds of improper admission or exclusion of evidence, unless the error complained of has resulted in the miscarriage of justice. In addition, there must be an objection to the admitted or excluded evidence on the record.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



73 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 8 Preserving Objections and Reversible Error Evidence Code §§ 353-354

1-8 California Courtroom Evidence 8.01

8.01 No Reversal on Error in Admitting Evidence--Exceptions--Evid Code § 354

[1] Evid Code § 353 Text

■ *Evid Code § 353.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

No effort is made to specify the form in which the objection must be made; hence the use of a continuing objection to a line of questions would be proper under *Evid Code § 353* just as it was under prior law [Cal Law Rev Com Comment].

Section (a) codifies established California law that objections must be accompanied by a reasonable, definite statement of the grounds. The requirement allows the judge to understand the question raised and allows the adversary an opportunity to remedy the defect if possible [Cal Law Rev Com Comment].

[3] Case Notes

[a] Timely Objection Required

The requirement of a specific objection must be interpreted reasonably, not formalistically. The statute does not require any particular form of objection. What is important is that the objection fairly inform the trial court, as well as the party

offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling [*People v. Partida* (2005) 37 C4th 428, 434-435, 35 CR3d 644, 122 P3d 765] .

An objection to evidence must generally be preserved by a 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 [*People v. Demetrulias* (2006) 39 C4th 1, 22, 45 CR3d 407, 137 P3d 229 (objection to evidence on grounds of irrelevance was insufficient to preserve objection to character evidence under *Evid Code* § 1101(a); motion to strike testimony on character ground, several days after testimony given, was properly denied)].

An objection that an exhibit had no probative value and should be excluded under *Evid Code* § 352 fairly informed the trial court that the defense was objecting to the relevancy of the exhibit [*People v. Perry* (2006) 38 C4th 302, 317 n6, 42 CR3d 30, 132 P3d 235] .

Prosecutor's request for limiting instruction served same purpose as hearsay objection and placed defendant on notice that statements were to be considered only for limited purpose [*People v. Elliot* (2005) 37 C4th 453, 481-482, 35 CR3d 759, 122 P3d 968] .

Specific and timely objection at trial is essential to appellate review of admissibility of evidence. Generally speaking, objections made for the first time on appeal are not permitted. [*Levin v. Ligon* (2006) 140 CA4th 1456, 1465, 45 CR3d 560] .

Examples:

- Claim that testimony was coerced is not cognizable on appeal in the absence of objection to testimony on that ground at trial [*People v. Kennedy* (2005) 36 C4th 595, 612, 31 CR3d 160, 115 P3d 472] .
- Defendant's failure at trial to object to witness's claim of self-incrimination precluded consideration on appeal on that ground [*People v. Seijas* (2005) 36 C4th 291, 301-302, 30 CR3d 493, 114 P3d 742] .
- Court on appeal would not address merits of new defense theory, based on hypothetical offer of proof [*People v. Valdez* (2004) 32 C4th 73, 8 CR3d 271] .
- On appeal, defendant who did not previously object may not challenge order for HIV blood test for lack of express finding of probable cause [*People v. Stowell* (2003) 31 C4th 1107, 6 CR3d 723] .
- Objections to photographs of victim could not be raised for first time on appeal [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131, cert. denied, 541 US 910] .
- Subsequent objection to photograph did not preserve issue for appeal [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384] .
- Failure to object to racist statements [*People v. Fairbank* (1997) 16 C4th 1223, 69 CR2d 784] .
- Objection to jury selection procedure must occur before jury is sworn; failure to object to hearsay waives issue [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1] .

1-8 California Courtroom Evidence 8.01

- Failure to object to judicial notice of facts in prior court's decision [*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 CA4th 204, 12 CR3d 786] .
- Failure to object to trial court's alleged failure to coerce jury's verdict [*People v. Neufer* (1994) 30 CA4th 244, 35 CR2d 386] .
- Failure to object to reading of plea agreement at trial [*People v. Fauber* (1992) 2 C4th 792, 821, 9 CR2d 24, 831 P2d 249] .
- Expert witness's testimony on credibility of child victim of sexual assault [*People v. Gilbert* (1992) 5 CA4th 1372, 7 CR2d 660] .
- Failure to object to prosecutor's reference that codefendant pleaded guilty [*People v. Harmon* (1992) 7 CA4th 845, 9 CR2d 265] .
- Failure to object to admission of confession at trial [*People v. Kelly* (1992) 1 C4th 495, 3 CR2d 677, 822 P2d 385] .
- Failure of defendant to object to prosecutor's cross-examination exceeding direct [*People v. Visciotti* (1992) 2 C4th 1, 5 CR2d 495, 825 P2d 388] .
- Five references may not be raised on appeal [*People v. Wharton* (1991) 53 C3d 522, 280 CR 631] .
- Defendant pleaded guilty without raising issue of admissibility at suppression hearing [*People v. Parrott* (1986) 179 CA3d 1119, 225 CR 293] .
- Objection cannot be raised for first time on appeal [*People v. Collie* (1981) 30 C3d 43, 177 CR 458, 634 P2d 534] .
- Objection that evidence of prior murders is prejudicial and cumulative should have been made at trial [*People v. Lanphear* (1980) 26 C3d 814, 163 CR 601, 608 P2d 689] .
- No objection made to testimony concerning nonverbal conduct [*In re Paul T.* (1971) 15 CA3d 886, 93 CR 510] .
- Note written by defendant [*People v. Small* (1970) 7 CA3d 347, 86 CR 478] .
- Fruits of search [*People v. Terry* (1970) 2 C3d 362, 85 CR 409, 466 P2d 961] .
- Nature of decedent's burns [*People v. Washington* (1969) 71 C2d 1061, 80 CR 567, 458 P2d 479] .
- Objection before cross-examination [*People v. Ogg* (1968) 258 CA2d 841, 66 CR 289] .
- Objection that evidence is not admissible or not competent is too general to include objection that evidence calls for hearsay [*Gallagher v. Connell* (2004) 123 CA4th 1260, 20 CR3d 673] .
- Objection to testimony as improper impeachment was a sufficient objection to its relevance when trial court spoke as if it were deciding question of relevance [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145] .

- No particular form of objection is required, but objection must be specific enough to alert court to "nature of the anticipated evidence and the basis on which exclusion is sought" and to afford proponent opportunity to establish admissibility [*People v. Holt* (1997) 15 C4th 619, 63 CR2d 782] .

- Trial court has mandatory duty to rule on evidentiary objections that are in proper form [*Vineyard Springs Estates v. Superior Court* (2004) 120 CA4th 633, 15 CR3d 587] .

- Objection that evidence is vague is not sufficient objection that testimony is beyond proper scope of expert testimony [*People v. Gutierrez* (1993) 14 CA4th 1425, 18 CR2d 371] .

- Continuing objection does not cover hearsay testimony from separate conversations [*People v. Epps* (1981) 122 CA3d 691, 176 CR 332] .

- Specific objection is required [*People v. Dorsey* (1974) 43 CA3d 953, 118 CR 362] .

- General objection insufficient [*People v. Davis* (1968) 265 CA2d 341, 71 CR 242] .

A motion in limine to exclude evidence may be a sufficient manifestation of objection to protect the record on appeal if it satisfies the basic requirements of *Evid Code* § 353, but the proponent must secure an express ruling from the court.

Cross Reference:

Discussion of making objection, see Imwinkelried et al., California Evidentiary Foundations, Ch. 2, Objections and Offers of Proof, Pt. C (Matthew Bender).

Examples:

- Pretrial objection and hearing adequate to preserve issue even though objection not renewed at trial [*People v. Carpenter* (1999) 21 C4th 1016, 90 CR2d 607] .

- Denial of motion in limine before trial did not preserve issue for appeal; court indicated it would hold hearings at trial when evidence presented, but opponent did not object or request hearings during trial, and court's promise to hold hearings did not bind court to hold them unprompted [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123] .

- Motion in limine may preserve objection for appeal; however, proponent must secure express ruling from court [*People v. Ramos* (1997) 15 C4th 1133, 64 CR2d 894] .

- Appeal from death penalty case, first degree murder with special circumstances [*People v. Morris* (1991) 53 C3d 152, 279 CR 720, 807 P2d 949] .



Strategic Point:

If the motion is denied, the safest method is to secure the ruling and renew the pretrial objection at trial.

An objecting party may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct [*People v. Partida* (2005) 37 C4th 428, 434-435, 35 CR3d 644, 122 P3d 765] .

A party must object at a later trial, even though the objection had been overruled at an earlier trial [*People v. Neely* (1999) 70 CA4th 767, 82 CR2d 886 (objection waived; law of the case argument rejected)].

Pen Code § 1538.5, allowing a defendant to seek further review of validity of search or seizure on appeal if judgment of conviction was predicated on a plea of guilty, does not permit the appellate court to make an initial and plenary factual decision on the search and seizure issue [*People v. Smith* (1986) 180 CA3d 72, 225 CR 348] .

Refusal to review *Miranda* rule on appeal has been based in part on the failure of counsel to make proper objection in the trial court [*People v. Holt* (1997) 15 C4th 619, 63 CR2d 782 (no specific objection in writing or at hearing to exclude statements); *People v. Carter* (1970) 7 CA3d 332, 88 CR 546 (coercion by administration of lie detector); *People v. Duty* (1969) 269 CA2d 97, 74 CR 606 (statement)].

[b] Exceptions to Timely Objection Requirement

In an appeal from a dissolution proceeding, the husband claimed that a retirement account had been transmuted into separate property by an alleged oral agreement, on the basis of which the husband had signed a deed in the wife's favor as to community real property. The husband claimed that the wife waived her right to complain about the alleged oral agreement by failing to move to exclude this evidence at trial. The wife did not challenge the transaction on technical, procedural, or evidentiary grounds under *Evid Code* § 353(a). Nor did she raise a statute of frauds defense of the kind deemed forfeited by failure to timely object to evidence of a disputed oral contract. However, the wife consistently claimed that no valid transmutation occurred under *Fam Code* § 852(a) and that authorities provided a substantive ground for relief. This preserved her right to object [*In re Marriage of Benson* (2005) 36 C4th 1096, 1004 n.3, 32 CR3d 471, 116 P3d 1152 (Supreme Court saw no bar to resolving issue under review)] .

Objections must be made to the admission of evidence, and the court must consider the admissibility of that evidence at the time it is offered, absent a statutory provision precluding relitigation, a stipulation by the parties, or an order by the court that prior rulings made in the prior trial will be binding at the new trial [*People v. Barragan* (2004) 32 C4th 236, 9 CR3d 76 (permitting retrial of strike allegation against defendant)].

Because involuntary HIV testing is strictly limited by a statute that conditions a testing order on a finding of probable cause, a defendant may challenge the sufficiency of the evidence even in the absence of an objection. Without evidentiary support, the order is invalid [*People v. Butler* (2003) 31 C4th 1119, 6 CR3d 730] .

A claim of coercion of a confession can be raised on appeal for the first time, but the defendant is restricted to the record of the trial court for evidence thereof [*People v. Carter* (1970) 7 CA3d 332, 88 CR 546 (coercion by administration of lie detector); *In re Cameron* (1968) 68 C2d 487, 67 CR 529, 439 P2d 633 (issue of coerced confession raised for first time in habeas corpus proceeding)].

The admission of an involuntary confession comes within the harmless error rule as a "trial error" occurring during the presentation of a case to the trier of fact and as such will not result in automatic reversal. The confession may be quantitatively assessed in the context of other evidence in order to determine whether its admission is harmless beyond a reasonable doubt [*Arizona v. Fulminante* (1991) 499 US 279, 111 S Ct 1246, 113 L Ed2d 302 (suspected murderer of stepdaughter confessed crime to another inmate, a paid FBI informant, in exchange for protection from other inmates' rough treatment of a child killer)].

In an action for wrongful termination and sexual harassment, the trial court sustained objections to parts of plaintiff's

declaration that allegedly repeated the harasser's offensive statements. The trial court then dismissed the action on summary judgment, based on the plaintiff's procedural failure to complete an internal complaint process before filing suit. The appellate court reversed on the same ground, noting in passing that plaintiff's failure to specifically challenge the propriety of those objections on appeal was not a waiver of any error, because the insufficiency of the evidence demonstrating harassment was the basis for neither the trial court's summary judgment, nor of the defendant's arguments on appeal [*Ahmadi-Kashani v. Regents of the University of California* (2008) 159 CA4th 449, 71 CR3d 556].

[c] Necessity for Exception in Criminal Proceedings (Pen Code § 1259)

On an appeal taken by the defendant in criminal proceedings, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or before or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the defendant's substantial rights. The appellate court may also review any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the defendant's substantial rights were affected thereby. If there is a showing of special circumstances that justify failure to timely object at the trial, appellate review will follow. Unpreparedness and ineffectiveness of counsel is not such a circumstance unless it was of such a degree as to render the proceedings a sham or a farce [*People v. Johnson* (1970) 5 CA3d 851, 85 CR 485] .

When trial took place before the decision that established particular objection, special circumstances may excuse failure to object [*People v. Berutko* (1969) 71 C2d 84, 77 CR 217, 453 P2d 721 (illegal entry); *People v. DeSantiago* (1969) 71 C2d 18, 76 CR 809, 453 P2d 353 (illegal entry); *People v. Pierce* (1969) 269 CA2d 193, 75 CR 251 (witness's prior inconsistent statement may not be used as substantive evidence against accused)].

If a theory newly advanced on appeal presents only a question of law arising from facts that are undisputed, the absence of a timely objection at the trial will not preclude appellate review, and the judgment must in any event be reversed if an error has resulted in a denial of due process of law [*People v. Mills* (1978) 81 CA3d 171, 146 CR 411 (argument on appeal that registration as sex offender is cruel and unusual punishment did not fall within exception)].

A written declaration in support of a motion to dismiss satisfies the requirement of an objection timely made at trial [*People v. Wright* (1977) 72 CA3d 328, 140 CR 98] .

Relevant hearsay evidence is admissible in the absence of a specific hearsay objection [*People v. Brown* (1969) 272 CA2d 623, 77 CR 650 (conversations between co-conspirators); *People v. Rodriguez* (1969) 274 CA2d 770, 79 CR 240 (testimony of expert)].

Failure to object may be excused when it places an unreasonable burden on defendant to anticipate unforeseen changes in the law and encourages fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal [*People v. Kitchens* (1956) 46 C2d 260, 294 P2d 17] .

[d] Motion to Strike Preserves Right to Appeal

A motion to strike the testimony in its entirety preserves the objection for appeal [*People v. Bailes* (1982) 129 CA3d 265, 180 CR 792] .

Motion to strike must be directed with precision to the part of the testimony sought to be stricken, especially when only part is objectionable [*San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 CA2d 889, 63 CR 640] .



Cross Reference:

Discussion of motion to strike, see Matthew Bender California Practice Guide: California Pretrial Civil

Procedure, Ch. 12, Motions to Strike.

[e] Miscarriage of Justice

A miscarriage of justice should be declared only when the court, after an examination of the entire case, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

Examples:

- In a personal injury lawsuit, an expert's testimony that the low-speed collision did not cause the injuries complained of was not prejudicial [*DePalma v. Rodriguez* (2007) 151 CA4th 159, 59 CR3d 479] .
- It was not reasonably probable that admission of photographs of murder victim affected verdict [*People v. Heard* (2003) 31 C4th 946, 4 CR3d 131] .
- In discrimination case, there was reasonable probability that exclusion of evidence of plaintiff's post-demotion work injury would have resulted in verdict more favorable to respondent [*Clifton v. Ullis* (1976) 17 C3d 99, 130 CR 155, 549 P2d 1251 ; *Huffman v. Interstate Brands Corp.* (2004) 121 CA4th 679, 17 CR3d 397] .
- Erroneous admission of prior inconsistent statements [*People v. Williams* (1976) 16 C3d 663, 128 CR 888, 547 P2d 1000, 17 L Ed2d 705] .
- Beyond a reasonable doubt standard [*Chapman v. California* (1967) 386 US 18, 87 S Ct 824, 17 L Ed2d 705] .
- Error in permitting cross-examination of defendant as to act irrelevant to any issue in the case did not result in a miscarriage of justice [*People v. Watson* (1956) 46 C2d 818, 299 P2d 243] .

Only when a timely objection has been made can there be a reversal based on the miscarriage of justice standard [*People v. Collie* (1981) 30 C3d 43, 177 CR 458, 634 P2d 534] .

Evidence obtained by unconstitutional means is inadmissible, and if such evidence is received at trial and effects a miscarriage of justice, a judgment of conviction will be reversed on appeal [*People v. Montoya* (1967) 255 CA2d 137, 63 CR 73] .

Evidence of illegality tossed aside before a physical seizure of a suspect cannot be excluded as tainted by unreasonable seizure. The refusal to yield after a show of authority means there has been no seizure; thus, the evidence is untainted and admissible [*California v. Hodari D.* (1991) 499 US 621, 111 S Ct 1547, 113 L Ed2d 690 (evidence discarded by a fleeing suspect may be used against that suspect in court)].

Erroneous admission of unrelated defects in a products case did not result in a miscarriage of justice in light of the entire record [*Marocco v. Ford Motor Co.* (1970) 7 CA3d 84, 86 CR 526] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Jury Instructions Limiting Instructions Evidence Procedural Considerations Objections & Offers of Proof Objections Family Law Marital Duties & Rights Property Rights Characterization Separate Property



74 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 8 Preserving Objections and Reversible Error Evidence Code §§ 353-354

1-8 California Courtroom Evidence 8.02

8.02 No Reversal in Excluding Evidence--Exceptions--Evid Code § 354

[1] Evid Code § 354 Text

■ *Evid Code § 354.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 354, like *Evid Code § 353*, reiterates the requirement of the *Cal Const art VI, § 13*, that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial [Cal Law Rev Com Comment].

There are situations where an offer of proof is unnecessary. One example is where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile [*Lawless v. Calaway* (1944) 24 C2d 81, 147 P 2d 604] . Another is where an objection is improperly sustained to a question on cross-examination [*Tossman v. Newman* (1951) 37 C2d 522, 233 P2d 1 ; *People v. Jones* (1911) 160 C 358, 117 P 176 Cal Law Rev Com Comment].

[3] Case Notes

[a] Miscarriage of Justice

When evidence is erroneously excluded because of a party's objection, the party may not complain on appeal that there was not sufficient evidence to support a finding against him or her when the insufficiency of the evidence resulted from the erroneous exclusion [*Kessler v. Gray* (1978) 77 CA3d 284, 143 CR 496] .

A ruling excluding evidence under *Evid Code* § 352 will be overturned on appeal only if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [*People v. Espinoza* (2002) 95 CA4th 1287, 116 CR2d 700 (defendant's right to present defense was not denied because court excluded expert testimony in defendant's sexual assault prosecution; proffered evidence of the victim's emotional problems was speculative and had little probative value)].

In an action for violation of state law requiring repair or replacement, arising out of water damage to a travel trailer, the defendant's belief and prior experience that it could readily repair the trailer was in fact brought out at trial. The rejected evidence was arguably cumulative, so on balance, the exclusion of evidence did not result in a miscarriage of justice [*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 CA4th 785, 815-816, 50 CR3d 731 (affirming judgment for plaintiffs)].

Evid Code § 354 prohibits the reversal of a judgment based upon the erroneous exclusion of evidence unless "the substance, purpose and relevance of the excluded evidence was made known to the [trial] court."

Examples:

- Hearsay exception not properly preserved for appeal [*People v. Ramos* (1997) 15 C4th 1133, 64 CR2d 894] .
- Defendant precluded from complaining on appeal that statements were not hearsay and should have been admitted, when defendant's trial counsel did not specifically raise that ground of admissibility [*People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249] .
- Exclusion of evidence regarding defective tool, statement of victim, and alternate means of bomb disposal [*People v. Morse* (1992) 2 CA4th 620, 3 CR2d 343] .

Denying a party the right to testify or offer evidence is a per se reversible error [*Kelly v. New West Federal Savings* (1996) 49 CA4th 659, 56 CR2d 803] .

[b] Necessity of Offer of Proof

Normally, if the trial court excludes evidence on cross-examination, no offer of proof is necessary to preserve the issue for consideration on appeal [*Evid Code* § 354(c)]. However, cross-examination is limited to the scope of the direct examination [*Evid Code* § 773]. If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue. In a prosecution for child molestation, defense counsel was not specific and made only the most speculative offer of proof in support of his request to inquire into whether an adult witness had a morbid fear of sexual matters and child molestation, which might have caused her to influence the report of the child victim. On appeal, defendant could not establish that the trial court's denial of his request was an abuse of discretion [*People v. Foss* (2007) 155 CA4th 113, 65 CR3d 790] .

In an action for battery against a preschool teacher, the trial court allowed evidence of other alleged acts of misconduct.

However, plaintiffs failed to make an offer of proof that such episodes occurred. The failure to make a specific offer of proof constituted waiver of a contention that the court erroneously excluded evidence [*Austin B. v. Escondido Union School Dist.* (2007) 149 CA4th 860, 57 CR3d 454 (judgment for defendant affirmed)].

If counsel asks a question whose pertinency is not clear, and the court sustains an objection, it is imperative that counsel either reframe the question or illustrate to the court the pertinency of the question and the materiality of the answer so as to allow the court an opportunity to correct its ruling. Otherwise, review of the error is precluded on appeal [*People v. Thomas* (1970) 3 CA3d 859, 83 CR 879 (no showing made in trial as to how prior statement was consistent)].

A claim that evidence was wrongfully excluded cannot be raised absent offer of proof in trial court [*People v. Pride* (1992) 3 C4th 195, 10 CR2d 636, 833 P2d 643] .

An offer of proof is not necessary when the trial court has declared that an entire class of evidence has been formally declared inadmissible or has indicated that it will receive no evidence on the subject [*Castaneda v. Bornstein* (1995) 36 CA4th 1818, 43 CR2d 10 (expert opinion on causation); *People v. Whitsett* (1983) 149 CA3d 213, 196 CR 647 (expert psychiatric testimony regarding defendant's mental state); *Beneficial etc. Ins. Co. v. Kurt Hitke & Co.* (1956) 46 C2d 517, 297 P2d 428 (no extrinsic evidence allowed on construction of contract between agent and insurance company)].

Party preserved objection to exclusion of evidence where trial court learned nature of evidence in hearing in limine, and party brought later motion to vacate [*Caira v. Offner* (2005) 126 CA4th 12, 31, 24 CR3d 233] .

An offer of proof is not required where the excluded testimony had already been made known to the trial court and it appears that an offer would be futile [*Rangel v. Graybar Electric Co.* (1977) 70 CA3d 943, 139 CR 191 (refusal to allow expert's rebuttal testimony resulted in miscarriage of justice)].

An offer of proof as to a question on cross-examination is not necessary because of the very nature of cross-examination [*Tossman v. Newman* (1951) 37 C2d 522, 233 P2d 1 (no offer necessary to obtain review of rulings on cross-examination)].

It can be plausibly argued that the principle that allows for no need of an offer of proof when the witness is under cross-examination covers, in addition, the situation where a party attempting to prove illegal selection of a grand jury examines the selectors [*Montez v. Superior Court* (1970) 10 CA3d 343, 88 CR 736] .



Cross Reference:

Discussion of making offer of proof, see *California Trial Guide*, Unit 40, Hearsay, 40.04 (Matthew Bender).

[c] Elements of Offer of Proof

The appellate court was troubled by the use, in a dependency hearing, of the offer of proof procedure mandated by local rule. First, nonstipulated offers of proof are not testimony. For example, in this case, in lieu of the live testimony of a social worker, counsel for the department recited an unsworn prepared statement indicating what the social worker would state if called to testify, and at the conclusion of the recitation the social worker, previously sworn, adopted the statement. An unsworn statement of counsel is not evidence. Second, the procedure compromised the ability of a party and his counsel to observe the social worker's demeanor, responsiveness and recollection during the course of a direct examination process. In a contested hearing, the precise words and demeanor of a witness during direct as well as cross-examination bears on the credibility and weight the trier of fact accords the witness's testimony. Moreover, observation of a witness on direct is important to the planning and execution of effective cross-examination. A prepared, concise statement read by counsel may speed up the hearing, but it is no substitute for the real thing. The trier

of fact and counsel lose the opportunity to assess the witness's strengths and weaknesses, recollection, and attempts at evasion or spinning the facts, etc. Third, with a scripted statement, prepared and agreed to by one party in advance, comes the passage of time and with that lapse may come the party's unyielding acceptance of the script. Lost to cross-examination is the opponent's ability to immediately test and dissect adverse testimony. While juvenile courts can establish local rules to expedite and administer their court proceedings, those rules must be reasonable and consistent with existing law. Measures to expedite the hearing process cannot override the requirement of providing litigants due process [*Denny H. v. Superior Court* (2005) 131 CA4th 1501, 1513-1514, 33 CR3d 89 (holding that use of mandatory offer of proof procedure was harmless under clear and convincing error standard)].

An offer of proof must make known to the trial court the substance of the evidence that is being offered. An offer of proof that sets forth only the substance of the facts to be proved is not sufficient, since facts are not evidence. The substance of evidence to be set forth in a valid offer of proof means the testimony of specific witnesses, writings, material objects, or other things presented to the senses [*People v. Schmies* (1996) 44 CA4th 38, 51 CR2d 185 ; *United Savings & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 CA3d 282, 129 CR 113] .

An offer of proof must be specific; a court may reject a general offer of proof made to prove a number of things [*People v. Rodriguez* (1969) 274 CA2d 770, 79 CR 240] .

An offer of proof that advises the trial court of the facts the party intends to prove rather than the evidence that the party would use to prove the facts is not sufficient [*McCleery v. City of Bakersfield* (1985) 170 CA3d 1059, 216 CR 852 (failure to satisfy *Evid Code* § 354 is fatal to appeal based on exclusion of that evidence); *Semsch v. Henry Mayo Newhall Memorial Hosp.* (1985) 171 CA3d 162, 216 CR 913] .



Cross Reference:

Discussion of offer of proof, see *California Trial Guide, Unit 21, Procedural Rules for Determining Admissibility of Evidence*, 21.16 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Procedural Considerations Objections & Offers of Proof Objections Evidence Testimony Examination Direct Examination



75 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 9 Limited Admissibility and Clarification of Evidence Evidence Code §§ 355-356

1-9 California Courtroom Evidence 9.syn

§ 9.syn Synopsis to Chapter 9: Limited Admissibility and Clarification of Evidence Evidence Code §§ 355-356

9.01 Evidence Admissible to One Party--Restrictions--Evid Code § 355

[1] Evid Code § 355 Text

[2] Commission Comment

[3] Case Notes

9.02 Partial Act Declaration, Writing--Inquiry Into Whole--Detached Act--Necessary Additions--Evid Code § 356

[1] Evid Code § 356 Text

[2] Official Comments

[3] Case Notes



76 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 9 Limited Admissibility and Clarification of Evidence Evidence Code §§ 355-356

1-9 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code* §§ 355 and 356 on admissibility of evidence for one purpose and clarification of evidence.

► **Cross Reference:**

Discussion of determination of admissibility, see Ch. 10, Preliminary Determination of Admissibility.

Further discussion of determining the admissibility of evidence, see California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence (Matthew Bender).



77 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 9 Limited Admissibility and Clarification of Evidence Evidence Code §§ 355-356

1-9 California Courtroom Evidence 9.01

9.01 Evidence Admissible to One Party--Restrictions--Evid Code § 355

[1] Evid Code § 355 Text

■ *Evid Code § 355.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

Under *Evid Code § 355*, the court must instruct the jury as to the limited purpose for which evidence may be considered when such evidence is admissible for one purpose and inadmissible for another [Cal Law Rev Com Comment].

Under *Evid Code § 352*, the judge may 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 [Cal Law Rev Com Comment].

[3] Case Notes

The trial court need not give a limiting instruction sua sponte. Defendant's proposed instruction, that evidence of the statements defendant made to various doctors were inadmissible for any purpose and should be entirely disregarded, did not generate a duty in the trial court to fashion a correct, more limited substitute. Neither defendant's proposed instruction, nor his argument that it be given, offered any hint of the completely different premise that all his statements to experts should be limited to their proper nonhearsay uses and not admitted as substantive evidence of defendant's mental state. Even if defendant's jury had been specifically instructed about the limited use it should make of defendant's hearsay statements to experts, the jury would nonetheless evaluate the credibility of those statements in order to tell whether the experts' resulting opinions were soundly based. Under these circumstances, the line between use of defendant's statements for their substantive "truth," on the one hand, and simply as the basis for doctors' diagnoses on the other, is so subtle that there is no reasonable basis to conclude the jury's guilt verdict would have been

altered, had the limiting instruction been given [*People v. Boyer* (2006) 38 C4th 412, 465-466, 42 CR3d 677, 133 P3d 581 (affirming conviction)].

In murder trial, trial court did not abuse discretion in refusing to admit, for impeachment, misdemeanor conviction for crime of moral turpitude; its slight relevance and probative value was outweighed by prospect of confusing jury, in light of third party culpability aspect, notwithstanding availability of limiting instruction [*People v. Robinson* (2005) 37 C4th 592, 624-625, 36 CR3d 760, 124 P3d 363] .

When evidence is inadmissible simply to show a person's character but is admitted on some other proper ground, the court may protect against the jury's possible misuse of the evidence through a limiting instruction [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164 (in murder prosecution, court properly gave limiting instruction regarding evidence of sexual orientation of victim)].

Evidence that is admissible because it is competent as to one point is not destroyed just because of its incompetency as to other points that it yet logically tends to prove. The danger of the jury misusing such evidence is manifest. The matter is largely one of discretion on the part of the trial judge. If the point to prove may be proved by other evidence, or if it is of slight weight or importance on that point, the trial judge is justified in excluding it entirely because of its prejudicial character as to other points [*Foreman & Clark Corp. v. Fallon* (1971) 3 C3d 875, 92 CR 162, 479 P2d 362 (waiver of limited admissibility)].

When a party makes no request for a limiting instruction, the trial court is not required to give one sua sponte [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224 ; *People v. Hernandez* (2004) 33 C4th 1040, 16 CR3d 880 (evidence relating to enhancement of crime by relation to criminal gang activity); *People v. Macias* (1997) 16 C4th 739, 66 CR2d 659 (Evid Code § 355 requires no sua sponte limiting instruction); *People v. Richards* (1976) 17 C3d 614, 131 CR 537, 552 P2d 97 (party who did not request the instruction cannot complain of its absence); *People v. Nudd* (1974) 12 C3d 204, 115 CR 372, 524 P2d 844] .

The timing of when to give a limiting instruction is in the trial court's discretion [*People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (trial court is not obliged to give limiting instruction the moment it is requested or when the limited evidence is presented; subsequent instruction can be sufficient in a proper case)].

If a codefendant feels the danger of prejudice will not be alleviated or eliminated by a limiting instruction, it is up to the codefendant to make a motion for a mistrial [*People v. Reeder* (1978) 82 CA3d 543, 147 CR 275] .

Evidence of subsequent remedial measures may be introduced if proper limiting instruction is given per Evid Code § 355 [*Morehouse v. Taubman Co.* (1970) 5 CA3d 548, 85 CR 308 (evidence that handrails were installed after plaintiff's injury where plaintiff fell was properly admitted and limited on issue of control of premises)].

There can be an exception to the rule that the defendant must request a limiting instruction, for an occasional extraordinary case in which unprotected evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose [*People v. Griggs* (2003) 110 CA4th 1137, 2 CR3d 380 (stipulation used for limited purpose of establishing prior conviction was obviously not used to establish propensity for crime and required no limiting instruction); *People v. Collie* (1981) 30 C3d 43, 177 CR 458] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Jury Instructions Requests to Charge Criminal Law & Procedure Appeals Standards of Review Abuse of Discretion General Overview Evidence Procedural Considerations Exclusion & Preservation by

Prosecutor



78 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 9 Limited Admissibility and Clarification of Evidence Evidence Code §§ 355-356

1-9 California Courtroom Evidence 9.02

9.02 Partial Act Declaration, Writing--Inquiry Into Whole--Detached Act--Necessary Additions--Evid Code § 356

[1] Evid Code § 356 Text

■ *Evid Code § 356.*

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.

LegH: 1965 ch. 299.

[2] Official Comments

Evid Code § 356 restates the substance of and supersedes section 1854 of the Code of Civil Procedure. The rule stated in *Evid Code § 356*, like the superseded statement of the rule in the Code of Civil Procedure, only makes admissible such parts of an act, declaration, conversation, or writing as are relevant to the part thereof previously given in evidence [Cal Law Rev Com Comment].

By its terms, *Evid Code § 356* allows further inquiry into otherwise inadmissible matter only when it relates to the same subject as the evidence already introduced and has relevant reference to that evidence [Cal Assmb Com Jud Comment].

Legislative Note:

The purpose of *Evid Code § 356* is to ensure that facts admitted into evidence are viewed in their proper factual context so that the true meaning and import of the evidence relevant to an issue in the case can be ascertained. With respect to cross-examination, *Evid Code § 356* is an exception to the general rule that cross-examination must be confined to the scope of the direct examination.

[3] Case Notes

Section 356 cannot be invoked to defeat the newsmen's shield laws [*People v. Sanchez* (1995) 12 C4th 1, 47 CR2d

843] .

Evid Code § 356 allows further inquiry into otherwise inadmissible matter when it relates to the same subject as the evidence already introduced and has relevant reference to that evidence, such as:

- Other statements that have some bearing on or connection with declaration in evidence [*People v. Zapien* (1993) 4 C4th 929, 17 CR2d 122, 846 P2d 704] .
- Admissions and confessions in criminal cases, even if omitted parts of conversation are self-serving [*People v. Douglas* (1991) 234 CA3d 273, 285 CR 609] .
- Evidence that was said or written that has "some bearing upon, or connection with, the admission or declaration in evidence" [*People v. Hamilton* (1989) 48 C3d 1142, 259 CR 701] .

By asking a defense psychologist to clarify his theory of how defendant's state of mind had changed when he encountered the murder/robbery victim, a prosecutor opened the door for the psychologist to relate defendant's version of events during that encounter [*Evid Code* § 356]. The answer was responsive to the prosecutor's question. The trial court erred in striking the question and answer, although reversal was not required, since the jury was fully informed, through other evidence, of the defendant's version. Having asked the proverbial "one question too many" and received an answer he did not like, the prosecutor was not entitled to turn back the clock [*People v. Bell* (2007) 40 C4th 582, 611-612, 54 CR3d 453, 151 P3d 292 , cert den 2007 US LEXIS 9157] .

In a prosecution for felony murder, defendant was not denied due process as a result of the trial court's admission into evidence of a codefendant's statement to police that defendant always carried a .380-caliber handgun and that defendant gave this gun to another person before the robbery. Defendant forfeited the right to challenge these statements by introducing into evidence other statements made by codefendant during the same interview, under *Evid Code* § 356 [*People v. Parrish* (2007) 152 CA4th 263, 60 CR3d 868] .

Evid Code § 356 allows further inquiry into otherwise inadmissible matter when it is necessary to make the already introduced evidence understood [*People v. Gambos* (1970) 5 CA3d 187, 84 CR 908 (conversation)].

Evid Code § 356 is qualified by the consideration of relevancy. Parts of the conversation that are not relevant to the items that have been introduced may be excluded [*People v. Claxton* (1982) 129 CA3d 638, 181 CR 281 (there is no "open door" policy in California); *People v. Williams* (1975) 13 C3d 559, 119 CR 210, 531 P2d 778 ; *People v. Perry* (1972) 7 C3d 756, 103 CR 161, 499 P2d 129] .

Evid Code § 356 is qualified by *Evid Code* § 352 in the trial court's exercise of discretion in determining whether to admit evidence [*Benson v. Honda Motor Co.* (1994) 26 CA4th 1337, 32 CR2d 322 (use of one photograph did not justify admission of entire report on crash tests)].

When a statement admitted into evidence is part of a conversation, the opponent is entitled to have everything the declarant said during the conversation placed in evidence providing that the other statements are relevant to the statement already admitted and are not excluded by a rule of law. Reception of such evidence is not barred by the hearsay rule [*People v. Arias* (1996) 13 C4th 92, 51 CR2d 770 (if a party's oral admissions have been introduced in evidence, party may introduce other portions of the same interview or conversation, even if they are self-serving, which have some bearing on, or connection with, the admission in evidence); *People v. Wharton* (1991) 53 C3d 522, 280 CR 631, 809 P2d 290 (prosecutor can rebut inference that defendant's culpability in prior conviction was somewhat reduced with evidence of entire conversation revealing admission of guilt); *People v. Barrick* (1982) 33 C3d 115, 187 CR 716, 654 P2d 1243 (post-arrest statement); *People v. Williams* (1975) 13 C3d 559, 119 CR 210, 531 P2d 778] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Examination of Witnesses Cross-Examination Evidence Procedural
Considerations Exclusion & Preservation by Prosecutor Evidence Relevance General Overview



79 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.syn

§ 10.syn Synopsis to Chapter 10: Preliminary Determination on Admissibility Evidence Code §§ 400-406

10.01 Governing Definitions--Evid Code § 400

[1] Evid Code § 400 Text

[2] Commission Comments

[3] Case Notes

10.02 Proffered Evidence--Evid Code § 401

[1] Evid Code § 401 Text

[2] Commission Comments

[3] Case Notes

10.03 Determination of Existence of Preliminary Fact--Evid Code § 402

[1] Evid Code § 402 Text

[2] Commission Comments

[3] Case Notes

10.04 Procedure for Determination of Admissibility of Proffered Evidence--Evid Code § 403

[1] Evid Code § 403 Text

[2] Commission Comments

[3] Case Notes

[a] Court's Determination

[b] Jury Instruction to Disregard Proffered Evidence

[c] Conditional Admission of Proffered Evidence--"Connecting Up"

[d] Failure to Make Offer of Proof

10.05 Determination of Existence of Preliminary Fact--Proffered Evidence Admissibility--Evid Code § 404

[1] Evid Code § 404 Text

[2] References

[3] Commission Comments

[4] Case Notes

10.06 Other Determinations--Evid Code § 405

[1] Evid Code § 405 Text

[2] Commission Comments

[3] Case Notes

[a] Civil Cases

[b] Criminal Cases

10.07 Evidence Relevant to Weight or Credibility--Admissibility--Evid Code § 406

[1] Evid Code § 406 Text

[2] Commission Comments

[3] Case Notes



80 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 400 through 406* on preliminary determinations of admissibility.



Cross Reference:

Further discussion of determining the admissibility of evidence, see California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence (Matthew Bender).

Further discussion of admissibility, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.



81 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.01

10.01 Governing Definitions--Evid Code § 400

[1] Evid Code § 400 Text

● *Evid Code § 400.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

"Preliminary fact" is defined to distinguish those facts on which the admissibility of evidence depends from those facts sought to be proved by the evidence [Cal Law Rev Com Comment].

[3] Case Notes

The party that claims the privilege has the burden of proof on the preliminary facts [*Mize v. Atchison T. & S. F. R. Co.* (1975) 46 CA3d 436, 120 CR 787] .

Expert testimony on probable effect of narcotics or alcohol on the faculties of the defendant is required before evidence of habitual use of such drugs may be admitted to impeach defendant's perception or memory [*People v. Balderas* (1985) 41 C3d 144, 222 CR 184, 711 P2d 480] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Privilege Evidence Procedural Considerations Preliminary Questions Admissibility of Evidence General Overview



82 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.02

10.02 Proffered Evidence--Evid Code § 401

[1] Evid Code § 401 Text

■ *Evid Code § 401.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

"Proffered evidence" is defined to avoid confusion between evidence whose admissibility is in question and evidence offered on the preliminary fact issue [Cal Rev Com Comment].

"Proffered evidence" includes such matters as the testimony to be elicited from a witness who is claimed to be disqualified, testimony or tangible evidence claimed to be privileged, or any other evidence to which objection is made [Cal Rev Com Comment].

[3] Case Notes

The defendant's right to present a defense was not denied because the court excluded expert testimony in defendant's sexual assault prosecution. The proffered evidence of the victim's emotional problems was speculative and had little probative value [*People v. Espinoza* (2002) 95 CA4th 1287, 116 CR2d 700] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Defenses
Right to Present Evidence
Procedural Considerations
Objections & Offers of Proof
Objections
Evidence
Procedural Considerations
Preliminary Questions
Admissibility of Evidence
General Overview



83 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.03

10.03 Determination of Existence of Preliminary Fact--Evid Code § 402

[1] Evid Code § 402 Text

● *Evid Code § 402.*

(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.**

LegH: 1965 ch. 299.

[2] Commission Comments

Under *Evid Code § 310*, the court must decide preliminary questions of fact upon which the admissibility of evidence depends. *Evid Code § 402* prescribes certain procedures that must be observed by the court when making such preliminary determination [Cal Law Rev Com Comment].

Legislative Note:

Based on former *CCP § 2102*, *Evid Code § 402(b)* changed the law by requiring the judge to hear preliminary facts with regard to a criminal defendant's confession or admission out of the presence of the jury.

➡ Cross Reference:

Further discussion of admissibility of proffered evidence, see *§ 10.04[3]*.

[3] Case Notes

Evid Code 402(b) does not mandate that a court must hold an evidentiary hearing on request. It states only that if a court holds an evidentiary hearing concerning the admissibility of a confession or admission, then it must do so outside the presence of the jury, if any party so requests [*People v. Hoyos* (2007) 41 C4th 872, 897, 63 CR3d 1, 162 P3d 528 , cert den 2008 U.S. LEXIS 1571 (defendant's objections to jailhouse testimony went to weight and not admissibility of testimony; conviction affirmed)].

Issues regarding a witness's credibility are properly left to the jury and are not a proper subject of an *Evid Code* § 402 hearing. Whether a statement had actually ever been made was for the jury to determine. In any event, a defendant in a murder trial did not dispute that he and the witness had been in adjacent holding cells and provided no authority supporting his contention that the trial court has a sua sponte duty to conduct an evidentiary hearing to determine a preliminary fact [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224 (prosecution for murder and theft)].

When there is a dispute over the existence of a preliminary fact, the court may conduct an evidentiary hearing to decide whether the property owner in an eminent domain action has presented evidence sufficient to satisfy his burden of production. Because this initial burden is the burden of going forward, the property owner satisfies this burden by presenting substantial evidence to support his claim. The property owner does not have to prove his claim. The court need only be convinced that the property owner has presented admissible evidence sufficient to go before a jury. The jury decides the ultimate fact. If the property owner presents substantial evidence and the evidence is relevant to the question of just compensation (i.e., may affect the value of the property), the court should not exclude the evidence from the jury's consideration. Where the preliminary facts are in dispute, they also present a question of fact for the jury. The jury should have access to all evidence relevant to the determination of the fair market value of the property on the date of valuation. The property owner, therefore, should not bear the burden of proof on the amount of compensation or any preliminary facts that may affect the jury's determination of that amount [*Metropolitan Water District v. Campus Crusade for Christ, Inc.* (2005) 135 CA4th 568, 588, 37 CR3d 598] .

While evidence of substantially similar tire-failure accidents would have been admissible to prove that plaintiff's tire failure accident occurred in the same manner, the trial court did not abuse its discretion in finding that plaintiff's expert's opinion lacked sufficient foundation, being unsupported by relevant facts about similar tires that failed. These problems did not go to the weight of the expert's testimony. Because his opinions and conclusions were nothing more than speculation, his testimony could not constitute substantial evidence in support of a verdict in plaintiff. The trial court correctly excluded the testimony in its entirety [*Stephen v. Ford Motor Co.* (2005) 134 CA4th 1363, 1371-1373, 37 CR3d 9 , (upholding nonsuit against plaintiff)].

Under *Evid Code* § 402(b), in situations going directly to the crime charged, the trial court has discretion as to whether or not it will hear evidence of preliminary facts in the presence of the jury [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123 , cert. denied, 118 S Ct 1169 (1998) (court's suggestion that it would hold a Section 402 hearing "at the appropriate time" did not bind court to conduct hearing, or outside jury's presence); *People v. MacIntosh* (1968) 264 CA2d 701, 70 CR 667 (legality of search and seizure); *People v. Scherr* (1969) 272 CA2d 165, 77 CR 35 (defendant's mental condition)].

In the absence of the conditions specified in *Evid Code* § 402(b)(1)-(4), the court may hear and determine the question of admissibility in the jury's presence [*People v. Rodriguez* (1971) 18 CA3d 793, 96 CR 162] .

When neither party requests an in camera hearing, the trial court is not required to order one sua sponte [*People v. Fowler* (1980) 109 CA3d 557, 167 CR 235] .

To hold an extended hearing in the jury's presence concerning the adequacy of a *Miranda* advisement was an abuse of discretion [*People v. Zaragoza* (1987) 188 CA3d 723, 236 CR 299 (no request for hearing was made; abuse of

discretion did not require reversal)].

Whether to conduct voir dire of witness outside the presence of the jury under *Evid Code* § 402(b) is a matter within the trial court's discretion [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123 (expert witness on gangs); *People v. Marshall* (1996) 13 C4th 799, 55 CR2d 347 (voir dire of adult witness in front of jury regarding the witness's ability to tell the truth did not surround witness with an undeserved aura of credibility or give the impression that opening counsel could not attack witness's credibility; proper admonition given by court)].

Denial of a *Pen Code* § 1538.5 motion to suppress is an implied finding that the testimony of the prosecution witnesses is true [*People v. Saam* (1980) 106 CA3d 789, 165 CR 256 ; *People v. Maury* (2003) 30 C4th 342, 133 CR2d 561 (finding that defendant's prior statements were voluntarily made was implied from court's order admitting statement into evidence)].

The proper means of suppressing statements obtained in violation of *Miranda* rights is by use of a hearing pursuant to *Evid Code* § 402. A finding that a statement was taken in violation of *Miranda* because of a police failure to give *Miranda* admonitions would justify the suppression of only the statement itself, not other evidence, including physical evidence, obtained through use of the unlawful but noncoerced statement [*People v. Brewer* (2000) 81 CA4th 442, 96 CR2d 786] .

The existence of facts constituting an element of a defense literally falls within the definition of "preliminary fact" within the meaning of *Evid Code* § 402(a) because the admissibility of the evidence comprising the entire defense depends on it [*People v. Galambos* (2002) 104 CA4th 1147, 128 CR2d 844 (at least when defense is novel and raises questions of whether there is sufficient evidence to sustain each element of the proffered defense--as in this case in which defendant was charged with marijuana cultivation and possession of marijuana for sale and raised defense of medical necessity and limited immunity afforded under Proposition 215--such a hearing is justified so that otherwise irrelevant and confusing matter is not placed before jury)].

The trial court may properly make a preliminary determination that the expert testimony of a law enforcement officer on the subject of prison gangs, proffered by defendant, is inadmissible as cumulative to defendant's own testimony on that subject [*People v. Chavez* (2000) 84 CA4th 25, 100 CR2d 680] .

The trial court properly rejected counsel's vague offer of proof under *Evid Code* § 402, in the absence of any explanation as to how the victim's brother's alleged drug dealing had any tendency to prove or disprove any disputed material fact in the case, or what evidence was available to establish its relevance to the charges of murder and robbery [*People v. Morrison* (2004) 34 C4th 698, 21 CR3d 682] .

If a psychotherapist reports that a patient made a threat to a third person, without a hearing to establish the context of the patient's statements, which would be a preliminary fact, a conviction on appeal may be reversed for insufficient evidence [*People v. Felix* (2001) 92 CA4th 905, 112 CR2d 311 (insufficient evidence to support defendant's conviction for making a terrorist threat against his ex-girlfriend to his psychotherapist because the state could not adequately prove the factual setting of defendant's remarks)].

The court has the discretion to hold a foundational hearing before admitting evidence of uncharged crimes at the penalty phase of a capital trial. Such a hearing may be advisable to minimize the risk that the evidence may not be sufficient to convince all jurors of the defendant's guilt, but it is not required [*People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186 (no abuse of discretion or prejudice in admitting evidence of uncharged murder at penalty phase, without foundational hearing)].

Substantial evidence of other violent criminal activity is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt [*People v. Griffin* (2004) 33 C4th 536, 15 CR3d 743 (evidentiary

hearing during penalty phase)].

Examples:

Specific preliminary determinations:

- Hearing whether to allow introduction of defendant's history of alcohol-related offenses in DUI vehicle homicide prosecution [*People v. Johnson (1994) 30 CA4th 286, 36 CR2d 4*].
- Fairness of identification procedure [*People v. Citrino (1970) 11 CA3d 778, 90 CR 80* ; *People v. George (1972) 23 CA3d 767, 100 CR 427* (criticizing the scope of Citrino)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Pretrial Motions & Procedures Suppression of Evidence Evidence Procedural Considerations Weight & Sufficiency Real Property Law Property Valuation



84 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.04

10.04 Procedure for Determination of Admissibility of Proffered Evidence--Evid Code § 403

[1] Evid Code § 403 Text

■ *Evid Code § 403.*

(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence, 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.

LegH: 1965 ch. 299.

[2] Commission Comments

As indicated in the Comment to *Evid Code* § 402, the judge does not determine in all instances whether a preliminary fact exists or does not exist. At times, the judge must admit the proffered evidence if there is evidence sufficient to sustain a finding of the preliminary fact, and the jury must finally decide whether the preliminary fact exists. *Evid Code* § 403 covers situations in which the judge is required to sustain a finding of the preliminary fact [Cal Law Rev Com Comment].

To eliminate uncertainties of classification, *Evid Code* § 403(a) lists the kinds of preliminary fact questions that are to be determined under the standard prescribed in Section 403. These preliminary fact questions are not finally decided by the judge because they have been traditionally regarded as jury questions [Cal Law Rev Com Comment].

Under *Evid Code* 403(b), the judge may receive evidence that is conditionally admissible under Section 403, subject to the presentation of evidence of the preliminary fact later in the course of the trial. *Evid Code* § 403(c) relates to instructions to be given to the jury when evidence is admitted whose admissibility depends on the existence of a preliminary fact determined under Section 403. When such evidence is admitted, the jury is required to make the ultimate determination of the existence of the preliminary fact. Unless the jury is persuaded that the preliminary fact exists, it is not permitted to consider the evidence [Cal Law Rev Com Comment].

[3] Case Notes

[a] Court's Determination

The trial judge's task under *Evid Code* § 403 is to determine, irrespective of any belief as to the existence or nonexistence of the preliminary fact, whether or not a reasonable trier of fact could find that the preliminary fact does exist [*People v. Pizarro* (2003) 110 CA4th 530, 3 CR3d 21 (whether foundational evidence is sufficiently substantial is within trial court's discretion); *Granville v. Parsons* (1968) 259 CA2d 298, 66 CR 149 (effect of evidence on witness credibility)].

Under *Evid Code* § 403, the trial court may determine preliminary facts regarding the relevance of evidence, the personal knowledge of a witness, the authenticity of a writing, and the statements and conduct of a person. The trial court's role here is to assess whether there is sufficient evidence to present these matters to the jury. If there is, the matter is submitted to the jury for a final determination; if not, the matter is inadmissible. The preliminary fact questions in this class of cases are those that have been traditionally regarded as jury questions [*Islas v. D & G Manufacturing Co., Inc.* (2004) 120 CA4th 571, 15 CR3d 559] .

In a murder trial, the trial court did not abuse its discretion in excluding evidence of a prosecution witness's reputation, which was offered as part of defendant's self-defense claim. There was no evidence of the foundational fact that defendant knew of the witness's reputation for dangerousness or that the witness associated with the murder victims, nor any evidence that the witness had ever acted aggressively towards defendant [*People v. Tafoya* (2007) 42 C4th 147, 165-166, 64 CR3d 163, 164 P3d 590] .

Under *Evid Code* § 403(a)(2), personal knowledge, including the capacity to perceive and recollect particular events, is determined in a different manner from fundamental capacity to act as a witness. Evidence may be excluded for lack of personal knowledge only if no jury could reasonably find that the witness has such knowledge. In a murder prosecution, the record contained ample evidence from which a rational jury could conclude that a severely beaten witness did perceive and independently recollect the attacks and their surrounding circumstances, and correctly identified defendant as the assailant. That the witness's various accounts were inconsistent in some respects, or that his testimony revealed lapses in memory, was no basis for a determination that he was fundamentally unable to perceive or recollect the testimonial events. It was up to the jury to decide whether his recollections were accurate [*People v. Zambrano*

(2007) 41 C4th 1082, 1140-1141, 63 CR3d 297, 163 P3d 4] .

In a case involving property valuation, when presented with a proffer that there is a highest and best use that is not permitted by the property's current zoning, the trial court should examine whether the proffer supplies sufficient evidence to permit the jury to find that there was a reasonable probability of rezoning to permit that use in the near future. The jury then should be instructed that it may consider the change in use, provided that it first finds a reasonable probability the property could be rezoned in the near future. In this case, however, the trial court collapsed these two steps into one by deciding, prior to trial, whether it was convinced there was a reasonable probability of rezoning. The matter would be remanded for the trial court to reexamine the record under the correct standard [*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ* (2007) 41 C4th 954, 970, 62 CR3d 623, 161 P3d 1175] .

Whether foundational evidence is sufficiently substantial under *Evid Code* § 403 is a matter within the court's discretion. There is nothing fundamentally unfair about applying ordinary rules of evidence to exclude speculative opinion testimony, especially when there is an obvious alternate source for the same information [*People v. Cornwell* (2005) 37 C4th 50, 83-84, 33 CR3d 1, 117 P3d 622 (trial court properly excluded "reverse diagnosis based on medication" where doctor witness lacked personal knowledge concerning defendant's condition)].

The proper standard under *Evid Code* § 403 is preponderance of the evidence. The trial court must determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence, even if the court personally would disagree [*People v. Marshall* (1996) 13 C4th 799, 55 CR2d 347] .

The trial court did not err in admitting, as evidence of premeditation, evidence of anonymous phone calls to the victim's home the night before defendant burglarized, raped, and murdered her. The day before the phone calls, defendant had stolen the victim's wallet, and although not clear from the record, the wallet might have contained a card or document with her unlisted number. The jury may reasonably have inferred that defendant made those calls. Moreover, evidence of the calls touched only tangentially on the question of defendant's mental state at the time of the crimes, and therefore their admission, if error, was harmless by any applicable standard [*People v. Williams* (2006) 40 C4th 287, 313-314, 52 CR3d 268, 148 P3d 47 (applying *Evid Code* § 403(a))].

The decision whether to admit parol evidence to interpret a contract involves a two-step process. The first is to review the offered material regarding the parties' intent to see if the language is reasonably susceptible of the interpretation urged by a party. If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract [*Roden v. Bergen Brunswick Corp.* (2003) 107 CA4th 620, 132 CR2d 549] .

The possibility that there was a missing page in a letter proffered by the prosecution did not prevent the court from finding sufficient evidence in the letter [*People v. Morris* (1991) 53 C3d 152, 279 CR 720 (appeal from death penalty case, first degree murder with special circumstances)].

The critical difference between *Evid Code* §§ 403 and 405 is that under Section 403 the court makes a preliminary determination regarding sufficiency, while under Section 405 the court makes a final determination regarding the existence of the preliminary fact. Under *Evid Code* § 403, absent some evidentiary consideration other than sufficiency of the evidence, the proponent may present the proffered evidence to the jury if a reasonable trier of fact could conclude that the preliminary fact is more likely than not to be true [*People v. Herrera* (2000) 83 CA4th 46, 98 CR2d 911 (2000)] .

[b] Jury Instruction to Disregard Proffered Evidence

Evid Code § 403 does not require a sua sponte duty to instruct [*People v. Marshall* (1996) 13 C4th 799, 55 CR2d 347 (reconstruction photographs)].

The trial court in a murder prosecution did not err by failing to sua sponte instruct the jury regarding the main prosecution witness's capacity to perceive and recollect as a preliminary fact. The record reflected in part that this witness did not suffer from severe mental defects that substantially affected his testimony or that his cocaine use substantially interfered with his ability to perceive and recollect. Furthermore, there was no evidence as to exactly when the witness stopped taking a major tranquilizer, or that he would otherwise experience hallucinations without taking the medication, from which to infer that he experienced hallucinations on the day of the murder [*People v. Lewis* (2001) 26 C4th 334, 110 CR2d 272, 28 P3d 34] .

In a paternity suit, for the "probability of paternity" statistics to be relevant, the jury had to find two preliminary facts: (1) the mother and the alleged father engaged in sexual intercourse, and (2) at such a time when, according to the laws of nature, the woman could conceive. *Evid Code* § 403 requires an instruction, where requested, to disregard the proffered evidence unless it finds the existence of the preliminary fact [*Everett v. Everett* (1984) 150 CA3d 1053, 201 CR 351 (instruction was proper)].

[c] Conditional Admission of Proffered Evidence--"Connecting Up"

The procedure of admitting evidence conditionally by either reserving ruling on objection or by admitting the evidence subject to a motion to strike is proper when the trial court is not in a position to determine whether in the light of all the offered evidence, the item objected to will turn out to be admissible [*Gribaldo, Jacobs, Jones, and Associates v. Agrippina Versicherungen A.G.* (1970) 3 C3d 434, 91 CR 6, 476 P2d 406 ; *Pacific Gas & Electric Co. v. G.W. Thomas Drayage and Rigging Co., Inc.* (1968) 69 C2d 33, 69 CR 569, 442 P2d 641] .

[d] Failure to Make Offer of Proof

Consideration of an assignment of error on appeal is precluded by failure to make a showing of the preliminary fact that will provide relevancy to the proffered evidence [Pugh v. See's Candies, Inc. (1988) 203 CA3d 743, 250 CR 195] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceProcedural

ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsWeight & Sufficiency



85 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.05

10.05 Determination of Existence of Preliminary Fact--Proffered Evidence Admissibility--Evid Code § 404

[1] Evid Code § 404 Text

● *Evid Code § 404.*

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.

LegH: 1965 ch. 299.

[2] References

Privilege against self-incrimination [*Cal Const, art I, § 15; Evid Code § 940*].

Compelling witness to furnish self-incriminating testimony or document in administrative proceeding [*Gov Code §§ 18676, 18677*].

Calling witness to give testimony that may be incriminating [*Pen Code § 1324*].

[3] Commission Comments

Although the person claiming the privilege under *Evid Code § 940* has the burden of showing possible incrimination, he or she is not required to produce evidence as such but rather information sufficient to indicate that the proffered evidence might incriminate him [*Cal Law Rev Com Comment*].

In addition to considering the evidence, the trial court must consider the matters disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other relevant factors [*Cal Law Rev Com Comment*].

[4] Case Notes

When incrimination is readily apparent, the trial court should order the witness to refrain from answering the question, but when the tendency of an answer to be incriminatory is not readily apparent, the trial court should first request the views of counsel on the matter [*People v. Lucas* (1995) 12 C4th 415, 48 CR2d 525 (witnesses may refuse to answer questions calling for a potential link in a chain of evidence of guilt); *In re Marshall K.* (1970) 14 CA3d 94, 92 CR 39] .

Defendant who refused to testify on the grounds that he would subject himself to impeachment by a prior felony conviction was not required to make an offer of proof because that would violate his rights against self-incrimination [*People v. Fries* (1979) 24 C3d 222, 155 CR 194, 594 P2d 19] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law &
Procedure Witnesses General Overview Governments Legislation Statutes of Limitations General Overview



86 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.06

10.06 Other Determinations--Evid Code § 405

[1] Evid Code § 405 Text

■ *Evid Code § 405.*

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 preliminary fact differs from the court's determination of the preliminary fact.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 405 requires the judge to determine the existence or nonexistence of certain preliminary facts because such facts are considered too unreliable to be evaluated properly by the jury or because public policy requires their exclusion [Cal Law Rev Com Comment].

Example:

The trial court erroneously determined a preliminary fact, that a machine that amputated the plaintiff's fingers was not a power press, that should have been jury question [*Islas v. D & G Manufacturing Co.*,

Inc. (2004) 120 CA4th 571, 15 CR3d 559] .

Under Section 405, the judge first indicates to the parties who has the burden of proof and the burden of producing evidence on the disputed issue as implied by the rule of law under which the question arises. The parties then submit their evidence on the preliminary issue to the court. If the court is persuaded by the party with the burden of proof, it finds in favor of that party with regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, the court finds against the party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding [Cal Law Rev Com Comment].

Legislative Note: Based on former *CCP § 2102*, *Evid Code § 405* is generally declarative of pre-Code law.

[3] Case Notes

[a] Civil Cases

Whether a person should be disqualified as a witness because he or she is incapable of expressing himself or herself understandably concerning the testimonial matter, or is incapable of understanding the duty of a witness to tell the truth, are preliminary facts to be determined exclusively by the court under *Evid Code § 405(a)* [*People v. Zambrano (2007) 41 C4th 1082, 1140, 63 CR3d 297, 163 P3d 4* (in murder prosecution, badly beaten witness nevertheless was capable of testifying)].

In a civil proceeding to commit a mentally retarded person on the basis that he was a danger to himself or others, it was error to admit the testimony of a police officer concerning criminal admissions by the mentally retarded person without first holding a Section 405 hearing to determine the voluntariness of the admissions [*Cramer v. Shay (1979) 94 CA3d 242, 156 CR 303*] .

Whether a contract is integrated is a question of law to be decided by the court in accordance with the provisions of *Evid Code § 405*. If the court decides that it cannot be said as a matter of law that the document is integrated, the proffered parol evidence is admitted and the jurors are instructed that they are to decide what the terms of the contract are, based on the oral and written evidence. The jury should not be allowed to redetermine the issue of integration [*Brawthen v. H & R Block, Inc. (1975) 52 CA3d 139, 124 CR 845*] .

It is the function of the court to determine the existence or nonexistence of a preliminary fact. That determination, under certain circumstances, may require expert assistance [*Mavroudis v. Superior Court (1980) 102 CA3d 594, 162 CR 724* (psychiatric expert not required for determination of existence of facts on which *Evid Code § 1024* is predicated)].

When the factual or legal basis of an exception to a claim of privilege has been put in issue, the People must make at least a prima facie showing of a violation of the offense or offenses that give rise to the exception [*Fortes v. Municipal Court for the Judicial District of Sacramento County (1980) 113 CA3d 704, 170 CR 292*] .

[b] Criminal Cases

Preliminary questions of law (in particular, the admissibility of evidence) are to be determined by the court in a voir dire procedure outside the presence of the jury. If the evidence is admitted, *Evid Code § 405* provides that the jury must not be instructed to disregard the evidence if its determination of the preliminary fact differs from that of the court. Thus, if the trial court found a confession to be voluntary and hence admissible, the jury is not to be instructed to disregard the confession if it found the confession to be involuntary. The trial court's determination is final [*People v. Carroll (1970) 4 CA3d 52, 84 CR 60* (voluntariness of confession)].

The California Supreme Court has ruled that the admission of an involuntary confession comes within the harmless error rule as a "trial error" occurring during the presentation of a case to the trier of fact and as such will not result in automatic reversal. The confession may be quantitatively assessed in the context of other evidence in order to determine whether its admission is harmless beyond a reasonable doubt [*Arizona v. Fulminante* (1991) 499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (suspected murderer of stepdaughter confessed crime to another inmate, a paid FBI informer, in exchange for protection from other inmates' rough treatment of a child killer)].

The "court" includes any judge of the court in which the case is pending, so that the judge trying the case need not call in another judge to hear the voir dire examination [*People v. Carroll* (1970) 4 CA3d 52, 84 CR 60 (voluntariness of confession)].

Although results of a polygraph examination are generally inadmissible under *Evid Code* § 351.1 in a criminal proceeding, *Evid Code* § 405 does not cover use of such results in civil or noncriminal juvenile matters. In the latter situation, an evidentiary hearing pursuant to *Evid Code* §§ 400-405 to determine the admissibility of the polygraph evidence must be granted [*In re Kathleen W.* (1987) 190 CA3d 68, 235 CR 205] .

The jury does not redetermine whether a confession was voluntarily made subsequent to the court's determination that a confession was voluntary, and therefore, admissible [*People v. Jiminez* (1978) 21 C3d 595, 147 CR 172] .

For the ruling of the trial court regarding the sufficiency of foundational proof to be disturbed on appeal there must have been (1) an apparent abuse of discretion [*People v. Pollock* (1939) 31 CA2d 747, 89 P2d 128 (dying declaration)], or (2) a palpably erroneous decision on the evidence [*People v. Midkiff* (1968) 262 CA2d 734, 68 CR 866 (waiver of rights following arrest)].

The critical difference between *Evidence Code* §§ 403 and 405 is that under Section 403 the court makes a preliminary determination regarding sufficiency, while under Section 405 the court makes a final determination regarding existence of the preliminary fact [*People v. Herrera* (2000) 83 CA4th 46, 98 CR2d 911] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Interpretation Parol Evidence General Overview Criminal Law & Procedure Jury Instructions General Overview Evidence Procedural Considerations Exclusion & Preservation by Prosecutor



87 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

C. Admitting and Excluding Evidence (Evid Code §§ 350-406)

Chapter 10 Preliminary Determination on Admissibility Evidence Code §§ 400-406

1-10 California Courtroom Evidence 10.07

10.07 Evidence Relevant to Weight or Credibility--Admissibility--Evid Code § 406

[1] Evid Code § 406 Text

- *Evid Code § 406.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

Other sections in this article provide that the judge determines whether proffered evidence is admissible (*i.e.*, whether it may be considered by the trier of fact). *Evid Code § 406* simply makes it clear that the judge's decision on a question of admissibility does not preclude the parties from introducing before the trier of fact evidence relevant to weight and credibility [Cal Law Rev Com Comment].

Examples:

- Fairness of identification [*People v. Rodriguez (1970) 10 CA3d 18, 88 CR 789*] .
- Qualifications of expert witness [*People v. King (1968) 266 CA2d 437, 72 CR 478*] .

[3] Case Notes

When defendant's testimony opened up questions that could properly be rebutted by admission of an unedited tape of the defendant's statements to the police, it was not reversible error to admit the tape despite the fact that defendant contended it was highly prejudicial [*People v. Dreas (1984) 153 CA3d 623, 200 CR 586*] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceRoutine Practices



88 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 11 Weight of Evidence Evidence Code §§ 410-413

1-11 California Courtroom Evidence 11.syn

§ 11.syn Synopsis to Chapter 11: Weight of Evidence Evidence Code §§ 410-413

11.01 Direct Evidence--Evid Code § 410

[1] Evid Code § 410 Text

[2] Case Notes

[a] Direct and Circumstantial Evidence Distinguished

[b] Direct Evidence

[c] Circumstantial Evidence

11.02 Evidence of One Witness Sufficient to Prove Fact--Evid Code § 411

[1] Evid Code § 411 Text

[2] Case Notes

[a] Testimony of One Witness

[b] Effect of Uncontradicted Testimony

[c] Summary Judgment

[d] Exceptions

11.03 Weak Versus Strong Evidence--Evid Code § 412

[1] Evid Code § 412 Text

[2] Commission Comments

[a] Reference

[3] Case Notes

[a] Failure to Call Witness

[b] Criminal Cases

11.04 Failure to Explain or Deny Evidence or Facts--Suppression--Evid Code § 413

[1] Evid Code § 413 Text

Scope

[2] Case Notes



89 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 11 Weight of Evidence Evidence Code §§ 410-413

1-11 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 410 through 413* on the weight of evidence.



Cross Reference:

Further discussion of relevancy issues, including weight of evidence, see *California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence, § 22.30* (Matthew Bender).

Further discussion of weight of evidence, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections, and Imwinkelried et al., California Evidentiary Foundations, Ch. 11, Substitutes for Evidence (Matthew Bender).



90 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 11 Weight of Evidence Evidence Code §§ 410-413

1-11 California Courtroom Evidence 11.01

11.01 Direct Evidence--Evid Code § 410

[1] Evid Code § 410 Text

- Evid Code § 410.

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.

LegH: 1965 ch. 299.

[2] Case Notes

[a] Direct and Circumstantial Evidence Distinguished

"Direct evidence" and "positive evidence" are distinguished from "indirect evidence" and "circumstantial evidence" [*People v. Di Giacomo* (1961) 193 CA2d 688, 14 CR 574 (consummation of criminal act)].

Evidence can be direct evidence of one fact (that an admission was made) and circumstantial evidence of another fact (the truth of the admission) [*People v. Gould* (1959) 170 CA2d 489, 338 P2d 938 (admission); *People v. Koenig* (1946) 29 C2d 87, 173 P2d 1 (admission)].

The line between direct evidence and circumstantial evidence (indirect evidence) is sometimes a fine one and a matter of degree [*People v. Crawford* (1967) 253 CA2d 524, 61 CR 472 (consummation of criminal act; identification)].

Extrajudicial admissions of defendant do not require independent corroboration with other direct evidence tending to connect the defendant to the offense as long as the corpus delicti has been independently established [*People v. Holmes* (1993) 16 CR2d 52] .

[b] Direct Evidence

When a witness testifies to what he or she has seen or heard, that testimony is direct evidence regardless of whether the facts are reduced to writing or otherwise recorded. If recorded, the witness is not testifying as to the contents of the

record but rather as to what was perceived [*People v. Thompson* (1957) 147 CA2d 543, 305 P2d 274 (identification); *People v. Kulwin* (1951) 102 CA2d 104, 226 P2d 672 (consummation of criminal act); *People v. Rayol* (1944) 65 CA2d 462, 150 P2d 812 (consummation of criminal act; defendant's state of mind)].

[c] Circumstantial Evidence

Circumstantial evidence is evidence applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from direct evidence, are [*People v. Crawford* (1967) 253 CA2d 524, 61 CR 472 (consummation of criminal act; identification)]:

- The existence and presentation of one or more evidentiary facts.
- A process of inference, by which these facts are connected with the facts sought, tending to produce a persuasion of their truth.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Examination of Witnesses General Overview Evidence Procedural Considerations Circumstantial & Direct Evidence Evidence Relevance Pleas & Related Statements



91 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 11 Weight of Evidence Evidence Code §§ 410-413

1-11 California Courtroom Evidence 11.02

11.02 Evidence of One Witness Sufficient to Prove Fact--Evid Code § 411

[1] Evid Code § 411 Text

- *Evid Code § 411.*

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.

LegH: 1965 ch. 299.

[2] Case Notes

[a] Testimony of One Witness

Testimony of one witness, which was similar to testimony of other witnesses, was sufficient to uphold trial court's finding [*Bradley v. Perrodin (2003) 106 CA4th 1153, 131 CR2d 402*] .

One person's declaration describing his duties as an assistant manager was sufficient to support class certification in lawsuit for recovery of unpaid overtime compensation [*Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 C4th 319, 17 CR3d 906*] .

[b] Effect of Uncontradicted Testimony

The testimony of one witness who is entitled to credit is sufficient for proof of any fact even though that testimony be uncorroborated and contradicted by the testimony of any number of other witnesses [*Chodos v. Insurance Co. of North America (1981) 126 CA3d 86, 178 CR 831* (single witness may be a party)].

The existence of documentary evidence does not impair the validity of this rule [*Bank of Costa Mesa v. Losack (1977) 74 CA3d 287, 141 CR 550* (bank account books)].

It is the general rule that the uncontradicted and unimpeached testimony of a witness to a particular fact [*Plastic Pipe & Fittings Assn. v. California Building Standards Com. (2004) 124 CA4th 1390, 22 CR3d 393* ; *Joseph v. Drew (1950)*

36 C2d 575, 225 P2d 504 (architectural term of art); *Mantonya v. Bratlie* (1948) 33 C2d 120, 199 P2d 677 (employer-employee relationship); *Hicks v. Reis* (1943) 21 C2d 654, 134 P2d 788 (permission to use automobile); *Gomez v. Cecena* (1940) 15 C2d 363, 101 P2d 477 (beneficial interest in property); *Hayward v. Rogers* (1882) 62 C 348 (action for money due)]:

1. May not be arbitrarily disregarded; and
2. Is to be accepted as proof of the fact unless grounds exist for disbelieving it.

This is also true for the uncontradicted and unimpeached testimony of an expert witness [*Krause v. Apodaca* (1960) 186 CA2d 413, 9 CR 10 (cause of conflagration); *Wirz v. Wirz* (1950) 96 CA2d 171, 214 P2d 839 (incurable insanity)].

The trial judge is not bound to accept as true the sworn testimony of a witness, even in the absence of contradicting evidence [*Warner Bros. Records Inc. v. Golden West Music Sales* (1974) 36 CA3d 1012, 112 CR 71] .

Testimony by a tenant detailing the customary and habitual mailing practices of his business was sufficient to prove the fact of those mailing practices. An uncorroborated out-of-court identification is sufficient to support a conviction if the conviction passes the substantial evidence test [*People v. Cuevas* (1995) 12 C4th 252, 48 CR2d 135 (expressly overruling corroboration requirement); *Jenkins v. Tuneup Masters* (1987) 190 CA3d 1, 235 CR 214 (unlawful detainer)].

Testimony of a jailhouse informant that is not directly corroborated is not made unworthy of full credit as a matter of law because of the witness's possible motive to lie [*People v. Alcala* (1984) 36 C3d 604, 205 CR 775, 685 P2d 1126 (not analogous to accomplice testimony where accomplice has motive to shift guilt)].

[c] Summary Judgment

The sole declaration of a party opposing a summary judgment motion that raises a triable issue of fact is sufficient to deny the motion [*Estate of Housley* (1997) 56 CA4th 342, 65 CR2d 628 (declaration not facially incredible as a matter of law)].

[d] Exceptions

There are many exceptions and limitations to *Evid Code* § 411 that allow testimony to be disregarded when due to:

- Inherent improbability of the veracity of the testimony [*Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 124 CA4th 1390, 22 CR3d 393 (the uncorroborated testimony of one witness can constitute substantial evidence, unless the testimony is inherently unreliable); *Delia S. v. Torres* (1982) 134 CA3d 471, 184 CR 787 (uncorroborated testimony concerning alleged minor injuries)].
- Doubts about veracity arising from the demeanor of the witness [*Nelson v. Black* (1954) 43 C2d 612, 275 P2d 473 (plaintiff's testimony)].
- Bias of the witness [*Leonard v. Watsonville Community Hospital* (1956) 47 C2d 509, 305 P2d 36 (testimony of defendant's employee who was possibly liable)].
- Substantial lapse of time between occurrence and trial of fact [*La Jolla Casa de Manana v. Hopkins* (1950) 98 CA2d 339, 219 P2d 871 (four years)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCriminal Law &
ProcedureTrialsExamination of WitnessesChild WitnessesReal Property LawTitle QualityAdverse Claim
ActionsUnlawful Detainer



92 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 11 Weight of Evidence Evidence Code §§ 410-413

1-11 California Courtroom Evidence 11.03

11.03 Weak Versus Strong Evidence--Evid Code § 412

[1] Evid Code § 412 Text

- *Evid Code § 412.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

There is no inconsistency between *Evid Code § 913* and *Evid Code §§ 412* and *413*. Section 913 deals only with the inferences that may be drawn from the exercise of a privilege; it does not purport to deal with the inferences that may be drawn from the evidence in the case; and the fact that a privilege has been relied on is irrelevant to the application of these sections [Cal Law Rev Com Comment].

[a] Reference

Cal Const, art I, § 15.

[3] Case Notes

[a] Failure to Call Witness

The inference of *Evid Code § 412* does not apply when each party has an equal opportunity to produce the evidence (e.g., to call a certain witness) [*Provencio v. Merrick* (1970) 5 CA3d 39, 84 CR 882 (failure to call investigating police officer)].

Failure to comply with discovery procedures creates the same inference as failure diligently to prosecute an action under CCP § 583 [*Lumpkin v. Friedman* (1982) 131 CA3d 450, 182 CR 378] .

Failure to produce the better evidence within a party's knowledge leads to an inference that the evidence would not favor that party [*People v. Moran* (1970) 1 C3d 755, 83 CR 411, 463 P2d 763 (failure to call police informer); *Westinghouse Credit Corp. v. Wolfer* (1970) 10 CA3d 63, 88 CR 654 (failure to present evidence of communications); *People v. Coleman* (1969) 71 C2d 1159, 80 CR 920, 459 P2d 248 (failure to call wife)].

In the absence of an established duty to produce, it has generally been acknowledged that no adverse inference should be drawn, because neither side is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question [*People v. Avila* (1967) 253 CA2d 308, 61 CR 441] .

[b] Criminal Cases

In criminal cases, all comment by the prosecution on the failure of the defendant to testify in his own behalf (i.e., take the stand) is prohibited by the *Fifth and Fourteenth Amendments to the U.S. Constitution* [*Griffin v. California* (1964) 380 US 609, 85 S Ct 1229, 14 L Ed2d 106 (comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the *Fifth Amendment* outlaws); *People v. Bostick* (1965) 62 C2d 820, 44 CR 649, 402 P2d 529 (reversal requires showing of prejudice to defendant)].

The prosecution may comment on the failure of the defendant to produce witnesses other than defendant and may suggest the inference to be drawn from that failure [*People v. Vaughn* (1968) 262 CA2d 42, 68 CR 366 (failure to produce records of mental institution and testimony of clinical psychologists); *People v. Romero* (1966) 244 CA2d 495, 53 CR 260 (failure to produce companions)].

After defendant's direct testimony that he "did not want to kill anybody" opened the door to cross-examination concerning other offenses, both the prosecutor and codefendant's counsel were free to comment on defendant's silence or failure to explain the evidence. In any event, brief and mild references to a defendant's failure to testify, unaccompanied by any suggestion that the jury should draw an inference of guilt from it, are generally held to be harmless [*People v. Coffman and Marlow* (2004) 34 C4th 1, 17 CR3d 710 (murder prosecution)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Examination of Witnesses Cross-Examination Evidence Inferences & Presumptions Inferences Evidence Privileges Government Privileges Official Information Privilege Informer Privilege



93 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 11 Weight of Evidence Evidence Code §§ 410-413

1-11 California Courtroom Evidence 11.04

11.04 Failure to Explain or Deny Evidence or Facts--Suppression--Evid Code § 413

[1] Evid Code § 413 Text

■ *Evid Code § 413.*

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.

LegH: 1965 ch. 299.

Legislative Note:

Evid Code § 413 deals with inferences to be drawn from evidence whereas *Evid Code § 913* pertains to inferences not to be drawn from the exercise of a privilege.

➡ Cross Reference:

Further discussion or competing evidence, see *11.03[2]*.

[2] Case Notes

Comment on and inferences from exercise of privilege [*Cal Const, art I, § 15; Evid Code § 913*]. The inference of *Evid Code § 413* does not apply when each party has an equal opportunity to produce the evidence (e.g., to call a certain witness) [*Patton v. Royal Industries, Inc. (1968) 263 CA2d 760, 70 CR 44* (failure to call participant to telephone conversation)].

In an unjust enrichment action brought by a county against persons convicted of systematically bribing a county administrator, the defendants intentionally concealed their assets, testified falsely regarding many factual issues, and

were, at best, evasive and nonresponsive in answering questions as to their financial condition. This conduct gave the court wide latitude to make inferences from the evidence unfavorable to defendants, under *Evid Code § 413*, prior to imposing actual and punitive damages [*County of San Bernardino v. Walsh* (2007) 158 CA4th 533, 69 CR3d 848] .

A defendant's failure to explain or deny the evidence relating to his out-of-state traffic citations, relevant to suspension of his California driver's license, may be used by the Department of Motor Vehicles or by the court in determining what inferences to draw from the evidence [*Isaac v Dept of Motor Vehicles* (2007) 155 CA4th 851, 66 CR3d 372] .

In a product liability action arising from an allegedly defective passenger restraint system, a special instruction that told the jury that defendant had attempted to conceal evidence from being used at trial, and that the jury could consider that fact in determining what inferences to draw from the evidence as it related to the technical feasibility issue, was based on *Evid Code § 413* and properly ordered as a sanction, in view of referee's finding that defendant's intentional behavior had led to loss of evidence [*Karlsson v. Ford Motor Co.* (2006) 140 CA4th 1202, 1224, 45 CR3d 265] .

The unexplained absence of evidence does not create an inference that the evidence has been willfully suppressed [*Noll v. Department of Motor Vehicles* (1969) 274 CA2d 281, 79 CR 236 (failure to produce sobriety test report)].

When a witness is available to give rebuttal testimony, but the party does not call that witness, this raises a logical inference that the witness's testimony would have been adverse to the party calling the witness [*California Fair Employment and Housing Com. v. Central Aluminum Corp.* (2004) 122 CA4th 1004, 18 CR3d 906 ; *People v. Denney* (1984) 152 CA3d 530, 199 CR 623] .

In a retaliatory discharge action, a fact finder could draw an adverse inference from a supervisor's arguably pointed evasion of the direct question as to whether he expected his referral of an incident to the security department to result in plaintiff's termination [*Reeves v. Safeway Stores, Inc.* (2004) 121 CA4th 95] .



Cross Reference:

Discussion of adverse inference, see 11.03.

When defendant could not locate personnel file of supervisor who sexually harassed plaintiff and covered up file's disappearance, instruction that jury could infer that file contained damaging material was proper [*Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 16 CR2d 787] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
 Pretrial Motions & Procedures
 Suppression of Evidence
 Evidence Inferences & Presumptions
 Transportation Law
 Private Vehicles
 Operator Licenses
 Revocation & Suspension



94 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.syn

§ 12.syn Synopsis to Chapter 12: Judicial Notice Evidence Code §§ 450-460

12.00 Introduction

- [1] Judicial Notice Is Substitute for Proof
- [2] Court Will Consider Relevance and Prejudicial Effect

12.01 Judicial Notice--Evid Code § 450

- [1] Evid Code § 450 Text
- [2] Commission Comments
- [3] Case Notes

12.02 Mandatory Judicial Notice--Evid Code § 451

- [1] Evid Code § 451 Text
- [2] Commission Comments
- [3] Case Notes
 - [a] Construction of Statute
 - [b] Decisional, Constitutional, and Public Statutory Law
 - [c] Rules, Regulations, Orders, and Standards of General Application
 - [d] Significance of English Words and Phrases
 - [e] Indisputable Facts and Propositions Universally Known

12.03 Permissive Judicial Notice--Evid Code § 452

[1] Evid Code § 452 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Decisional, Constitutional, and Statutory Law

[c] Regulations and Legislative Enactments

[d] Legislative History

[e] Official Acts

[f] Court Records

[g] Foreign Law

[h] Facts of Common Knowledge and Facts Not Subject to Dispute

[i] Items Not Judicially Noticed

12.04 Computer-Generated Official Court Records of Criminal Convictions--Evid Code § 452.5

[1] Evid Code § 452.5 Text

[2] Legislative Notes

[3] Commission Comments

[4] Case Notes

12.05 Judicial Notice Mandatory on Request--Instructions--Evid Code § 453

[1] Evid Code § 453 Text

[2] Commission Comments

[3] Case Notes

12.06 Determination of Propriety of Taking Judicial Notice--Evid Code § 454

[1] Evid Code § 454 Text

[2] Commission Comments

[3] Case Notes

12.07 Reasonable Opportunity to Present Information--Source of Information--Judicial Notice--Evid Code § 455

[1] Evid Code § 455 Text

[2] Commission Comments

[3] Case Notes

12.08 Denial of Request to Take Judicial Notice--Notification--Evid Code § 456

[1] Evid Code § 456 Text

[2] Commission Comments

[3] Case Notes

12.09 Jury Instructions to Accept as Fact Matter Noticed--Evid Code § 457

[1] Evid Code § 457 Text

[2] Commission Comments

12.10 Judicial Notice of Later Proceedings--Evid Code § 458

[1] Evid Code § 458 Text

[2] Commission Comments

12.11 Judicial Notice by Reviewing Courts--Evid Code § 459

[1] Evid Code § 459 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Determination of Propriety

[c] When Judicial Notice Will Not Be Taken

12.12 Appointment of Knowledgeable Persons--Compensation--Evid Code § 460

[1] Evid Code § 460 Text

[2] Commission Comments

[3] Case Notes



95 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code § 450 et seq.* on judicial notice.



Cross References:

Discussion of judicial notice and appropriate forms, see *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence, 20.60* (Matthew Bender); *California Forms of Pleading and Practice, Ch. 321, Judicial Notice* (Matthew Bender); Imwinkelried et al., *California Evidentiary Foundations, Ch. 11, Substitutes for Evidence, C* (Matthew Bender); *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure, 26.17*.



96 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.00

12.00 Introduction

[1] Judicial Notice Is Substitute for Proof

Judicial notice obviates introducing evidence to prove certain matters. Judicial notice is thus a substitute for formal proof. It is not a type of evidence; rather, its effect is similar to that of a conclusive presumption [*see Evid Code § 457*]; it eliminates the possibility of presenting evidence to the jury disputing the matter noticed by the court.

[2] Court Will Consider Relevance and Prejudicial Effect

Only relevant material may be judicially noticed. Because judicial notice is a substitute for proof, it is always confined to those matters that are relevant to the issue at hand. The matters that must be and may be judicially noticed are subject to the qualification that the matter be relevant [*Evid Code §§ 350, 450*] and not unduly prejudicial [*Evid Code § 352; Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 C4th 1057, 31 CR2d 358, 875 P2d 73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeGeneral Overview



97 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.01

12.01 Judicial Notice--Evid Code § 450

[1] Evid Code § 450 Text

- *Evid Code § 450.*

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

LegH: 1965 ch. 299.

[2] Commission Comments

Like former *CCP § 1875*, which this division of the Evidence Code supersedes, judicial notice is not limited to those matters specified in the Evidence Code [*see Evid Code §§ 451, 452* (matters that must or may be judicially noticed)] but includes matters of common knowledge that are certain and indisputable, matters authorized or required by other statutes to be judicially noticed, and matters judicially noticed pursuant to case law [Cal Law Rev Com Comment].

Under the Evidence Code, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law [Cal Law Rev Com Comment].

Evid Code § 450 neither broadens nor limits the extent to which a court may resort to extrinsic aids in determining the rules of law that it is required to notice. Nor does *Evid Code § 450* broaden or limit the extent to which a court may take judicial notice of any other matter not specified in *Evid Code § 451* or *§ 452* [Cal Law Rev Com Comment].

[3] Case Notes

Relevant matters that are properly the subject of judicial notice may be treated as having been pleaded [*City of Hawthorne ex rel. Wohlner v. H&C Disposal Co. (2003) 109 CA4th 1668, 1 CR3d 312*] .

There is a vast difference between judicial notice and judicial knowledge; the party on whom rests the burden of

establishing the fact of which the court may take judicial notice is not relieved of the necessity of bringing that fact to the knowledge of court [*Popcorn Equipment Co. v. Page* (1949) 92 CA2d 448, 207 P2d 647] .

Courts need not take judicial notice that everything contained in a judicially noticed document is true [*Munoz v. State of California* (1995) 33 CA4th 1767, 39 CR2d 860] .

Although courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. Courts may not take judicial notice of allegations in affidavits, declarations, and probation reports in court records because these matters are reasonably subject to dispute and therefore require formal proof [*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 CA4th 875, 110 CR2d 877 (modified appellate decision was not the proper subject of judicial notice because the client never had a chance to contest the finding, and thus the finding was still a matter of dispute)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayRule ComponentsTruth of Matter AssertedEvidenceJudicial NoticeAdjudicative FactsFacts Generally KnownEvidenceJudicial NoticeDomestic Laws



98 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.02

12.02 Mandatory Judicial Notice--Evid Code § 451

[1] Evid Code § 451 Text

■ *Evid Code § 451.*

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.**

LegH: 1965 ch. 299; 1971 ch. 438; 1972 ch. 764; 1982 ch. 454; 1985 ch. 106; 1986 ch. 248.

[2] Commission Comments

Judicial notice of the matters specified in *Evid Code § 451* is mandatory, whether or not the court is requested to notice

them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points urged in the trial court may not be advanced on appeal [Cal Law Rev Com Comment].



Warning:

Counsel should take care to provide the court with references to pertinent cases, statutes, rules, and regulations, to ensure that these matters will be considered and made a part of the case.

This section includes matters of both law and fact. Other matters, such as the law of foreign nations and certain regulations and ordinances, will be found in *Evid Code* § 452 [Cal Law Rev Com Comment].

Under *Evid Code* § 451, judicial notice must be taken of the following [Cal Law Rev Com Comment]:

- Decisional, constitutional, and public statutory law of California.
- Rules, regulations, orders, and standards of general application by California state agencies [*Gov Code* §§ 11343.6, 11344.6].
- Rules of the State Personnel Board [*Gov Code* § 18576].
- Documents published in the Federal Register.
- California Rules of Court.
- Rules of pleading, practice, and procedure promulgated by the U.S. Supreme Court.
- Rules of Professional Conduct of the State Bar of California.
- Indisputable facts and propositions universally known.

That a fact is known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. It is not required that every person have knowledge of such facts [Cal Law Rev Com Comment; see *Evid Code* § 452(g)(h) (notice of facts that are indisputable but not universally known)].



Warning:

Matters noticed under this section are subject to the general requirements of relevancy [*Mozzetti v. City of Brisbane* (1977) 67 CA3d 565, 136 CR 751].



Strategic Point:

Because this section restates (with modification) the basic principles set forth in the law before the *Evid Code*, cases construing these basic principles still should be good law.

[3] Case Notes

[a] Construction of Statute

Courts will take judicial notice of the public and private official acts of the legislative, executive, and judicial departments of this state, whether or not pleaded [*Estate of Joseph* (1998) 17 C4th 203, 70 CR2d 619, 949 P2d 472 (statutory law mandatory); *Contractor's Safety Assn. v. California Comp. Ins. Co.* (1957) 48 C2d 71, 307 P2d 626], such as:

- Records of the State Bar [*In re Visciotti* (1996) 14 C4th 325, 58 CR2d 801, 926 P2d 987 ; *People v. Ngo* (1996) 14 C4th 30, 57 CR2d 456, 924 P2d 97].
- A jail house informant report [*In re Sassounian* (1995) 9 C4th 535, 37 CR2d 446, 887 P2d 527].
- Records showing that California administrative agencies routinely authorized payment of court-awarded attorney fees out of the agencies' current operating expense and equipment budgets or similar budgetary appropriations [*Mandel v. Myers* (1981) 29 C3d 531, 174 CR 841, 629 P2d 935].
- Administrative rules of the Insurance Commissioner relating to premium rates and dividends and rebates [*Contractor's Safety Assn. v. California Comp. Ins. Co.* (1957) 48 C2d 71, 307 P2d 626].

Exception:

Internal memos of a district attorney's office are not considered "official acts" of an executive agency [*People v. Pinholster* (1992) 1 C4th 865, 4 CR2d 765, 824 P2d 571].

[b] Decisional, Constitutional, and Public Statutory Law

A California court must take judicial notice of the decisional and statutory law of California and the United States [*Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 CA4th 759, 765, 48 CR3d 420].

The California Supreme Court would take judicial notice of additional federal decisions that do not appear in West's Federal Reporter and Federal Supplement [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 502 n3, 30 CR3d 787, 115 P3d 68].

Judicial notice of a statute defining "district" in the Water Code was required [*People v. Moore* (1997) 59 CA4th 168, 69 CR2d 56].

Although courts take judicial notice of public records, they do not take judicial notice of the truth of all matters stated therein [*Munoz v. State of California* (1995) 33 CA4th 1767, 39 CR2d 860 ; *People v. Long* (1970) 7 CA3d 586, 86 CR 590].

Both trial court and appellate court are required to take judicial notice of Ins Code sections [*Hinckley v. Bechtel Corp.* (1974) 41 CA3d 206, 116 CR 33].

[c] Rules, Regulations, Orders, and Standards of General Application

Regulations of county agency, established pursuant to statute, adopted under Administrative Procedures Act, and filed with Secretary of State, must be judicially noticed under *Gov Code* § 11343.6 [*Scott v. County of Los Angeles* (1994) 27 CA4th 125, 32 CR2d 643].

Judicial notice is not mandatory when State Administrative Manual is not adopted as a regulation under Administrative Procedures Act and where party fails to present a certified copy of duly promulgated regulations to the trial court as

required by Gov Code § 11343.6 [*Willis v. State of California* (1994) 22 CA4th 287, 27 CR2d 413].

Notice was taken of state regulations that pertained to in-home supportive services. These regulations were not published in the state administrative code [*In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 CA3d 720, 199 CR 697].

Parts of the CFR naming the criteria used by the Commissioner of Federal Housing when determining whether to approve an application for a rental increase under a guaranteed mortgage were required to be noticed by the appellate court [*Phillip Chang & Sons Associates v. La Casa Novato* (1986) 177 CA3d 159, 222 CR 800].

[d] Significance of English Words and Phrases

Courts may judicially notice dictionary definitions [*Golden Sec. Thrift v. First American Title* (1997) 53 CA4th 250, 61 CR2d 442 (dictionary definition of "dimensions" to interpret title insurance policy)].

[e] Indisputable Facts and Propositions Universally Known

No one can doubt that the population of even the largest city or county in California is only a small percentage of the population of the state as a whole. California courts have regularly taken judicial notice of demographic propositions far less obvious and universally known [*Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 CA4th 1427, 71 CR3d 332].

Courts may judicially notice facts of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute [*People v. Coulon* (1969) 273 CA2d 148, 78 CR 95 (judicial notice of term "hippie")].

Court took judicial notice of the "mathematical truth" that a 12" x 12" opening has a 17" diagonal [*Harris v. Capital Growth Investors XIV* (1989) 211 CA3d 886, 259 CR 586].

Court can take judicial notice that both citizens' income levels and regional housing costs vary within state; such notice is proper as a fact of common knowledge within court's territorial jurisdiction that is not really disputable [*People v. Bradley* (1982) 132 CA3d 737, 183 CR 434].

That marijuana is harmless is not judicially noticed as this is not indisputable [*Comings v. State Bd. of Education* (1972) 23 CA3d 94, 100 CR 73].

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law Practice & Proceedings General Overview Insurance Law Industry Regulation Rates Supporting Documentation Legal Ethics General Overview



99 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.03

12.03 Permissive Judicial Notice--Evid Code § 452

[1] Evid Code § 452 Text

■ *Evid Code § 452.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section includes matters both of law and those of fact. The court may take judicial notice of certain matters, even if not requested. But if counsel makes a request for a matter to be judicially noticed and complies with the applicable requirements [see *Evid Code* § 453], the court must take judicial notice of the matter [Cal Law Rev Com Comment].

If a party requests judicial notice and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party [see *Evid Code* § 453] [Cal Law Rev Com Comment].

The Evidence Code distinguishes between matters as to which judicial notice is mandatory [*Evid Code* § 451] and those to which it is optional [*Evid Code* § 452]. The optional provisions may become mandatory if a party so requests and complies with certain procedural guidelines [*Evid Code* § 453]. The mandatory provisions of *Evid Code* § 452 overlap the provisions of *Evid Code* § 451 in some respects. When this happens, the mandatory provision of *Evid Code* § 451 prevails [Cal Law Rev Com Comment].

Judicial notice may be taken (and must be taken if the conditions in *Evid Code* § 453 are met) of the following [Cal Law Rev Com Comment]:

- Decisional, constitutional, and statutory law in force in the territories and possessions of the United States [*Evid Code* § 452(a)].
- Resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States [*Evid Code* § 452(a)].
- Regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory, or possession of the United States [*Evid Code* § 452(b)].
- Official acts, including administrative and executive acts [*Evid Code* § 452(c)].
- Court records [*Evid Code* § 452(d)]. This is included to eliminate any uncertainty. Court records clearly are suitable for judicial notice.
- Rules of court [*Evid Code* § 452(e)]. To the extent that this overlaps with *Evid Code* § 451(c) and (d), notice is, of course, mandatory under *Evid Code* § 451.
- All law, in whatever form [*Evid Code* § 452(f)].

"Territorial jurisdiction" within the context of *Evid Code* § 452(g) refers to the county in which a superior court is located or the judicial district in which a municipal or justice court is located. The fact of which notice is taken need not be something physically located within the court's territorial jurisdiction [Cal Law Rev Com Comment].

"Sources of reasonably indisputable accuracy" as set forth in *Evid Code* § 452(h) include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. Such matters are restricted to use before the judge and parties, and are not to be received into evidence nor sent to the jury room [Cal Law Rev Com Comment].

The matters covered by *Evid Code* § 452(g) and (h) are included in *Evid Code* § 452, rather than *Evid Code* § 451 (mandatory judicial notice), because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. To the extent that *Evid Code* § 452(g) and (h)

overlap *Evid Code* § 451(f), notice is, of course, mandatory under *Evid Code* § 451 [Cal Law Rev Com Comment].



Strategic Point:

Since this section restates (with modification) the basic principles set forth in former *CCP* § 1875, earlier cases construing these basic principles are still good law.

[3] Case Notes

[a] Construction of Statute

Although judicial notice may be taken of a document, the truthfulness and proper interpretation of the document are disputable [*StorMedia Inc. v. Superior Court* (1999) 20 C4th 449, 84 CR2d 843, 976 P2d 214 ; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 C4th 1057, 31 CR2d 358, 875 P2d 73].

Judicial notice may be taken of materials bearing on legislative intent [*People v. Eubanks* (1996) 14 C4th 580, 59 CR2d 200, 927 P2d 310 (notice of legislative history to ascertain purpose and meaning of ambiguous statute)], such as:

- Documents from enactment histories of bills [*Lantzy v. Centex Homes* (2003) 31 C4th 363, 2 CR3d 655, 73 P3d 517].
- Letters and legislative staff analyses [*People v. Cruz* (1996) 13 C4th 764, 55 CR2d 117, 919 P2d 731].

Exception:

Materials compiled by the Legislative Intent Service are not subject to judicial notice [*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 C4th 26, 77 CR2d 709, 960 P2d 513].

Courts also may take judicial notice of official acts and regulations of departments of the United States [*Pearson v. State Social Welfare Board* (1960) 54 C2d 184, 5 CR 553, 353 P2d 33].

[b] Decisional, Constitutional, and Statutory Law

Although judicial notice may be taken of a finding by a state agency, a factual determination made in that action cannot be judicially noticed. A court may not take judicial notice of the truth of a factual finding made in another action [*Fowler v. Howell* (1996) 42 CA4th 1746, 50 CR2d 484].

Courts of this state may take judicial notice of the laws of sister states as well as the interpretation thereof by highest courts of appellate jurisdiction of such states [*Safeco Insurance Co. of America v. Tholen* (1981) 117 CA3d 685, 173 CR 23 (deciding whether to sustain demurrer on grounds of res judicata)].

When the court must interpret or use the law of a sister state, it is proper to take judicial notice. Such interpretation is a matter of law in which the judge, using the statutory and decisional law of the state in question, is an expert. If the judge is unable to interpret the sister state's law, he should not call in another "expert," such as an attorney from the sister state. Rather, under *Evid Code* § 311, he should use the law of California or dismiss the action [*People v. Bray* (1975) 52 CA3d 494, 124 CR 913].

[c] Regulations and Legislative Enactments

The court would take judicial notice of historical wage orders, which are regulations promulgated by the Industrial Welfare Commission, governing employment in the State of California [*Reynolds v. Bement* (2005) 36 C4th 1075, 1083 n3, 32 CR3d 483, 116 P3d 1162].

Several documents presented by an American Indian Tribe were properly the subject of judicial notice. The Tribe's constitution and bylaws, the Big Valley Rancheria Gaming Act of 1994, and the Resolution of the General Community Council of the Big Valley Rancheria No. 03-0197-1 were judicially noticeable respectively as a constitutional law, the legislative enactment of a public entity, and the official act of a "state" within the United States [*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 CA4th 1185, 1192, 35 CR3d 357 (citing *Evid Code* § 452(a)-(c))].

Maps are among the materials that the court may take notice of under *Evid Code* § 452(h) [*Fleetwood Enterprises, Inc. v. Workers' Compensation Appeals Board* (2005) 134 CA4th 1316, 1320 n3, 37 CR3d 587 (court would take judicial notice of distance and general direction of applicant's travels)].

The appellate court would take judicial notice of the decennial census from the U.S. Census Bureau's website [*Moehring v. Thomas* (2005) 126 CA4th 1515, 1523 n4, 25 CR3d 118].

Provisions of a tariff may be judicially noticed [*Dollar-A-Day-Rent-A-Car Systems v. Pacific Tel. & Tel. Co.* (1972) 26 CA3d 454, 102 CR 651].

County charter and rules adopted by the county Civil Service Commission may be judicially noticed [*Olson v. Sacramento County* (1974) 38 CA3d 958, 113 CR 664].

Court may take judicial notice of a municipal ordinance under *Evid Code* § 452(b) [*Martin v. City of Corning* (1972) 25 CA3d 165, 101 CR 678].

Court may take judicial notice of a school district resolution by which the school district adopted a fee study as a legislative enactment issued under the authority of a public entity in the United States [*La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 CA4th 804, 124 CR2d 618].

Court may take judicial notice of a city ordinance even though it was not mentioned by the parties [*McMaster v. City of Santa Rosa* (1972) 27 CA3d 598, 103 CR 749].

Trial and appellate courts may take judicial notice of city charter provisions [*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 CA3d 893, 165 CR 401 ; *City of Atascadero v. Merrill Lynch* (1999) 68 CA4th 445, 80 CR2d 329 (settlement agreement and release between county and securities broker)].

An appellate or trial court may take judicial notice of the foundational facts required for the official records exception to the hearsay rule [*People v. Abelson* (1980) 104 CA3d Supp 16, 164 CR 369 (city traffic survey)].

Judicial notice may be taken of the essentially identical arbitration codes of the New York Stock Exchange and the National Association of Securities Dealers [*Lewis v. Merrill Lynch, Pierce, Fenner and Smith, Inc.* (1986) 183 CA3d 1097, 228 CR 345 (*New York Stock Exchange Code of Arbitration Procedure*); *Parr v. Superior Court* (1983) 139 CA3d 440, 188 CR 801].

[d] Legislative History

Judicial notice has been taken of materials bearing on legislative intent:

- Report of legislative task force to assembly committee [*Reilly v. City and County of San Francisco* (2006) 142 CA4th 480, 487 n3, 48 CR3d 291 (appellate court took notice sua sponte)].
- Legislative history of an amendment to the judicial disqualification statute [*People v. Barrera* (1999) 70 CA4th 541, 82 CR2d 755].
- Legislative history of a senate bill [*People v. Herrera* (1998) 67 CA4th 987, 79 CR2d 539].
- Letter promulgated by the author of a senate bill [*McGlothen v. Department of Motor Vehicles* (1977) 71 CA3d 1005, 140 CR 168].
- In absence of objection, appellate court would take judicial notice of minutes of city council meeting and the city attorney's opinion as legislative history reflecting basis for that enactment [*Evans v. City of Berkeley* (2006) 38 C4th 1, 8 , cert denied, 127 S Ct 434, 166 L Ed 2d 330] .

Where the parties requested that the appellate court take judicial notice of a patchwork of documents they submitted regarding a code section's legislative history, and those documents did not provide a comprehensive view of the relevant history, the appellate court would deny the parties' various requests for judicial notice, except where noted otherwise, and instead, on its own motion, take judicial notice of the legislative materials cited in its opinion [*Mills v. Superior Court* (2006) 135 CA4th 1547, 1553 n5, 38 CR3d 497 (interpretation of *Lab Code* § 226.7)].

Exception--Law Revision Commission Studies:

Judicial notice was not taken of studies by the California Law Revision Commission, on the ground that the Commission's publication was not an expression of the legislature and the studies indicated an intent to change existing law, not simply clarify it [*Duarte v. Chino Community Hosp.* (1999) 72 CA4th 849, 85 CR2d 521] .

[e] Official Acts

Judicial notice may be taken of executive acts of the governor [*Adkins v. California* (1996) 50 CA4th 1802, 59 CR2d 59 (declaration of emergency)].

Judicial notice is taken of the system of surveys prevailing in state and government surveys of public lands and field notes thereof [*People v. Smith* (1981) 118 CA3d Supp 7, 173 CR 659 (engineering and traffic survey); *People v. Flaxman* (1977) 74 CA3d Supp 16, 141 CR 799 (traffic surveys)].

Records and files of an administrative board are a proper subject of judicial notice [*Hogen v. Valley Hospital* (1983) 147 CA3d 119, 195 CR 5 (*Board of Medical Quality Assurance*); *De Asis v. Department of Motor Vehicles* (2003) 112 CA4th 593, 5 CR3d 231 (judicial notice of excerpts from Assembly Daily Journal and from bill history, while proper, did not determine relevance of evidence); see *Evid Code* § 452(c)].

Appellate court took judicial notice, by request, of regional water quality board's basin plan, which addressed beneficial uses to be protected and water quality objectives, and established program of implementation that was subject of dispute [*Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 C4th 921].

Judicial notice may be taken of major legislative committee reports, the final legislative history of an act, excerpts from testimony given at public legislative hearings and correspondence from legislative analysts, state agencies, and

individual legislators to the governor's office recommending his signature on a bill [*Post v. Prati* (1979) 90 CA3d 626, 153 CR 511].

Judicial notice of an appraisal document as a genuine document may be taken where opposing party does not contest its genuineness [*City of Los Angeles v. Waller* (1979) 90 CA3d 766, 154 CR 12].

Evid Code § 452(c) permits judicial notice of official acts of a county [*Cooke v. Superior Court* (1989) 213 CA3d 401, 261 CR 706 (county resolution upgrading standard of care provided to indigents); *Marina Tenants Association v. Deauville Marina Development Co., Ltd.* (1986) 181 CA3d 122, 226 CR 321 (lease contract between county and lessees); *Cruz v. County of Los Angeles* (1985) 173 CA3d 1131, 219 CR 661].

Official files of a state department may be judicially noticed [*Guardianship of Gridley* (1973) 32 CA3d 1053, 108 CR 200 (rates for care of incompetents)].

Recorded declarations of restrictions on lots, crafted by state agency and recorded by landowners as required by permits issued by agency, may be judicially noticed under *Evid Code* § 452(c) [*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 CA4th 516, 32 CR2d 103].

Official publications of California state department are proper subjects for judicial notice, but notice will not be taken by appellate court where documents were not before trial court and request for notice is opposed [*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 CA4th 498, 130 CR2d 823 (court took judicial notice of all-county letter sent by Department of Health Services as official act of executive department); *Carleton v. Tortosa* (1993) 14 CA4th 745, 17 CR2d 734 (Cal. Dept. of Real Estate publications regarding testing of, and code of ethics for, real estate brokers and agents)].

Court of Appeal would take judicial notice of minutes of hearing of regional water quality control board [*City of Sacramento v. State Water Resources Control Bd.* (1992) 2 CA4th 960, 3 CR2d 643].

Exceptions:

- An FDA order for retention, recall and/or destruction was not judicially noticeable under *Evid Code* §§ 451 and 452 [*Cryolife, Inc. v. Superior Court* (2003) 110 CA4th 1145, 2 CR3d 396 (denying request of real party in interest)].

- Materials prepared by private parties and on file with state agencies may not be judicially noticed [*People v. Thacker* (1985) 175 CA3d 594, 221 CR 37 ; see *Evid Code* § 452(c)].

[f] Court Records

A court may take judicial notice of "the *existence* of judicial opinions and court documents, along with the truth of the results reached--in the documents such as orders, statements of decision, and judgments--but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact" [*People v. Woodell* (1998) 17 C4th 448, 71 CR2d 241, 950 P2d 85 (notice of appellate opinion supporting existence of conviction) (emphasis in original)].

The existence of a document may be judicially noticeable, although the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable [*Fremont Indemnity Co. v. Fremont Gen. Corp.* (2007) 148 CA4th 97, 55 CR3d 621 (written agreement between parties)].

1-12 California Courtroom Evidence 12.03

Judicial notice of court records may be taken by appellate courts [*Taus v. Loftus* (2007) 40 C4th 683, 54 CR3d 775, 151 P3d 1185 ; *In re Marquez* (2003) 30 C4th 14, 131 CR2d 911, 65 P3d 403] with respect to:

- Court records of proceedings on remand in another case [*People v. Johnson* (2006) 38 C4th 1096, 1106, 45 CR3d 1, 136 P3d 804] .
- A bankruptcy court's opinion dismissing the bankruptcy petition filed by the defendant in the instant case [*Circle Star Center Associates, L.P. v. Liberate Technologies* (2007) 147 CA4th 1203 n1].
- Minute order in another proceeding [*People v. Hernandez* (2003) 30 C4th 835, 134 CR2d 602, 69 P3d 446 (minute order illustrated prosecutor's mix-up of facts of prior acquittal and prior conviction)].
- Trial court's order granting motion for summary judgment [*Temple Community Hospital v. Superior Court* (1999) 20 C4th 464, 84 CR2d 852, 976 P2d 223].
- Superior court file from a different case [*Titolo v. Cano* (2007) 157 CA4th 310, 68 CR3d 616 ; *City of Manhattan Beach v. Superior Court* (1996) 13 C4th 232, 52 CR2d 82, 914 P2d 160 ; *People v. Avena* (1996) 13 C4th 394, 53 CR2d 301, 916 P2d 1000].
- Unpublished opinions [*In re Schmidt* (2006) 143 CA4th 694, 701 n6, 49 CR3d 477 ; *People v. Padilla* (1995) 11 C4th 891, 47 CR2d 426, 906 P2d 388 (codefendant in capital murder case)].
- An amended criminal complaint that is pertinent to an issue raised on appeal [*People v. Hayes* (1990) 52 C3d 577, 276 CR 874, 802 P2d 376].
- Complete transcript of a sentencing hearing [*In re Pipinos* (1982) 33 C3d 189, 187 CR 730, 654 P2d 1257 ; see *Evid Code* § 452(d)].

Exceptions:

- At the penalty phase of a capital homicide prosecution, a trial court must refuse to take judicial notice of evidence of an accomplice's sentence [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145, 73 P3d 1137 (accomplice's sentence did not shed any light on the circumstances of the offense or the defendant's character, background, history, or mental condition)].
- Generally, the appellate court should not take judicial notice if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court, except where there would be no unfairness to either side [*People v. Hardy* (1992) 2 C4th 86, 134 n.8, 5 CR2d 796, 825 P2d 781].

An appellate court may take notice of a juvenile court file and an unpublished opinion upholding a judgment [*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 CA4th 1474, 35 CR2d 698].

Hearsay allegations not judicially noticed as true simply because in court file [*In re Tanya F.* (1980) 111 CA3d 436, 168 CR 713].

Judicial notice is taken of a habeas corpus petition, Attorney General's opposition, and minute order denial of writ by

district Court of Appeal [*People v. Pacini* (1981) 120 CA3d 877, 174 CR 820 ; see *Evid Code* § 459(a)].

The court will take judicial notice of records, such as admissions, answers to interrogatories, and affidavits when considering a demurrer only when they contain statements of the plaintiff inconsistent with the allegations of the pleading [*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 CA3d 593, 176 CR 824].

Under *Evid Code* § 452(d)(1), judicial notice may be taken of the records of any court of this state in a prior proceeding, as supporting documentation for a motion for summary judgment [*Cuenca v. Safeway San Francisco Employees* (1986) 180 CA3d 985, 225 CR 852 (court judicially noticed some portions, but not the entire record, of the prior trial)].

A court may take judicial notice of the files in another action pending before the same court [*City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 CA4th 1668, 1 CR3d 312 (pleadings in similar actions against party were judicially noticed by trial court and in appellate record); *Insurance Underwriters Clearing House v. Natomas* (1986) 184 CA3d 1520, 228 CR 449].

California appellate courts have discretion to take judicial notice of the opinion of a court of another state pursuant to the provisions of *Evid Code* § 452(d) [*Szetela v. Discover Bank* (2002) 97 CA4th 1094, 118 CR2d 862 (court granted request to take judicial notice of trial court opinion in parallel New Jersey case but would give decision only such weight as appropriate for out-of-state trial court decision)].

An appellate court may notice its own opinion in a related appeal [*In re Christy L.* (1986) 187 CA3d 753, 232 CR 184 ; see *Evid Code* § 452(d)(1)].

An appellate or trial court may take judicial notice of the foundational facts required for the official records exception to the hearsay rule [*People v. Abelson* (1980) 104 CA3d Supp 16, 164 CR 369 (city traffic survey)].

Under *Evid Code* § 452(d) (request to notice material found in court files), the California Supreme Court would take judicial notice of a letter submitted to it by the Attorney General, on behalf of the Department of Insurance, in connection with another case in which the intermediate appellate court reached an interpretation conflicting with the intermediate appellate decision in the case at hand [*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 753 n3, 27 CR3d 648, 110 P3d 903].

All the verified and unverified pleadings in a case, including their history (early superseding pleadings and exhibits that they incorporate), may be judicially noticed when the court in its discretion is determining whether a defective pleading can be amended to state a recognizable legal claim [*Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 CA2d 702, 72 CR 441].

A probated will and codicil are matters subject to judicial notice [*Estate of Cooper* (1983) 142 CA3d 118, 190 CR 826].

Judicial notice may be taken of records of conviction because they are included within *Evid Code* § 452(d) records of court [*In re Richard W.* (1979) 91 CA3d 960, 155 CR 11].

If a file is judicially noticed and a party believes that portions of the file are inadmissible, that party must identify the inadmissible material and state a cognizable objection [*In re Rocco M.* (1991) 1 CA4th 814, 2 CR2d 429 (objection to file as a whole; court found no miscarriage of justice); see *Evid Code* § 353].

Exceptions:

- Judicial notice could not be taken of truth of factual findings by judge in previous case [*Sosinsky v. Grant* (1992) 6 CA4th 1548, 8 CR2d 552].

- Judicial notice cannot be taken of materials not part of the record on appeal although submitted in conjunction with a deposed petition for habeas corpus [*People v. Thacker* (1985) 175 CA3d 594, 221 CR 37 ; see *Evid Code* § 452(d)].

[g] Foreign Law

A court may take judicial notice of treaties between the United States and other nations, as well as treaties between foreign nations [*Chong v. Superior Court (HBZ Finance Ltd.)* (1997) 58 CA4th 1032, 68 CR2d 427 (judicial notice of treaty between Britain and China on status of Hong Kong); *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 123 CA3d 840, 176 CR 874 (judicial notice of terms of agreement between United States and West Germany)].

[h] Facts of Common Knowledge and Facts Not Subject to Dispute

A court may take judicial notice of facts that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of a dispute when it tests the sufficiency of a complaint by demurrer [*Daar v. Yellow Cab Co.* (1967) 67 C2d 695, 63 CR 724, 433 P2d 732], such as:

- Textbook statements concerning the lethal dosage of insulin [*People v. Archerd* (1970) 3 C3d 615, 91 CR 397, 477 P2d 421].

- Extent of tidal influence up the San Joaquin River past the port of Stockton [*Colberg, Inc. v. State* (1967) 67 C2d 408, 62 CR 401, 432 P2d 3].

It is proper for a trial court to take judicial notice of earlier proceedings from within the same court for the purpose of establishing the foundational requirements for admitting scientific evidence under the *Kelly-Frye* doctrine [*People v. Smith* (1989) 215 CA3d 19, 263 CR 678 (judicial notice appropriately taken of extensive *Kelly-Frye* hearings and conclusions in another case within the county, regarding evidence of electrophoretic testing of dried blood stains); see generally *People v. Kelly* (1976) 17 C3d 24, 130 CR 144, 549 P2d 1240 ; *Frye v. United States* (DC Cir 1923) 293 F 1013].

It may be judicially noticed that development of residential subdivisions is accomplished by means of loans secured by deeds of trust on the real property [*U.S. Financial v. Sullivan* (1974) 37 CA3d 5, 112 CR 18].

Certain facts are judicially noticed because they are of common knowledge or capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. The following list is not meant to be all-inclusive, merely illustrative:

- Baseball pitchers throw balls to hit batters [*Avila v. Citrus Community College Dist.* (2006) 38 C4th 148, 165 n12, 41 CR3d 299, 131 P3d 383 , but see contra 38 C4th at 172-173 (dissent)].

- The state Department of Motor Vehicles handbook of registration procedures [*In re Raymond C.* (2006) 145 CA4th 1320, 1324, 52 CR3d 330].

- That communications between bench officers and their staff on matters of law and procedure are normally not reported [*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 CA4th 81, 133 CR2d 234].

- Election not held in a given area [*Professional Engineers in California Gov't v. Wilson* (1998) 61 CA4th 1013, 72 CR2d 111].
- Terms of a redevelopment agency agreement with an Indian tribe [*People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 CA4th 868, 65 CR2d 786].
- Travel times and distances between places [*City of Anaheim v. W.C.A.B.* (1981) 116 CA3d 248, 172 CR 92].
- That a book existed (but did not take judicial notice of its contents) [*People v. Cooks* (1983) 141 CA3d 224, 190 CR 211].
- Vast size of Los Angeles International Airport; receipt of crank calls and bomb threats by public agencies [*Moncur v. City of Los Angeles, Dept. of Airports* (1977) 68 CA3d 118, 137 CR 239].
- Prime rate of interest [*Gamer v. duPont Glore Forgon, Inc.* (1976) 65 CA3d 280, 135 CR 230].
- In a pat-down search, boots are less resilient than other items of clothing [*In re Willy L.* (1976) 56 CA3d 256, 128 CR 592].
- Ubiquity of television sets; availability of low-cost TV video cameras [*People v. Moran* (1974) 39 CA3d 398, 114 CR 413].
- Location of city streets; fact that a jurisdiction is an incorporated city [*People v. Vega* (1971) 18 CA3d 954, 96 CR 391].
- Safety belts are effective in reducing fatalities and minimizing injuries in motor vehicle collisions [*Greyhound Lines Inc. v. Superior Court* (1970) 3 CA3d 356, 83 CR 343].
- Coronary arteriosclerosis amounts to "heart trouble" [*Knowles v. W.C.A.B.* (1970) 10 CA3d 1027, 89 CR 356].
- Effect of a sudden shock on the nervous system [*Windeler v. Scheers Jewelers* (1970) 8 CA3d 844, 88 CR 39].
- Venice is in Los Angeles County [*People v. Harvath* (1969) 1 CA3d 521, 82 CR 48].
- Lawyer's medical diagnosis not always reliable [*Union Trust Life Ins. Co. v. Superior Court* (1968) 259 CA2d 23, 66 CR 270].
- Text of a redevelopment plan [*Swiss Park Inc. v. City of Duarte* (1982) 136 CA3d 755, 186 CR 549].

The court may take judicial notice of a well-publicized riot situation throughout the county that involved looting, assaults, and homicide [*In re Juan C.* (1994) 28 CA4th 1093, 33 CR2d 919 (petition hearing under W&I Code § 602, alleging that a minor defendant violated a city curfew regulation, which was issued in response to widespread rioting and other civil disorder)].

Exception:

- Judicial notice would not be taken of the financial health and budgets of the State of California and the Caltrans agency [*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 CA4th 807, 65 CR3d 251] .

[i] Items Not Judicially Noticed

Courts may decline to take judicial notice of scientific treatises on disputable subjects or other facts or propositions not capable of determination from sources of reasonably accurate sources [*People v. Ramos* (1997) 15 C4th 1133, 64 CR2d 892, 938 P2d 950 (newspaper articles not judicially noticed)]. Declining to take judicial notice of a newspaper index apparently referencing a news article that recounted the facts surrounding an election in Tennessee, the California Supreme Court noted that the fact that the article resided in the index did not mean that the truth of the article had been shown with "reasonably indisputable accuracy" as required by *Evid Code* § 452(h) [*Edelstein v. City & County of San Francisco* (2002) 29 C4th 164, 126 CR2d 727, 56 P3d 1029]. Among matters not subject to judicial notice are:

- The truth of statements contained in a document and its proper interpretation, when disputed by the parties [*Fremont Indemnity, Co. v. Fremont Gen. Corp.* (2007) 148 CA4th 97, 55 CR3d 621 (written agreement between parties)].
- Documents filed supporting a motion for class certification, when not needed by the appellate court to resolve the issue before it [*Aguir v. Cintas Corp.* (2006) 144 CA4th 121, 128 n2, 50 CR3d 135] .
- A private corporation's brochure, national directories, and summary of changes in federal regulations may not be judicially noticed since they are not matters of common knowledge [*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 C4th 739, 76 CR2d 749, 958 P2d 1062 (three Brobeck partners' biographical data, extracted from popular national directory of attorneys and law firms)].
- The existence of an alleged preference in placing the name of an incumbent first on the ballot is not properly the subject of judicial notice [*Diamond v. Allison* (1973) 8 C3d 736, 106 CR 13, 505 P2d 205 ; *Mexican-American Political Assoc. v. Brown* (1973) 8 C3d 733, 106 CR 12, 505 P2d 204].
- The appellate court would decline defendants' request to take permissive judicial notice of a State Bar of California "attorney profile" of appellant under *Evid Code* § 452(h) [*Honig v. San Francisco Planning Dept.* (2005) 127 CA4th 520, 524 n3, 25 CR3d 649].
- A casino's human resources manual was not equivalent to a tribal regulation, and did not qualify for judicial notice as either a regulation under *Evid Code* § 452(b) or an official act of the Tribe under *Evid Code* § 452(c). The Tribe provided no information about the source, legal effect, or official ratification of the human resources manual. The manual itself stated that it did not promise that the "policies discussed in it will be applied in all cases." Lack of clear information about the manual's ratification and legal effect made it an improper subject for judicial notice. Similarly, a proffered declaration from the tribal secretary, purporting to establish the Tribe never ratified or approved the contracts of the casino employees, was not a proper subject for judicial notice, both because it was a declaration of an adverse party and because it was not a "proposition reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" under *Evid Code* § 452(h) [*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 CA4th 1185, 1192-1193, 35 CR3d 357].

- The appellate court would grant a request for judicial notice as to only one document, a letter from the Chief Legal Officer of the California Department of Real Estate (DRE), stating that it was an administrative interpretation of the provisions of the predatory lending law. There was no basis under *Evid Code* § 452 for the appellate court to take judicial notice of the remaining documents: a fax transmittal sending the DRE letter to counsel for plaintiff, a letter from industry groups to the California Deputy Secretary for Business Regulation, a letter from a state senator to the California Corporations Commissioner, a letter from the Assistant Commissioner of the DRE to the Associate Director of the California Reinvestment Committee, and a letter from a deputy attorney general to a California assemblyman (for which there was no evidence it is a formal opinion of the Attorney General) [*Wolski v. Fremont Investment & Loan* (2005) 127 CA4th 347, 355-356, 25 CR3d 500].

- The appellate court would grant a request for judicial notice of the complete docket report in the underlying criminal case, because the clerk's transcript was not complete, but deny a request to take judicial notice of the superior court's case management procedures as described in the declaration of a superior court deputy clerk. Procedures relating to how the superior court's computerized case management system or bond tracking system work do not constitute facts or propositions that are of such common knowledge that they cannot reasonably be the subject of dispute [*Evid Code* § 452(g)]. Neither did these procedures appear to be capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy [*Evid Code* § 452(h)] [*People v. Aegis Security Ins. Co.* (2005) 127 CA4th 569, 575, 25 CR3d 623].

- The appellate court would judicially notice the fact of plaintiff's filing for workers' compensation benefits as evidenced by his petition dated June of 2002, but would decline to take judicial notice of the remaining documents (computer records of plaintiff's WCAB case history, health insurance claim forms, and medical records), in the absence of any meaningful explanation as to why these items or facts were relevant, other than plaintiff's conclusions [*Bell v. Greg Agee Construction, Inc.* (2005) 125 CA4th 453, 459 n2, 23 CR3d 33 (action for personal injuries)].

Courts of appeal have declined to take judicial notice of:

- Court proceedings in another case, and partial transcripts of depositions taken of defendant's employees in another case, were irrelevant [*Hailey v. California Physicians' Service* (2007) 158 CA4th 452, 69 CR3d 789].

- A Riverside County District Attorney's Office White Paper, offered as evidence that medical marijuana had increased crime in the city of Garden Grove [*City of Garden Grove v. Superior Court* (2007) 157 CA4th 355, 68 CR3d 656 (action for return of confiscated marijuana)].

- A disputable treatise on the connection between cancer and electromagnetic fields [*Ford v. Pacific Gas & Elec. Co.* (1997) 60 CA4th 696, 70 CR2d 359].

- A conclusion of suicide from a government document to establish the cause of death [*Bohrer v. County of San Diego* (1980) 104 CA3d 155, 163 CR 419].

- A birth certificate [*Ruddock v. Ohls* (1979) 91 CA3d 271, 154 CR 87].

- The extent to which general inflationary trends had affected the value of lands [*San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co.* (1972) 28 CA3d 556, 104 CR 733].

- An environmental impact statement filed by the San Luis Obispo County and Cities Area Planning Coordination Council [*Edna Valley Assn. v. San Luis Obispo County and Cities Area Planning Coordinating Council* (1977) 67 CA3d 444, 136 CR 665].
- A social services agency's usual practices [*David B. v. Superior Court* (2004) 123 CA4th 768, 20 CR3d 336].
- The truth of a magistrate's finding [*People v. Tolbert* (1986) 176 CA3d 685, 222 CR 313].
- A self-serving hearsay declaration in a document that qualifies for judicial notice [*Childs v. State* (1983) 144 CA3d 155, 192 CR 526 (declaration describing mailing practices of State Board of Control)].
- The existence of a contract between private parties [*Gould v. Maryland Sound Industries, Inc.* (1995) 31 CA4th 1137, 37 CR2d 718].

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law Practice & Proceedings General Overview Civil Procedure Alternative Dispute Resolution General Overview Torts Transportation Torts General Overview



100 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.04

12.04 Computer-Generated Official Court Records of Criminal Convictions--Evid Code § 452.5

[1] Evid Code § 452.5 Text

■ *Evid Code § 452.5.*

(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.

LegH: 1996 ch. 642; 2002 ch. 784.

[2] Legislative Notes

It is the intent of the Legislature to simplify record-keeping and admission in evidence of records of criminal convictions by establishing a central computer database of that information, and by authorizing admission in evidence of this computer data. It is anticipated that this will result in considerable savings of time and money by state and county courts and agencies while improving and maintaining the accuracy of the records [1996 Cal Stat, ch 642, § 2].

[3] Commission Comments

Evid Code § 452.5(a) is amended to reflect unification of the municipal and superior courts pursuant to *Cal Const, art VI, § 5(e)*. The reference to former *Gov Code § 71280.5* is deleted because that provision concerned certification and submission of municipal court records relating to criminal convictions. *Gov Code § 69844.5* is the comparable superior court provision [Cal Law Rev Com Comment].

[4] Case Notes

The use of computer-generated records to prove a prior criminal conviction predates the enactment of this section [*People v. Dunlap* (1993) 18 CA4th 1468, 23 CR2d 204 (California Law Enforcement Telecommunications System computer printout, commonly called rap sheet, was admitted to prove prior convictions under public records exception to hearsay rule, *Evid Code* § 1280; judicial notice was taken that DOJ has statutory duty to record criminal information, evidentiary presumptions support that official duty regularly performed, and records sufficiently trustworthy)].

Evid Code § 452.5(b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred [*People v. Duran* (2002) 97 CA4th 1448, 119 CR2d 272 (*Evid Code* § 452.5 does not limit statute's purview to computer-generated court records, but broadly includes "an official record of conviction" certified as specified in *Evid Code* § 1530)]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawCriminal OffensesData Crimes & FraudEstate, Gift & Trust LawTrustsGeneral
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101 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.05

12.05 Judicial Notice Mandatory on Request--Instructions--Evid Code § 453

[1] Evid Code § 453 Text

■ *Evid Code § 453.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is intended to be a safeguard, not a limitation on the court's power to take judicial notice. For instance, this section does nothing to affect the discretionary power of the court to take judicial notice under *Evid Code § 452*. A judge may take judicial notice under *Evid Code § 452* without notice or without any information furnished by any of the parties [Cal Law Rev Com Comment].

But, when the matter noticed under *Evid Code § 452* is one that is of substantial consequence to the action, even though the court may take judicial notice under *Evid Code § 452* when the requirements of *Evid Code § 453* have not been satisfied, the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed [Cal Law Rev Com Comment].

In cases where the notice given does not comply with the requirement of *Evid Code § 453(a)*, the court may decline to take judicial notice. Since judicial notice is binding on the jury, notice is of critical importance [Cal Law Rev Com Comment].

Evid Code § 453 requires only reasonable notice and the definition of this varies depending on the facts and circumstances of the particular case. This requirement should be administered with flexibility due to the wide variety of

cases in which it may be applied and in order to properly implement the policy behind the doctrine of judicial notice [Cal Law Rev Com Comment].

If "sufficient information" is not provided, as set forth in *Evid Code* § 453(b), a court may decline to take judicial notice. It is not the judge's responsibility to do the necessary research in order to determine the necessary fact, but of course he may do so if he so wishes [Cal Law Rev Com Comment].

The definition of "sufficient information" necessarily varies from case to case, and the court, when confronted with especially difficult problems, may request expert testimony to clarify matters [Cal Law Rev Com Comment].

The party requesting that judicial notice be taken has the burden of demonstrating that the item to be noticed is a proper one under *Evid Code* § 452, as well as the propriety of the tenor of the matter to be persuaded. If this is not done, the judge may decline to take judicial notice [Cal Law Rev Com Comment].

The degree of persuasion necessary to have a court take judicial notice of a matter depends upon which subdivision of *Evid Code* § 452 the party wants the court to follow; for example, to take judicial notice of a city ordinance [*Evid Code* § 452(b)], the judge must be persuaded of the existence and the tenor of a valid ordinance [Cal Law Rev Com Comment].

If a matter was properly noticed, a court's determination to take judicial notice of a matter specified in *Evid Code* § 452 will be upheld on appeal [see *Evid Code* § 459]. Correspondingly, if a court determines not to take judicial notice of a matter, it will not be reversed on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter [Cal Law Rev Com Comment].

[3] Case Notes

Although courts are required to take judicial notice if the requirements of *Evid Code* § 453 are met, courts are not bound to consider the items if they are irrelevant [*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement of Ventura County* (1997) 16 C4th 483, 66 CR2d 304, 940 P2d 891 (memo from attorney general to governor was not relevant to determine legislative intent)].

A choice-of-law provision in a contract requiring the application of Hong Kong law was interpreted under California law where the parties did not request judicial notice of the Hong Kong law [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 C4th 459, 11 CR2d 330, 834 P2d 1148] .

A trial court need not take judicial notice of other matters if they are irrelevant and would cause an undue consumption of time [*Mitroff v. United Services Auto. Ass'n* (1999) 72 CA4th 1230, 85 CR2d 759 (no notice of unrelated other cases involving insurance company)].

A court is not required to take judicial notice where a party does not furnish the court with sufficient information to enable it to take judicial notice of the matter [*Willis v. State of California* (1994) 22 CA4th 287, 27 CR2d 413 (no information appended as to State Administrative Manual not adopted as regulation); *People v. Maxwell* (1978) 78 CA3d 124, 144 CR 95 (court record)].

A court cannot be expected to perform the duties of an advocate and is not required to take judicial notice of all documents in the case and each specific formal statutory maneuver initiated by either counsel, irrespective of the formal requirements of a statute governing the matter on which it must rule [*Truslow v. Woodruff* (1967) 252 CA2d 158, 60 CR 304].

Before court records can be judicially noticed, a party must request judicial notice, must furnish the court with sufficient information to enable it to take such notice, and must give each party sufficient notice of the request to prepare to meet it [*Smith v. Hatch* (1969) 271 CA2d 39, 76 CR 350].

The trier of fact may not take judicial notice of the truth of a magistrate's finding [*People v. Tolbert* (1986) 176 CA3d 685, 222 CR 313].

Although a court may take judicial notice of municipal ordinances under *Evid Code* § 452(b) and must do so if a party properly so requests, it is not required to do either where the party failed to provide the court with the ordinances in question [*Salinero v. Pon* (1981) 124 CA3d 120, 177 CR 204].

Court could not take judicial notice of treatises where sufficient information was not provided to ensure that they were of reasonably indisputable accuracy [*Whispering Pines Mobile Home Park Ltd. v. City of Scotts Valley* (1986) 180 CA3d 152, 225 CR 364 (appraisal treatises)].

A complaint may be read as if it contained matters judicially noticed, and such matters may show the complaint fails to state a cause of action, though its bare allegation does not disclose the defect [*Four Star Electric, Inc. v. F & H Construction* (1992) 7 CA4th 1375, 10 CR2d 1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesGeneral OverviewEvidenceJudicial NoticeDomestic
LawsGovernmentsCourtsJudges



102 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.06

12.06 Determination of Propriety of Taking Judicial Notice--Evid Code § 454

[1] Evid Code § 454 Text

■ *Evid Code § 454.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section exists to give the court considerable leeway in order to determine what sources are trustworthy. This coincides with the policy behind the doctrine of judicial notice, which is to simplify the process of proof making [Cal Law Rev Com Comment].

This section restates prior law as found in former *CCP § 1875* [Cal Law Rev Com Comment].



Strategic Point:

Therefore, case law construing that section should be persuasive authority.

[3] Case Notes

For the purpose of determining whether a body of water was intended to be included within a designated territorial boundary of the state and whether it is a bay geographically, historically, and legally, the Supreme Court may examine historical data and maps, public papers and records, and may take judicial notice of such geographical, historical, and political data even though the same have not been introduced in evidence in the trial court [*People v. Stralla* (1939) 14 C2d 617, 96 P2d 941].

A court consulted Webster's New International Dictionary and the Encyclopedia Britannica to determine the meanings of words [*Kiessig v. County of San Diego* (1942) 51 CA2d 47, 124 P2d 163].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceJudicial NoticeAdjudicative FactsPublic RecordsEvidenceJudicial NoticeLaws of Foreign StatesGovernmentsState & Territorial GovernmentsBoundaries



103 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.07

12.07 Reasonable Opportunity to Present Information--Source of Information--Judicial Notice--Evid Code § 455

[1] Evid Code § 455 Text

■ *Evid Code § 455.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is intended to provide procedural safeguards, so as to afford both parties reasonable opportunity to be heard as to the propriety of taking judicial notice of a matter and as to the tenor of a matter which is of substantial consequence to the determination of the action [Cal Law Rev Com Comment].

Evid Code § 455(a) limits its application to those matters of substantial consequences specified in *Evid Code §§ 451(f)* and 452. It would be impracticable to make *Evid Code § 455(a)* applicable to inconsequential matters or the other matters listed in *Evid Code § 451* [Cal Law Rev Com Comment].

The definition of "reasonable opportunity to present ... information" as set forth in *Evid Code § 455(a)* varies depending on the facts and circumstances of the case (for example, validity of city ordinance is not in question--no formal hearing

is necessary; complex issue as to tenor of foreign law--hearing would be mandatory) [Cal Law Rev Com Comment].

The requirement of *Evid Code* § 455(b) (making information and source used by the court known to the parties) assures its availability for examination by the parties and by a reviewing court [Cal Law Rev Com Comment].

[3] Case Notes

This section creates procedural safeguards, which due process may require, offering litigants a hearing on the propriety of taking judicial notice of a matter or on the tenor of the matter to be noticed [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 89 CR 737, 474 P2d 689 (breach of film star's contract; discussion in dissent)].

When there has been no notice to the parties the trial court cannot take judicial notice of records of the court containing financial information [*In re Estate of Nicholas* (1986) 177 CA3d 1071, 223 CR 410].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureEminent Domain ProceedingsJury TrialsEvidenceJudicial NoticeAdjudicative FactsGeneral Overview



104 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.08

12.08 Denial of Request to Take Judicial Notice--Notification--Evid Code § 456

[1] Evid Code § 456 Text

■ *Evid Code § 456.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The statute is designed to provide the parties with an adequate opportunity to submit evidence on any matter as to which judicial notice was anticipated but not taken. Hence, the court must advise the parties and indicate for the record at the earliest practicable time any denial of a request to take judicial notice of a matter [Cal Law Rev Com Comment].

[3] Case Notes

Although the trial court neither advised the parties that it was denying a request to take judicial notice of the navigability of a body of water, nor did it indicate the denial on the record, its error was harmless beyond doubt [*Heist v. Colusa County* (1984) 163 CA3d 841, 213 CR 278].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceJudicial NoticeGeneral Overview



105 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.09

12.09 Jury Instructions to Accept as Fact Matter Noticed--Evid Code § 457

[1] Evid Code § 457 Text

■ *Evid Code § 457.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section makes matters judicially noticed binding on the jury thereby eliminating any possibility of presenting to the jury evidence disputing the fact as noticed by the court [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions



106 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.10

12.10 Judicial Notice of Later Proceedings--Evid Code § 458

[1] Evid Code § 458 Text

■ *Evid Code § 458.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section makes it clear that the refusal of the court to take judicial notice of a matter at the trial does not bar the trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureEminent Domain ProceedingsJury TrialsEvidenceJudicial NoticeGeneral Overview



107 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.11

12.11 Judicial Notice by Reviewing Courts--Evid Code § 459

[1] Evid Code § 459 Text

■ *Evid Code § 459.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section sets forth a separate set of rules for the taking of judicial notice by a reviewing court [Cal Law Rev Com Comment].

A reviewing court, in addition to taking judicial notice of those matters noticed by the trial court, must take judicial

notice of the matters specified in *Evid Code* § 451 even though the trial court failed to take notice of such matters [Cal Law Rev Com Comment; *see Evid Code* § 459(a)].

The reviewing court is not bound by the tenor of the notice taken by the trial court if the trial court erred as to a matter specified in *Evid Code* § 452, where a proper request was made by a party and the same party satisfied the requirements of *Evid Code* § 453 [Cal Law Rev Com Comment; *Evid Code* § 459(a)].

The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are nonevidentiary in character, namely, the reasons of policy governing appellate review. For example, the appellate court is required to notice the matters of law mentioned in *Evid Code* § 451, but it may hold that an error which the appellant has "invited" is not reversible error, or that points not urged in the trial court may not be advanced on appeal, and may refuse, therefore, to apply the law to the pending case [Cal Law Rev Com Comment].

The reviewing court may consult any source of pertinent information for the purpose of determining the propriety of taking judicial notice or the tenor of the matter to be noticed [Cal Law Rev Com Comment; *Evid Code* § 459(b)].

The parties have the same procedural protection when judicial notice is being taken by the reviewing court as is provided by *Evid Code* § 455 [Cal Law Rev Com Comment; *Evid Code* § 459(c)].

The parties the same procedural safeguard at the appellate level that they have in the trial court [Cal Law Rev Com Comment; *Evid Code* § 459(d); *see Evid Code* § 455(b)].

[3] Case Notes

[a] Construction of Statute

Although an appellate court is required to take judicial notice if *Evid Code* § 453 requirements are met, the court is not bound to consider the items if they are irrelevant [*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement of Ventura County* (1997) 16 C4th 483, 66 CR2d 304, 940 P2d 891 (though required to take notice, memo from attorney general to governor not relevant to determine legislative intent)].

Both trial and appellate courts may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from the same case and other cases [*In re Marquez* (2003) 30 C4th 14, 131 CR2d 911, 65 P3d 403 (court would accept date of event offered by prosecutor and used in appellate opinion, in absence of petition for rehearing); *Crowley v. Katleman* (1994) 8 C4th 666, 34 CR2d 386, 881 P2d 1083].

Exception:

As a general rule, the appellate court should not take judicial notice if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court [*Brosterhous v. State Bar* (1995) 12 C4th 315, 48 CR2d 87, 906 P2d 1242 (administrative record); *People v. Hardy* (1992) 2 C4th 86, 5 CR2d 796, 825 P2d 781 (however, court did take judicial notice because both parties requested it, facts were not open to dispute, and *Evid Code* § 459(d) contemplates that kind of situation)].

In an action for invasion of privacy, against the authors of an article on recovered memories of sexual abuse, plaintiff claimed that defendants had improperly gotten information about her from confidential court records. Defendants requested rehearing, and that the Court of Appeal take judicial notice of voluminous records from a number of public, non-confidential court proceedings involving plaintiff, including a guardianship proceeding and a wrongful death action brought on plaintiff's behalf, that contained substantial information relating to plaintiff, including her identity and the name of her foster mother. The Court of Appeal denied both requests. The California Supreme Court granted both

review and a motion to take judicial notice of the proffered, relevant court records. It concluded that the defendants could have obtained their information from the non-confidential records, so that the Court of Appeal erred in holding that plaintiff had established a prima facie case of intrusion into private matters [*Taus v. Loftus* (2007) 40 C4th 683, 726, 54 CR3d 775, 151 P3d 1185].

Pursuant to *Evid Code* § 459, an appellate court may take judicial notice of:

- The appellate record of another action [*County of San Diego v. State of California* (1997) 15 C4th 68, 61 CR2d 134, 931 P2d 312].
- A certificate of rehabilitation obtained from another California superior court [*Gates v. Discovery Communications, Inc.* (2004) 34 C4th 679, 684 n1, 21 CR3d 663, 101 P3d 552].
- A change, made by a division of the district court of appeal, in its oral argument waiver notice after its decision in this case. The revised notice is the same in every respect as the notice employed here except for the addition of a single sentence at the end of the first paragraph, regarding a request for oral argument [*People v. Pena* (2004) 32 C4th 389, 9 CR3d 107, 83 P3d 506].
- Statistical records and other reports of a state agency [*People v. Ngo* (1996) 14 C4th 30, 57 CR2d 456, 924 P2d 97 (bar records showing defendant's attorney was on inactive status during trial; judicial notice taken by appellate court for writ of habeas corpus); *In re Adoption of Michelle Lee T.* (1975) 44 CA3d 699, 117 CR 856 (Health Department guidelines); *California State Employees' Assoc. v. Flournoy* (1973) 32 CA3d 219, 108 CR 251].
- Photocopies of Los Angeles Daily News articles [*People v. Hardy* (1992) 2 C4th 86, 5 CR 796, 825 P2d 781].
- Price figures provided by an Alcohol Beverage Control licensee even though the figures were not presented to the department, since the information was derived from the price postings filed with the department and relied upon by the appeals board [*Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 C3d 431, 146 CR 585, 579 P2d 476].
- Matters in a civil action arising out of the course of conduct underlying charges in a disbarment proceeding [*Yokozeki v. State Bar* (1974) 11 C3d 436, 113 CR 602, 521 P2d 858].

[b] Determination of Propriety

The reviewing court has authority to exercise the same discretionary power to take judicial notice as is possessed by the trial court [*County of Kern v. Ginn* (1983) 146 CA3d 1107, 194 CR 512]. However, an appellate court can take judicial notice in a tenor different from that of the trial court, under *Evid Code* § 459(a) [*Jordan v. County of Los Angeles* (1968) 267 CA2d 794, 73 CR 516]. For example, in the interests of justice, on demurrer, court will consider judicially noticeable facts, even if facts are not set forth in complaint [*Cantu v. Resolution Trust Corp.* (1992) 4 CA4th 857, 6 CR2d 151 (even when pleadings contain allegations to the contrary)].

Exception: In a malicious prosecution lawsuit, where party did not argue in the trial court that it was improper to judicially notice the facts as determined in a statement of decision in the underlying lawsuit, the party was foreclosed from doing so on appeal [*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 CA4th 204, 12 CR3d 786].

Although a court may judicially notice a variety of matters, only relevant material may be noticed. If a document is

relevant and subject to judicial notice, notice is taken of its existence but not of the truth of any matters asserted in it. Although an appellate court may take judicial notice of materials not before the trial court, including records of another court, the appellate court need not give effect to that evidence [*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 C4th 1057, 31 CR2d 358, 875 P2d 74, *overruled on other grounds in* *In re Tobacco Cases II* (2007) 41 C4th 1257, 63 CR3d 418, 163 P3d 106; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 C3d 180, 184, fn. 1, 151 CR 837, 588 P2d 1261; *Kilroy v. State of California* (2004) 119 CA4th 140, 14 CR3d 109 (appellate court would not take judicial notice of truth of facts stated in trial court's suppression order)].

Notwithstanding official condemnation, pitchers have been throwing at batters for the better part of major league baseball's 100-year history. The taking of judicial notice of such matters is not reserved to trial courts, but lies within the power of every court [*Evid Code* § 459]. To ignore this history in favor of reversal and remand would do nothing to enhance respect for the trial and appellate courts' respective roles [*Avila v. Citrus Community College Dist.* (2006) (negligence action by college athlete)].

Appellate courts have taken judicial notice of:

- Dismissals of other actions between the parties that were not before the trial court when it ruled on defendant's motion to strike, where the dismissals were proper subjects for judicial notice and helped complete context of the instant case [*Flatley v. Mauro* (2006) 39 C4th 299, 306 n2, 46 CR3d 606, 139 P.3d 2 ; *Lambert v. Carneghi* (2008) 158 CA4th 1120, 70 CR3d 626 (appellate court construed motion to augment record as motion to take judicial notice of ruling against another defendant in same action, and granted motion)].
- The legislative history of *CCP* § 425.16, notwithstanding that the court had previously decided in other cases that the statute spoke for itself [*Flatley v. Mauro* (2006) 39 C4th 299, 306 n2, 46 CR3d 606, 139 P.3d 2] .
- The Voter Information Guide prepared by the Secretary of State [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2007) 148 CA4th 39, 54 n10, 55 CR3d 585 (taking notice sua sponte)].
- The report of a task force on property tax administration, submitted to the state assembly Committee on Revenue and Taxation and used as a basis for legislation [*Strong v. State Bd. of Equalization* (2007) 155 CA4th 1182, 66 CR3d 657] .
- The fact that counterfeit goods cause significant losses to manufacturers and retailers and deprive state and local governments of much needed tax revenue [*Yoo v. Jho* (2007) 147 CA4th 1249, 1251 n1, 55 CR3d 243] .
- A judgment entered by a German court [*In re Marriage of Taschen* (2005) 134 CA4th 681, 688 n3, 36 CR3d 286] .
- Unpublished appellate decision affirming defendant's conviction of attempted murders for which he was tried [*People v. Blair* (2005) 36 C4th 686, 703 n5, 31 CR3d 485, 115 P3d 1145] .
- Pursuant to *Evid Code* § 459(c), the California Supreme Court proposed to take judicial notice of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association as posted on that organization's internet site [*Boghos v. Lloyds of London* (2005) 2005 C LEXIS 5647 (parties invited to present information to court relevant to propriety of taking judicial notice of matter)].

- An advisory committee's report to the legislature in construing legislative intent [*CPF Agency Corp. v. R&S Towing* (2005) 132 CA4th 1014, 1028-1030, 34 CR3d 106].
- A bankruptcy filing by one of the parties before it [*Bell v. Greg Agee Construction, Inc.* (2004) 125 CA4th 453, 23 CR3d 33].
- A writ of supersedeas filed in related case [*Armando D. v. State Dept. of Health Services* (2004) 124 CA4th 13, 21 CR3d 66].
- A prior judgment in a different case, when the judgment was appropriately drawn to the court's attention and the opposing party had adequate notice and opportunity to be heard on the question of the effect of such judgment [*Swaffield v. Universal Ecsco Corp.* (1969) 271 CA2d 147, 76 CR 680].
- Documents in the file of the case wherein a demurrer is interposed, the trial court's own records, and also the files of another case pending in the trial court [*Saltares v. Kristovich* (1970) 6 CA3d 504, 85 CR 866 ; *In re Karen G.* (2004) 121 CA4th 1384, 18 CR3d 301 (minute order of juvenile court)].
- A logging company's planning document and its approval by the California Department of Forestry and Fire Protection, for the limited purpose of determining the reasonableness of the geographic assessment area [*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2004) 123 CA4th 1331, 20 CR3d 808].
- A ballot pamphlet, to ascertain the intent of the voters in passing an initiative measure [*Moore v. Superior Court* (2004) 117 CA4th 401, 12 CR3d 383].
- Legislative history [*Ass'n for Sensible Development at Northstar, Inc. v. Placer County* (2004) 122 CA4th 1289, 19 CR3d 440 (taking judicial notice of legislative history concerning amendment to CEQA regarding mandate hearings)].
- In a review of a judgment on the pleadings in an inverse condemnation suit: a disputed interim ordinance [*First English Evangelical v. County of Los Angeles* (1989) 210 CA3d 1353, 258 CR 893].
- A letter sent by legislators to the executive officer of the Water Quality Control Board to protest the board's original interpretation of "six-month period" in the mandatory minimum penalty provisions. This particular letter was relevant to review of the legislative history because it apparently prompted a change in the board's interpretation of the statute, and the Legislature amended the statute to define "six-month period" against the background of that administrative interpretation. It was relevant because it illustrates the context in which the Legislature enacted the definition [*City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 CA4th 714, 20 CR3d 322].
- The rent control act of a city and its rent control board regulations [*Hazon-Iny Development, Inc. v. Unkefer* (1980) 116 CA3d Supp 1, 172 CR 191].
- Briefs filed by consumer organizations in rulemaking proceedings before the Public Utilities Commission, for the purpose of showing that litigants in proceedings now before the PUC are relying on the interim interpretation of the "first priority condition" [*PG&E Corp. v. Public Utilities Com.* (2004) 118 CA4th 1174, 13 CR3d 630].
- The amendment of a prior action [*Vann v. Travelers Companies* (1995) 39 CA4th 1610, 46 CR2d 617 (judicial notice taken of the naming of two more defendants, raising possibility that other parties

might be responsible for the tort)].

- A related superior court action [*Zelda, Inc. v. Northland Ins. Co.* (1997) 56 CA4th 1252, 66 CR2d 356].

- An unpublished order in a federal district court case [*Forty-Niner Truck Plaza v. Union Oil Co.* (1997) 58 CA4th 1261, 68 CR2d 532].

In an action attacking the approval of a subdivision development, alleging violation of the California Environmental Quality Act and the Subdivisions Map Act, the appellate court took judicial notice of the notice of preparation and the draft residential hillside ordinance, for the limited purpose of providing background information [*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 CA4th 885, 69 CR3d 105] .

When one party did not oppose respondents' motion to augment the record in the appellate court, the appellate court would grant motion. Neither the appellate record nor the motion to augment reflected whether the party had opposed respondents' requests for judicial notice of documents filed in the same case in the trial court, or whether those requests were granted [*McBride v. Boughton* (2004) 123 CA4th 379, 20 CR3d 115] .

[c] When Judicial Notice Will Not Be Taken

A watercraft industry report, the industry's model code, and a related magazine article were not properly judicially noticeable under either *Evid Code* § 452(g) (common knowledge) or *Evid Code* § 452(h) (facts and propositions "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy") [*Truong v. Nguyen* (2007) 156 CA4th 865, 67 CR3d 675 (wrongful death action)].

In a matter involving sibling visitation, the appellate court would not take notice of an adoption agreement, although it would take notice of a subsequent order of adoption and the related minute order [*In re Miguel A.* (2007) 156 CA4th 389, 67 CR3d 307] .

Courts will generally not rely on evidence of the individual views of proponents of legislation [*In re S.B.* (2004) 32 C4th 1287, 13 CR3d 786, 90 P3d 746 (Supreme Court granted request for judicial notice of proposed assembly bill and analysis of assembly committee, but specifically stated that unenacted legislation and committee analysis did not affect decision in case)].

The appellate court would deny a request for judicial notice when defendant failed to establish the relevance of the requested records to his claims of prosecutorial misconduct and trial court error [*People v. Young* (2005) 34 C4th 1149, 1171, 24 CR3d 112, 105 P3d 487].

The appellate court would not take judicial notice of information contained on printouts from various Web sites maintained by UCLA and the University of California, submitted by both parties. This public information was plainly subject to interpretation and for that reason not subject to judicial notice [*L.B. Research & Ed. Foundation v. UCLA Foundation* (2005) 130 CA4th 171, 180 n2, 29 CR3d 710].

Comment:

Print-outs from websites are self-authenticating and may be admissible for non-hearsay purposes [see *Evid Code* § 1552].

A court denied a request to take judicial notice of certain actions allegedly taken by the Controller in response to the Legislature's recent elimination of the requirement imposed on the state to pay interest on claims made for unclaimed

property. The Controller's actions do not represent the "decisional" law of the state of which the court must take judicial notice [*Fong v. Westly* (2004) 117 CA4th 841, 12 CR3d 76].

Although courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. Courts may not take judicial notice of allegations in affidavits, declarations, and probation reports in court records because these matters are reasonably subject to dispute and therefore require formal proof [*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 CA4th 875, 110 CR2d 877 (modified appellate decision was not the proper subject of judicial notice because the client never had a chance to contest the finding, and thus the finding was still a matter of dispute)].

An appellate court is not required to take judicial notice of foreign law unless it is requested by a party to take such notice and is provided adequate data for its inquiry [*Ehret v. Ichioka* (1967) 247 CA2d 637, 55 CR 869].

An appellate court declined to take judicial notice of consent documents that were not before the trial court. This would have allowed the proponent (the People) to create a new theory that the defendant would not have had an opportunity to dispute [*People v. Hamilton* (1986) 191 CA3d Supp 13, 236 CR 894].

A court of appeal could not judicially notice that a prior burglary was of inhabited dwelling so as to support prior felony allegation not proved through trial court's record [*People v. Jackson* (1992) 7 CA4th 1367, 10 CR2d 5].

An appellate court would decline to take judicial notice of the alleged "many occasions" when the Environmental Protection Agency had issued prevention of significant deterioration (PSD) permits without issuance of a California Environmental Quality Act (CEQA) document. The party requesting judicial notice neglected to cite to evidence of one of these instances, and it was unclear whether this evidence would be relevant in the context of the specific delegation agreement before the court [*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 CA4th 861, 13 CR3d 420].

An appellate court would not take judicial notice of a newspaper article by an assemblywoman, since statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation [*Southern Cal. Edison Co. v. Public Utilities Com.* (2004) 117 CA4th 1039, 12 CR3d 441].

An appellate court would deny the request for judicial notice of various items pertaining to city ordinances and ballot measures as ultimately irrelevant to the limited question resolved on appeal [*Barratt American, Inc. v. City of San Diego* (2004) 117 CA4th 809, 12 CR3d 132].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law
Judicial Review
Administrative Record
General Overview
Bankruptcy Law
Practice & Proceedings
General Overview
Civil Procedure
Alternative Dispute Resolution
General Overview



108 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

D. Weight of Evidence and Judicial Notice (Evid Code §§ 410-460)

Chapter 12 Judicial Notice Evidence Code §§ 450-460

1-12 California Courtroom Evidence 12.12

12.12 Appointment of Knowledgeable Persons--Compensation--Evid Code § 460

[1] Evid Code § 460 Text

■ *Evid Code § 460.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section makes it clear that a court may appoint experts on matters that are subject to judicial notice in those cases where the advice of an expert not identified with a party seems desirable and when the advice of such persons is required in order to enable the court to take such notice [Cal Law Rev Com Comment].

[3] Case Notes

When a referee in a dissolution of marriage action rejected all the testimony concerning goodwill valuation, he should have either had the parties furnish additional evidence or appointed his own expert to testify regarding goodwill valuation [*In re Marriage of Hargrave* (1985) 163 CA3d 346, 209 CR 764].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceJudicial NoticeGeneral OverviewEvidenceTestimonyExpertsCourt-Appointed ExpertsCompensationFamily LawMarital Termination & Spousal SupportGeneral Overview



109 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.syn

§ 13.syn Synopsis to Chapter 13: Burden of Proof Evidence Code §§ 500-523

13.01 General Provisions--Evid Code § 500

[1] Evid Code § 500 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Criminal Case Penalty Phase

[c] When Plaintiff Has Burden of Proof

[d] When Defendant Has Burden of Proof

[e] Defendant's Burden to Prove Causation

[f] Burden on Party With Peculiar Knowledge of Facts

[g] Shifting of Burden

[h] Effect of Burden of Proof

13.02 Criminal Actions--Evid Code § 501

[1] Evid Code § 501 Text

[2] Explanation of Exception

[3] Case Notes

[a] Prosecution's Burden of Proof

[b] Defendant's Burden as to Elements of Offense

[c] Defendant's Burden as to Collateral Matters

[d] Probation Revocation Hearing

[e] Burden of Proof on Entrapment Defense

[f] Burden of Proof on Legality of Search

[g] Other Burden-of-Proof Issues

13.03 Jury Instructions--Evid Code § 502

[1] Evid Code § 502 Text

[2] Explanation of Section

[3] Case Notes

[a] Fraud

[b] Establishing Liability

[c] Proof Established as Matter of Law

[d] Proving Proximate Cause

[e] Where Higher Standard Applied

[f] Criminal Proceedings

13.04 Crime or Wrongdoing Accusation--Evid Code § 520

[1] Evid Code § 520 Text

[2] Case Notes

13.05 Degrees of Care Accusation--Evid Code § 521

[1] Evid Code § 521 Text

[2] Commission Comments

[3] Case Notes

13.06 Insanity Accusation--Evid Code § 522

[1] Evid Code § 522 Text

[2] Commission Comments

[3] Case Notes

13.07 Land Patented or Granted by State-Disclosure of Nonprivileged Relevant Evidence--Evid Code § 523

[1] Evid Code § 523 Text



110 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code § 500 et seq.* on the burden of proof.



Cross Reference:

For discussion of the burden of proof and appropriate forms, see California Trial Guide, § Unit 51, Privileges, § 51.10 et seq. (Matthew Bender); Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burdens of Proof and Persuasion.



111 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.01

13.01 General Provisions--Evid Code § 500

[1] Evid Code § 500 Text

■ *Evid Code § 500.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Usually, the burden of proof requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence, a degree of proof usually described as proof by a preponderance of the evidence [*Evid Code § 115*] [Cal Law Rev Com Comment].

However in some instances, the burden of proof requires a party to produce a substantially greater degree of belief in the mind of the trier of fact a burden usually described by stating that the party must introduce clear and convincing proof or, with respect to the prosecution in a criminal case, proof beyond a reasonable doubt [Cal Law Rev Com Comment].

The basic rule is that whatever a party must affirmatively plead that party has the burden of proving. *Evid Code § 500*, however, is broader and applies to issues not raised in the pleadings [Cal Law Rev Com Comment].

Evid Code § 500 does not attempt to indicate what facts may be essential to a particular party's claim for relief or defense. The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence [Cal Law Rev Com Comment].

The court under *Evid Code § 500* may alter the normal application of the burden of proof in some cases and require a party to bear the burden of proof on an issue that is not part of his affirmative case. In determining whether to shift the burden of proof, the courts consider the following factors [Cal Law Rev Com Comment; see *Aydin Corp. v. First State Ins. Co.* (1998) 18 C4th 1183, 77 CR2d 537, 959 P2d 1213 (application of these four factors); *Corbett v. Hayward Dodge, Inc.* (2004) 119 CA4th 915, 14 CR3d 741 (no exception to general rule under circumstances)]:

1. The knowledge of each party concerning the particular fact,
2. The availability of the evidence to each party,
3. The most desirable result in terms of public policy in the absence of proof of the particular fact, and
4. The probability of the existence or nonexistence of the fact.

The essential considerations are those of policy and fairness based on experience in different situations [Cal Law Rev Com Comment].

Distinguish:

Evid Code §§ 601, 605, 606, and 660 *et seq.*, codify presumptions affecting the burden of proof. Generally, they are intended to implement some public policy other than to facilitate the determination of the actions. See the individual sections for a more complete discussion.

[3] Case Notes

[a] Construction of Statute

"Fundamental fairness" is the lodestar for analysis under *Evid Code* § 500 [*Adams v. Murakami* (1991) 54 C3d 105, 284 CR 318, 813 P2d 1348].

Evid Code § 500 was not intended to supersede rules allocating the burden of proof embodied in other statutory provisions or court decisions, as made clear by the section's introductory clause. In a defamation case in which the defendant asserts the common-interest privilege, the defendant bears the initial burden of proving the communication was made on a privileged occasion, and the plaintiff then bears the burden of proving that the defendant made the communication with malice [*Lundquist v. Reusser* (1994) 7 C4th 1193, 31 CR2d 776, 875 P2d 1279].

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 a party wants the court to do something, the party must present evidence sufficient to overcome the state of affairs that would exist if the court did nothing. Of course, the hard work for courts presented with burden of proof issues is to ascertain the true nature of the status quo, or the baseline where the court starts [*Conservatorship of Hume* (2006) 140 CA4th 1385, 1388, 44 CR3d 906 (in conservatorship, burden of proof is on objector to inventory and appraisal, not on conservator)].

The Supreme Court has suggested that municipal governments have no authority to depart from the common law of evidence. The Legislature has the power to make or alter the rules of evidence. Since there is no evidence of legislative intent to have municipal ordinances fall within the exception clause of *Evid Code* § 500, such an ordinance that shifts the traditional allocation of the burden of proof directly conflicts with the Evidence Code and is invalid to the extent of that conflict [*Fisher v. City of Berkeley* (1984) 37 C3d 644, 209 CR 682, 693 P2d 261].

A city rent control regulation that created a so-called "substantive defense" to eviction in situations where a landlord had voluntarily dismissed without prejudice a previous attempt to evict for owner-occupancy conflicted with the provisions of the Code of Civil Procedure that allow for the voluntary dismissal without prejudice of an unlawful detainer action. The regulation eliminated a procedural right granted to plaintiffs in unlawful detainer (and all other civil) actions, and could not stand [*Bohbot v. Santa Monica Rent Control Bd.* (2005) 133 CA4th 456, 471-472, 34 CR3d 827 (invalidating regulation)].

[b] Criminal Case Penalty Phase

Neither the prosecution nor the defense has the burden of proof during the penalty phase of a capital offense trial [*People v. Lenart* (2004) 32 C4th 1107, 12 CR3d 592, 88 P3d 498 ; *People v. Welch* (1999) 20 C4th 701, 85 CR2d 203, 976 P2d 754].

[c] When Plaintiff Has Burden of Proof

Consistent with a plaintiff's general burden under *Evid Code* § 500, a plaintiff employee who alleges violation of the California Fair Employment and Housing Act as a basis for recovery must prove that the defendant impermissibly discriminated because the plaintiff was able to do the job, with or without reasonable accommodation [*Green v. California* (2007) 42 C4th 254, 263, 64 CR3d 390, 165 P3d 118] .

The party moving to exclude evidence as a sanction for discovery abuse has the initial burden of establishing grounds supporting the request [*Evid Code* § 500]. When, as here, the court had not issued an order compelling a response or further response to an interrogatory (and when such an order had not been violated), the party moving for the exclusion of evidence had the burden of establishing the answer given by the responding party was willfully false, i.e., intentionally not true. In this case the interrogatory answers were incomplete and evasive, and clearly merited the issuance of an order compelling further answers and an award of monetary sanctions. But plaintiffs' failure to seek an order to compel constituted a waiver of any right to a further response [*CCP* § 2030.300(c)] to that particular question regarding witnesses' names. In the absence of a violation of an order to compel, incomplete and evasive answers were themselves an insufficient basis to exclude evidence. The trial court erred in excluding those witnesses' testimony; however, the error was harmless [*Saxena v. Goffney* (2008) 159 CA4th 316, 71 CR3d 469].

In an action seeking reimbursement from the insured for insurance defense costs, the insurer has the burden of proof [*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 C4th 38, 70 CR2d 118, 948 P2d 909 (where insurer breaches duty to defend, burden shifts to insured to prove site investigation expenses, which are then presumed reasonable; insurer must then prove expenses unreasonable or unnecessary); *Buss v. Superior Court* (1997) 16 C4th 35, 65 CR2d 366, 939 P2d 766 (preponderance of evidence)].

Punitive damages are "windfall recoveries"; 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 [*Kelly v. Haag* (2006) 145 CA4th 910, 917, 52 CR3d 126 ; *Chavez v. Keat* (1995) 34 CA4th 1406, 41 CR2d 72 ; *Adams v. Murakami* (1991) 54 C3d 105, 284 CR 318, 813 P2d 1348 (unfair to make defendant "bid against himself")].

In a civil case, plaintiff has the burden of proof with respect to all facts essential to his or her claim for relief [*Roddenberry v. Roddenberry* (1996) 44 CA4th 634, 51 CR2d 907 (contract action for Star Trek profits); *Mathis v. Morrissey* (1992) 11 CA4th 332, 13 CR2d 819 (burden of going forward with evidence of physician's nondisclosure for consent to proposed medical treatment rests with plaintiff)].

[d] When Defendant Has Burden of Proof

Plaintiffs sued for breach of an insurance policy issued by defendant. However, plaintiffs made material misrepresentations on the insurance application, entitling defendant to rescind the policy. Thus, defendant had no duty to defend or indemnify plaintiffs. The trial court correctly determined defendant was entitled to reimbursement of the defense and settlement costs it had paid, but erred in awarding judgment jointly and severally against all of the insureds. Defendant had failed to present evidence of the amount by which each of its insureds benefited from the defense and settlement costs it had advanced [*LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 CA4th 1259, 67 CR3d 917].

The defendant bears the burden of proving when the plaintiff discovered, or should have discovered, the facts constituting malpractice, for purposes of applying the one-year-from-discovery limitation on the commencement of an attorney malpractice action under *CCP* § 340.6(a). The plaintiff's actual or constructive discovery of defendant's wrongdoing is an element of the one-year-from-discovery limitation defense; the burden of proving a defense is on the party asserting it [*Samuels v. Mix* (1999) 22 *C4th* 1, 91 *CR2d* 273, 989 *P2d* 701].

The defendant generally bears the burden of proving its affirmative defenses. Thus, although *CCP* § 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense [*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 *CA4th* 658, 676, 35 *CR3d* 31 (in professional malpractice action against law firm whose clients ran "Ponzi scheme" that fleeced other clients, trial court erred in denying law firm's motion to strike under SLAPP law)].

Defendant has the burden of proof as to each fact, the existence or nonexistence of which is essential to the defense that he or she is asserting [*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 *CA4th* 415, 7 *CR3d* 60 (trial court erroneously instructed jury that plaintiffs bore burden to disprove affirmative defense of mistake of fact, as an element of their cause of action)].

[e] Defendant's Burden to Prove Causation

The burden of proof as to causation may be shifted to the defendant where demanded by the policy consideration that the burden of proving an element of a case is more appropriately borne by the party with greater access to information [*Sindell v. Abbott Laboratories* (1980) 26 *C3d* 588, 163 *CR* 132, 607 *P2d* 924 (*DES drug case*) ; *Haft v. Lone Palm Hotel* (1970) 3 *C3d* 756, 91 *CR* 745, 478 *P2d* 465 (drownings in motel pool)].

As a condition precedent to shifting the burden of proof as to causation to the defendant, the plaintiff must establish a "prima facie" case or "substantial probability" of causation [*McGee v. Cessna Aircraft Co.* (1983) 139 *CA3d* 179, 188 *CR* 542 ; *Harris v. Irish Truck Lines, Inc.* (1974) 11 *C3d* 373, 113 *CR* 489, 521 *P2d* 481 ; *Haft v. Lone Palm Hotel* (1970) 3 *C3d* 756, 91 *CR* 745, 478 *P2d* 465].

The burden of proving causation is not transferred merely upon testimony that the defendant's negligence may have compromised the plaintiff's ability to establish a case. Rather, the burden of proof is shifted only when there is a substantial probability that the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove proximate causation conclusively [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 *CA4th* 1658, 3 *CR3d* 279 (burden of proof for prima facie elements is placed on defendants when it is otherwise impossible for plaintiff to make its case, and when policy considerations support giving plaintiff greater protection); *Thomas v. Lusk* (1994) 27 *CA4th* 1709, 34 *CR2d* 265 (legal malpractice action based on attorney's failure to obtain and preserve defective product in underlying products liability action); *Simmons v. West Covina Medical Clinic* (1989) 212 *CA3d* 696, 260 *CR* 772 ; *Haft v. Lone Palm Hotel* (1970) 3 *C3d* 756, 91 *CR* 745, 478 *P2d* 465].

[f] Burden on Party With Peculiar Knowledge of Facts

If evidence lies peculiarly within the knowledge of one party, it may be necessary to place the burden of proof on that party [*Morris v. Williams* (1967) 67 *C2d* 733, 63 *CR* 689, 433 *P2d* 697]:

- The county properly had the burden of showing what it spent its surplus for and whether those expenditures were allowable as indirect costs [*County of Orange v. Barratt American, Inc.* (2007) 150 *CA4th* 420, 58 *CR3d* 542 (private attorney general action, attacking fees charged by county with surplus)].
- The burden of proving that the plaintiff was paid contingent compensation is properly placed on the

defendant in exclusive control of essential financial records [*Wolf v. Superior Court* (2003) 107 CA4th 25, 130 CR 2d 860].

- Trustees of California State University had the burden of proof as to the unfitness of a professor, based on access to information [*Webster v. Trustees of Cal. State University* (1993) 19 CA4th 1456, 24 CR2d 150].

- The burden of proof as to expenses incurred in piracy and sales of recordings was on the party with knowledge of the facts [*A & M Records, Inc. v. Heilman* (1977) 75 CA3d 554, 142 CR 390].

[g] Shifting of Burden

Once there has been a showing that a settlement has been made that 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 [*Fisher v. Superior Court* (1980) 103 CA3d 434, 163 CR 47 (this allocation of proof produces the most desirable effect in terms of public policy)].

[h] Effect of Burden of Proof

The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose [*Evans v. Paye* (1995) 32 CA4th 265, 37 CR2d 915 ; *Doyle v. Department of Real Estate* (1994) 30 CA4th 893, 36 CR2d 193 ; *Parker v. City of Fountain Valley* (1981) 127 CA3d 99, 179 CR 351].

The burden of proof to demonstrate use of a trade secret through improper means remained with the plaintiff, even though the burden of producing evidence to refute the prima facie case shifted to the defending party [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 3 CR3d 279].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Discovery & Inspection
Discovery Misconduct
General Overview
Insurance Law
Claims & Contracts
Good Faith & Fair Dealing
Duty to Defend
Trade Secrets Law
Misappropriation Actions
Elements
Improper Means



112 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.02

13.02 Criminal Actions--Evid Code § 501

[1] Evid Code § 501 Text

■ Evid Code § 501.

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.

LegH: 1965 ch. 299.

[2] Explanation of Exception

Evid Code § 522 is a stated exception. It provides that the defendant must prove his insanity by a preponderance of the evidence. Where a statute allocates the burden of proof to the defendant on any other issue relating to his guilt or innocence, however, the defendant's burden is merely to raise a reasonable doubt as to his guilt.

[3] Case Notes

[a] Prosecution's Burden of Proof

Pen Code § 1096 places on the prosecution in a criminal action the burden of proving a defendant guilty beyond a reasonable doubt. This requires the prosecution to prove every element of the offense beyond a reasonable doubt. It is a violation of due process to reduce the prosecution's burden or to shift to the defendant the burden of negating an element of the offense that the prosecution is required to prove [*People v. Babbitt* (1988) 45 C3d 660, 248 CR 69, 755 P2d 253].

The presumption of innocence is not a true presumption but a burden of proof on the issue of guilt [*People v. Pizarro* (2003) 110 CA4th 530, 3 CR3d 21].

In a proceeding to revoke probation of a defendant sentenced to diversion and counseling under Proposition 36, the prosecution had the burdens of producing evidence and of persuasion that at least one violation of probation was not drug-related [*People v. Atwood* (2003) 110 CA4th 805, 2 CR3d 67].

[b] Defendant's Burden as to Elements of Offense

A statute may create an affirmative defense that places on a defendant either the burden of proof (that is, persuasion) or the burden of producing evidence. However, no burden of proof can be placed on the defendant as to an element of the offense. If a statute places on the defendant the burden to produce evidence as to a fact that, if established, would tend to overcome or negate proof of an element of the crime charged as otherwise established by the prosecution, the defendant need only raise a reasonable doubt as to the existence or nonexistence of the fact.

- In prosecution for possession and cultivation of marijuana, facts underlying defense provided by *H&S Code § 11362.5(d)*, providing that statutes that criminalize possession and use of marijuana do not apply to a patient, or a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient on the written or oral recommendation or approval of a physician, defendant is required merely to raise reasonable doubt [*People v. Mower (2002) 28 C4th 457, 122 CR2d 326, 49 P3d 1067*].

- Instruction on presumption of consciousness places burden on defendant to produce evidence of unconsciousness, but only need raise reasonable doubt [*People v. Babbitt (1988) 45 C3d 660, 248 CR 69, 755 P2d 253*].

- In prosecution for sale of unqualified securities, statute placing burden of proving exemption of securities from qualification required defense to raise reasonable doubt that sale came within private-offering exemption [*People v. Figueroa (1986) 41 C3d 714, 224 CR 719, 715 P2d 680*].

- Defendant's alibi evidence only need create reasonable doubt he or she committed crime [*People v. Costello (1943) 21 C2d 760, 135 P2d 164*].

- Defendant has burden to show transportation of drugs was for personal use in order to be given Proposition 36 diversion; prosecution need not plead and prove the negative [*People v. Glasper (2003) 113 CA4th 1104, 7 CR3d 4*].

- In prosecution for cultivation of marijuana, defendant's testimony that he had physician approval under Proposition 215 was sufficient to raise reasonable doubt [*People v. Jones (2003) 112 CA4th 341, 4 CR3d 916*].

- Instruction that defendant had burden of raising reasonable doubt as to lawful possession of hypodermic syringe not error since it was affirmative defense under statute that contained exception for authorized possession [*People v. Fuentes (1990) 224 CA3d 1041, 274 CR 17*].

[c] Defendant's Burden as to Collateral Matters

As to an affirmative defense or other issue that is collateral to a defendant's guilt, the defendant may have the burden of proof (that is, persuasion) by a preponderance of the evidence. Such a burden may be placed on a defendant when the defense raises factual issues collateral to the question of the defendant's guilt or innocence that do not bear directly on any link in the chain of proof of any element of the crime [*People v. Newell (1923) 192 C 659, 221 P 622* (double jeopardy)].

- Because an exemption defense is not collateral to the defendant's guilt of a charge of selling unqualified securities, a defendant's burden is only to raise a reasonable doubt that the defendant sold nonexempt securities [*People v. Simon (1995) 9 C4th 493, 37 CR2d 278, 886 P2d 1271*].

● It is the defendant's burden to show by a preponderance of evidence that a witness was accomplice [*People v. Tewksbury* (1976) 15 C3d 953, 127 CR 135, 544 P2d 1335].

When a penal statute contains an exception or proviso to its operation, the exception may be either an affirmative defense upon which the defendant bears the burden of proof or may be an element of the crime that the prosecution must negate. Whichever it is depends on the nature of the exception, not its location. If the exception constitutes a part of the definition or description of the offense, the burden as to its proof is on the prosecution [*People v. Gott* (1994) 26 CA4th 881, 31 CR2d 840 (prosecution's burden to prove defendant was required to have permit for possession of ephedrine, since criteria for permit was incorporated within definition or description of offense)]. An instruction that the defendant had the burden of raising a reasonable doubt as to lawful possession of a hypodermic syringe was not error since it was an affirmative defense under the statute that contained an exception for authorized possession [*People v. Fuentes* (1990) 224 CA3d 1041, 274 CR 17].

[d] Probation Revocation Hearing

The "beyond a reasonable doubt" standard of proof is inapplicable in a probation revocation hearing. The court need only have a "reason to believe" that a probationer has violated his probation or committed a new offense. Thus, even if defendant has been acquitted of the second crime, the court at the revocation hearing may find that he did commit the second crime and revoke his probation [*In re Coughlin* (1976) 16 C3d 52, 127 CR 337, 545 P2d 249].

[e] Burden of Proof on Entrapment Defense

The entrapment defense requires proof by the defendant by a preponderance of the evidence. The reason for this rule is that the entrapment defense is not based on the defendant's guilt or innocence but was created by the courts for the extrinsic social policy of controlling illegal police conduct [*People v. Moran* (1970) 1 C3d 755, 83 CR 411, 463 P2d 763 ; *People v. Avila* (1967) 253 CA2d 308, 61 CR 441 (defendant must show he was induced to commit crime); *People v. DeJean* (1967) 249 CA2d 220, 57 CR 211 (entrapment is a positive defense)].

The defense will fail if the defendant is proved to have had criminal intent [*People v. Walters* (1968) 264 CA2d 834, 70 CR 766 (accused was willing to make a drug sale); *People v. Dickerson* (1969) 270 CA2d 352, 75 CR 828 (solicitation by decoy of an accused with pre-existing criminal intent)].

Entrapment may not be raised for the first time on appeal [*People v. Johnson* (1969) 276 CA2d 232, 80 CR 683].

[f] Burden of Proof on Legality of Search

The prosecution's burden of proof on the issue of consent to a search is proof by a preponderance of the evidence [*Taylor v. Superior Court* (1969) 275 CA2d 146, 79 CR 677 (reviewing court will accept consent freely given as a fact proven when substantial evidence supports trial court's findings); *People v. James* (1977) 19 C3d 99, 137 CR 447, 561 P2d 1135 (consent induced by illegal search or arrest is not voluntary)].

If a search is conducted without a warrant, the prosecution has the burden to prove justification under a recognized exception to the warrant requirement [*People v. Rios* (1976) 16 C3d 351, 128 CR 5, 546 P2d 293].

[g] Other Burden-of-Proof Issues

When seeking to have a defendant certified to the juvenile court, the burden of proof is on the party seeking to establish the defendant's minority [*People v. Van Nguyen* (1990) 222 CA3d 1612, 272 CR 523].

Prima facie proof is all that is necessary where evidence of another offense is offered to show common plan, scheme, or

design [*People v. Holliman* (1969) 274 CA2d 89, 78 CR 826].

Prosecution's burden of proof on venue issue in a criminal case may be proved by a mere preponderance of the evidence [*People v. Dorsey* (1969) 270 CA2d 423, 75 CR 658].

"Preponderance of the evidence" is the proper standard of proof for proving defendant committed uncharged crimes for purposes of determining the amount of restitution or whether restitution should be ordered as condition to probation [*People v. Baumann* (1985) 176 CA3d 67, 222 CR 32].

In a petition for conditional release under *W&I Code § 6608* (Sexually Violent Predator Act), the petitioner has the burden of proof by a preponderance of the evidence [*People v. Collins* (2003) 110 CA4th 340, 1 CR3d 641 (court declined to apply rules relating to guilty pleas)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesControlled SubstancesManufactureGeneral OverviewCriminal Law & ProcedureCriminal OffensesControlled SubstancesPossessionGeneral OverviewCriminal Law & ProcedureTrialsBurdens of ProofProsecution



113 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.03

13.03 Jury Instructions--Evid Code § 502

[1] Evid Code § 502 Text

■ *Evid Code § 502.*

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.

LegH: 1965 ch. 299.

[2] Explanation of Section

The court must instruct regarding the burden of proof and the proper standard to be applied on each issue. Three standards have been officially recognized: (1) preponderance of the evidence, (2) proof by clear and convincing evidence, and (3) proof beyond a reasonable doubt.

[3] Case Notes

[a] Fraud

The burden of proof in a fraud case is the same as any other civil case; the proof is by preponderance of the evidence [*Sierra National Bank v. Brown* (1971) 18 CA3d 98, 95 CR 742 ; *Liodas v. Sahadi* (1977) 19 C3d 278, 137 CR 635, 562 P2d 316 (case disapproves language to the contrary in several earlier Court of Appeal opinions)].

[b] Establishing Liability

Before liability may be established, all issues must be proved by a preponderance of the evidence. The plaintiff may have proof as a matter of law on negligence, but this does not automatically establish liability; he or she must also prove proximate cause of the injury, unless the facts are uncontroverted [*Haft v. Lone Palm Hotel* (1970) 3 C3d 756, 91 CR 745, 478 P2d 465 (swimming accident); *Whinery v. Southern Pac. Co.* (1970) 6 CA3d 126, 85 CR 649 (train

collision)].

[c] Proof Established as Matter of Law

Once proof is established as a matter of law the burden shifts to the other party to prove to the contrary by a preponderance of the evidence [*Haft v. Lone Palm Hotel* (1970) 3 C3d 756, 91 CR 745, 478 P2d 465 (swimming accident); *Summers v. Tice* (1948) 33 C2d 80, 199 P2d 1 (hunting accident); *Ybarra v. Spangard* (1944) 25 C2d 486, 154 P2d 687 (res ipsa loquitur)].

[d] Proving Proximate Cause

On failure to prove the issue of proximate cause as a matter of law, the burden of proof does not shift [*Smith v. American Motor Lodge* (1974) 39 CA3d 1, 113 CR 771].

[e] Where Higher Standard Applied

In conservatorship proceedings under the Lanterman-Petris-Short Act [W&I Code § 5350 *et seq.*], the proponent must prove beyond a reasonable doubt, rather than use the lower civil standard, that a person alleged to be gravely disabled is in need of the appointment of a conservator and commitment to an institution [*Conservatorship of Roulet* (1979) 23 C3d 219, 152 CR 425, 590 P2d 1].

[f] Criminal Proceedings

There is no statutory or constitutional duty to instruct on the prosecutorial burden at the penalty phase of a capital trial [*People v. Majors* (1998) 18 C4th 385, 75 CR2d 684, 956 P2d 1137 (neither is there a constitutional requirement that all aggravating factors must be proved beyond a reasonable doubt, that aggravating factors must outweigh the mitigating factors beyond a reasonable doubt, or that death must be found to be the appropriate penalty beyond a reasonable doubt)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Jury Instructions Particular Instructions General Overview Criminal Law & Procedure Sentencing Capital Punishment Aggravating Circumstances Torts Negligence Proof Res Ipsa Loquitur Elements Causation



114 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.04

13.04 Crime or Wrongdoing Accusation--Evid Code § 520

[1] Evid Code § 520 Text

- *Evid Code § 520.*

The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

LegH: 1965 ch. 299.

[2] Case Notes

Neither the federal Constitution nor *Evid Code § 520* requires that the jury be instructed that the prosecution has the burden of proof with regard to the truth of aggravating circumstances or the appropriateness of the death penalty. The trial court is not required to explicitly tell the jury that neither party bears the burden of proof [*People v. Leonard* (2007) 40 C4th 1370, 1429, 58 CR3d 368, 157 P3d 973 , cert den 2007 US LEXIS 12044] .

A trial court has a sua sponte duty under *Evidence Code Section 502* to instruct the jury correctly on defendant's burden of proof as to a defense. However, the trial court is required to instruct on a defense (and, by extension, on the defendant's burden of proof as to that defense) only if substantial evidence supports the defense [*People v. Shelmire* (2005) 130 CA4th 1044, 1054, 30 CR3d 696].

California's death penalty sentencing law is not unconstitutional, and did not violate *Evid Code § 520*, in requiring no burden of proof as to penalty because the capital sentencing function is not susceptible to a burden of proof quantification [*People v. Dunkle* (2005) 36 C4th 861, 32 CR3d 23, 116 P3d 494].

During the penalty phase of a capital trial, because the determination of penalty is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. The jury itself must, by determining what weight to give the various relevant factors, decide which penalty is more appropriate [*People v. Lenart* (2004) 32 C4th 1107, 12 CR3d 592, 88 P3d 498 ; *People v. Hayes* (1990) 52 C3d 577, 276 CR 874, 802 P2d 376].

On rare occasions, courts will shift the burden of proof from the plaintiff to the defendant, based on a policy judgment that there is a substantial probability the defendant has engaged in wrongdoing and the defendant's wrongdoing makes it

practically impossible for the plaintiff to prove the wrongdoing. Even in these cases, however, the plaintiff has the burden of producing some evidence before the burden of proof is shifted to the defendant [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 CA4th 1336, 133 CR2d 207 (plaintiff in false advertising action had burden of proving that challenged advertising claim was false or misleading)].

This section does not apply to liability under essentially regulatory statutes for toxic contamination by reason of acts in many instances done long before the statutes were enacted [*FMC Corp. v. Plaisted and Companies* (1998) 61 CA4th 1132, 72 CR2d 467 (CERCLA)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law
Hazardous Wastes & Toxic Substances
CERCLA & Superfund
Enforcement
Defenses & Exemptions
General Overview
Evidence
Procedural Considerations
Burdens of Proof
Allocation
Evidence
Procedural Considerations
Burdens of Proof
Burden Shifting



115 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.05

13.05 Degrees of Care Accusation--Evid Code § 521

[1] Evid Code § 521 Text

- *Evid Code § 521.*

The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

LegH: 1965 ch. 299.

[2] Commission Comments

As in *Evid Code § 520*, this Evid Code § codifies the burden of proof on the issue which replaces the now discredited "presumption of due care" contained in former *CCP § 1963* [Cal Law Rev Com Comment].

[3] Case Notes

Proof of negligence as a matter of law is established where the only reasonable hypothesis is that negligence existed [*Horn v. Oh* (1983) 147 CA3d 1094, 195 CR 720].



116 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.06

13.06 Insanity Accusation--Evid Code § 522

[1] Evid Code § 522 Text

■ *Evid Code § 522.*

The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

LegH: 1965 ch. 299

[2] Commission Comments

Evid Code § 522 codifies an allocation of the burden of proof that is frequently referred to in the cases as a presumption [Cal Law Rev Com Comment].

Distinguish: An insanity claim must be established by a preponderance of the evidence, and, as such, is an exception to *Evid Code § 501*.

[3] Case Notes

A proper instruction under *Evid Code § 522* may include the statement that "moral insanity," as an independent state, is not recognized by the law as a defense to a crime [*People v. Flanagan* (1969) 275 CA2d 966, 80 CR 408].

Requiring a defendant to prove insanity by a preponderance of the evidence is constitutional [*People v. Flanagan* (1969) 275 CA2d 966, 80 CR 408].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureDefensesBurdens of ProofCriminal Law & ProcedureDefensesInsanityInsanity Defense



117 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 13 Burden of Proof Evidence Code §§ 500-523

1-13 California Courtroom Evidence 13.07

13.07 Land Patented or Granted by State-Disclosure of Nonprivileged Relevant Evidence--Evid Code § 523

[1] Evid Code § 523 Text

■ *Evid Code § 523.*

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.

LegH: 1994 ch. 128.



118 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 14 Burden of Producing Evidence Evidence Code § 550

1-14 California Courtroom Evidence 14.syn

§ 14.syn Synopsis to Chapter 14: Burden of Producing Evidence Evidence Code § 550

14.01 Burden of Producing Evidence--Evid Code § 550

[1] Evid Code § 550 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Application of Rule

[c] Criminal Defendant's Burden



119 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 14 Burden of Producing Evidence Evidence Code § 550

1-14 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code* § 550 on the burden of producing evidence.



Cross Reference:

Discussion of the burden of producing evidence and appropriate forms, see *California Forms of Pleading and Practice*, Ch. 551, Trial, § 551.91 (Matthew Bender); Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burdens of Proof and Persuasion (Matthew Bender).



120 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 14 Burden of Producing Evidence Evidence Code § 550

1-14 California Courtroom Evidence 14.01

14.01 Burden of Producing Evidence--Evid Code § 550

[1] Evid Code § 550 Text

■ *Evid Code § 550.*

(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that 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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 550 deals with the allocation of the burden of producing evidence. At the outset of the case, this burden will coincide with the burden of proof. However, during the course of the trial, the burden of producing evidence may shift from one party to the other, irrespective of the incidence of the burden of proof [Cal Law Rev Com Comment].

For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof [Cal Law Rev Com Comment].

In addition, a party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence. These principles are in accord with well settled California law [Cal Law Rev Com Comment].

[3] Case Notes

[a] Construction of Statute

Evid Code §§ 603, 604, and 630 *et seq.* codify presumptions affecting the burden of producing evidence. Generally, they place the burden of producing evidence on particular issues on the party who has better access to the data [*Haft v. Lone Palm Hotel* (1970) 3 C3d 756, 91 CR 745, 478 P2d 465 (burden is on motel owner who failed to post warning and provide lifeguard at pool); *Conti v. Board of Civil Service Commissioners* (1969) 1 C3d 351, 82 CR 337, 461 P2d 617 (rehearing on limited issue on which respondents may possess evidence); *People v. Coffey* (1967) 67 C2d 204, 60 CR 457, 430 P2d 15 (state has burden of proving constitutionality of prior convictions elsewhere)].

When the evidence that is necessary to establish a fact essential to a claim is peculiarly within the knowledge and competence of the defendant, the defendant has the burden of going forward with the evidence on the issue even though the defendant did not assert the claim [*Morris v. Williams* (1967) 67 C2d 733, 63 CR 689, 433 P2d 697 (in action challenging validity of regulations reducing Medi-Cal services, burden is on the administrator of the health and welfare agency)].

[b] Application of Rule

Although equal probability does not satisfy a burden of proof [*Evid Code* § 115], it does satisfy a burden of producing evidence [*Estate of Obernolte* (1979) 91 CA3d 124, 153 CR 798].

When one party has the burden of producing evidence the other party does not have to produce further evidence until the party with the burden produces sufficient evidence to meet that burden [*People v. Zavala* (1983) 147 CA3d 429, 195 CR 527].

In a hearing on the termination of the parent-child relationship, the burden of proof by a preponderance of the evidence is with the party seeking to terminate the relationship [*In re Rose Lynn G.* (1976) 57 CA3d 406, 129 CR 338].

[c] Criminal Defendant's Burden

In an "own recognizance" hearing, the burden of producing evidence on the detainee's ties to the community is on the detainee [*Van Atta v. Scott* (1980) 27 C3d 424, 166 CR 149, 613 P2d 210].

The initial burden of introducing evidence on the illegality of an arrest or a search and seizure is on the defendant, who makes a *prima facie* case by establishing that an arrest or search was made without a warrant. The burden then shifts to the prosecution to show proper justification. This burden is discharged by proof by a preponderance of the evidence [*People v. James* (1977) 19 C3d 99, 137 CR 447, 561 P2d 1135 (warrantless search); *People v. Collins* (1997) 59 CA4th 988, 69 CR2d 544 (prosecution failed to introduce facially valid warrant)].

A probationer who objects to use of his or her testimony given at a probation revocation hearing has the initial burden of producing evidence that the charges against him or her are related to the circumstances at issue in the probation hearing [*People v. Coleman* (1975) 13 C3d 867, 120 CR 384, 533 P2d 1024].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Arrests Warrantless Arrest Criminal Law & Procedure Search & Seizure Warrantless Searches General Overview



121 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.syn

§ 15.syn Synopsis to Chapter 15: Presumptions and Inferences Evidence Code §§ 600-670

15.01 Governing Definitions--Evid Code § 600

[1] Evid Code § 600 Text

[2] Commission Comments

[3] Case Notes

[a] Presumptions

[b] Inferences

[c] Inference-on-Inference Rule

15.02 Conclusive or Rebuttable Presumptions--Definition--Evid Code § 601

[1] Evid Code § 601 Text

[2] Commission Comments

[3] Case Notes

15.03 Prima Facie Evidence--Evid Code § 602

[1] Evid Code § 602 Text

[2] Commission Comments

[3] Case Notes

15.04 Singular Purpose of Presumption Affecting Burden of Producing Evidence--Evid Code § 603

[1] Evid Code § 603 Text

[2] Commission Comments

[3] Case Notes

15.05 Effect of Presumption Affecting the Burden of Producing Evidence--Inferences--Evid Code § 604

[1] Evid Code § 604 Text

[2] Commission Comments

[3] Case Notes

15.06 General Purpose of Presumption Affecting Burden of Proof--Evid Code § 605

[1] Evid Code § 605 Text

[2] Commission Comments

[3] Case Notes

15.07 Effect of Presumption Affecting Burden of Proof--Proof of Presumed Fact--Evid Code § 606

[1] Evid Code § 606 Text

[2] Commission Comments

[3] Case Notes

15.08 Operation of Presumption in Criminal Action--Evid Code § 607

[1] Evid Code § 607 Text

[2] Commission Comments

[3] Case Notes

15.09 General Provisions--Evid Code § 620

[1] Evid Code § 620 Text

[2] Commission Comments

[3] Case Notes

15.10 Repealed--Evid Code § 621

15.11 Repealed--Evid Code § 621.1

15.12 Facts in Written Instruments--Evid Code § 622

[1] Evid Code § 622 Text

[2] Commission Comments

[3] Case Notes

15.13 Intentional Misleading Statement--Bar to Contradiction--Evid Code § 623

[1] Evid Code § 623 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Question of Fact or Law

[c] When Estoppel Applies

[d] When Estoppel Does Not Apply

15.14 Title Held by Landlord--Evid Code § 624

[1] Evid Code § 624 Text

[2] Commission Comments

15.15 Presumptions Affecting Burden of Producing Evidence--Evid Code § 630

[1] Evid Code § 630 Text

[2] Commission Comments

[3] Case Notes

15.16 Money Delivered by One to Another--Evid Code § 631

[1] Evid Code § 631 Text

[2] Commission Comments

[3] Case Notes

15.17 Thing Delivered by One to Another--Evid Code § 632

[1] Evid Code § 632 Text

[2] Commission Comments

15.18 Obligation Delivered Up to the Debtor--Evid Code § 633

[1] Evid Code § 633 Text

[2] Commission Comments

[3] Case Notes

15.19 Person in Possession of Order on Self for Payment or Delivery--Evid Code § 634

[1] Evid Code § 634 Text

[2] Commission Comments

[3] Case Notes

15.20 Obligation Possessed by Creditor--Evid Code § 635

[1] Evid Code § 635 Text

[2] Commission Comments

[3] Case Notes

15.21 Payment of Earlier Rent or Installments--Evid Code § 636

[1] Evid Code § 636 Text

[2] Commission Comments

[3] Case Notes

15.22 Things Possessed--Evid Code § 637

[1] Evid Code § 637 Text

[2] Commission Comments

[3] Case Notes

15.23 Exercise of Act of Ownership--Evid Code § 638

[1] Evid Code § 638 Text

[2] Commission Comments

[3] Case Notes

15.24 Judgment Determines, Sets Forth Rights of Parties--Evid Code § 639

[1] Evid Code § 639 Text

[2] Commission Comments

[3] Case Notes

15.25 Writing--Evid Code § 640

[1] Evid Code § 640 Text

[2] Commission Comments

[3] Case Notes

15.26 Letter Properly Addressed and Mailed--Evid Code § 641

[1] Evid Code § 641 Text

[2] Commission Comments

[3] Case Notes

15.27 Trustee's Conveyance to a Particular Person--Evid Code § 642

[1] Evid Code § 642 Text

[2] Commission Comments

15.28 Older Document to Affect Real or Personal Property Interest--Evid Code § 643

[1] Evid Code § 643 Text

[2] Commission Comments

15.29 Book Purporting to be Published by Public Authority--Evid Code § 644

[1] Evid Code § 644 Text

[2] Commission Comments

15.30 Book Purporting to Contain Reports of Adjudged Cases--Evid Code § 645

[1] Evid Code § 645 Text

[2] Commission Comments

15.31 Newspaper and Periodical Presumption--Evid Code § 645.1

[1] Evid Code § 645.1 Text

15.32 Res Ipsa Loquitur--Evid Code § 646

[1] Evid Code § 646 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Presumption of Negligence Applies

[c] Presumption of Negligence Can Apply in Unusual Situations

[d] Medical Malpractice Cases

[e] Presumption of Negligence Not Applicable

15.33 Process Server Returned--Evid Code § 647

[1] Evid Code § 647 Text

15.34 Presumptions Affecting the Burden of Proof--Evid Code § 660

[1] Evid Code § 660 Text

[2] Commission Comments

[3] Case Notes

15.35 Repealed--Evid Code § 661

15.36 Owner of Legal title is Owner of Beneficial Title--Evid Code § 662

[1] Evid Code § 662 Text

[2] Commission Comments

[3] Case Notes

[a] Application of Rule

[b] Rebuttal of Presumption

15.37 Ceremonial Marriage--Evid Code § 663

[1] Evid Code § 663 Text

[2] Commission Comments

[3] Case Notes

15.38 Official Duty Regularly Performed--Lawful Arrest--Evid Code § 664

[1] Evid Code § 664 Text

[2] Commission Comments

[3] Case Notes

[a] Burden of Proof

[b] Official Duty Presumed to Have Been Performed

[c] Lawfulness of Arrest

[d] Habeas Corpus Proceedings

[e] Clerks of Court

[f] Judges

[g] School District

[h] Completion of Prison Term

[i] Administration of Breath Test

15.39 Intention of Ordinary Consequences of Voluntary Act--Evid Code § 665

[1] Evid Code § 665 Text

[2] Case Notes

15.40 Any Court, Judge Acting as Such--Evid Code § 666

[1] Evid Code § 666 Text

[2] Commission Comments

[3] Case Notes

15.41 Presumption of Death--Five Year Absence--Evid Code § 667

[1] Evid Code § 667 Text

[2] Commission Comments

[3] Case Notes

15.42 Doing an Unlawful Act--Evid Code § 668

[1] Evid Code § 668 Text

[2] Commission Comments

[3] Case Notes

15.43 Failure of Person to Exercise Due Care--Rebuttal--Evid Code § 669

[1] Evid Code § 669 Text

[2] Commission Comments

[3] Case Notes

[a] Application of Rule

[b] Statutory Violation

[c] Violation of Work Safety Law

[d] Violation of Ordinance

[e] Violation of Regulation

[f] Effect of Rule Other Than Statute, Ordinance, or Regulation

15.44 Local Rules of Public Employment Conduct--Evid Code § 669.1

[1] Evid Code § 669.1 Text

[2] Case Notes

15.45 Presumption of Impact on Housing Supply--Ordinance Limiting Building--Evid Code § 669.5

[1] Evid Code § 669.5 Text

[2] Case Notes

15.46 Evidence Raising Presumption of Payment in Disputes Concerning Payment by Check--Evid Code § 670

[1] Evid Code § 670 Text



122 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code § 600 et seq.* on presumptions and inferences.



Cross Reference:

For discussion of presumptions and inferences and appropriate forms, see *California Forms of Pleading and Practice, Ch. 551, Trial, § 551.100 et seq.* (Matthew Bender); Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burdens of Proof and Persuasion (Matthew Bender).



123 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.01

15.01 Governing Definitions--Evid Code § 600

[1] Evid Code § 600 Text

■ *Evid Code § 600.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

Other sections classify and list various presumptions [*Evid Code* §§ 620, 622-624 (conclusive presumptions); *Evid Code* §§ 630-646 (presumptions affect burden of proving evidence); *Evid Code* §§ 600-666 (presumptions affect the burden of proof)]. The primary distinction between a presumption and an inference is that a presumption is an assumption of facts required to be made from another fact or facts which then affects either the burden of producing evidence or the burden of proof (unless it is a conclusive presumption), whereas an inference is merely a deduction of fact drawn from another fact or facts [Cal Law Rev Com Comment].

The definition of "inference" in *Evid Code* § 600(b) restates in substance *CCP* §§ 1958 and 1960. Under the Evidence Code, an inference is not evidence, it is the result of reasoning from evidence [Cal Law Rev Com Comment].

Certain presumptions formerly found in the Code of Civil Procedure are not brought forward in the Evidence Code. The fact that a statutory presumption has been repealed will not preclude the drawing of any appropriate inferences from the facts that would have given rise to the presumption. And, in appropriate cases, the court may instruct the jury on the propriety of drawing particular inferences [Cal Law Rev Com Comment].

The second sentence of (a) is included to clearly repudiate decisional law in the state which states that a presumption was evidence to be weighed against conflicting evidence. The former rule created an imposition of an undefined, higher

burden of proof on the party against whom it applied. This is now corrected [Cal Law Rev Com Comment].

[3] Case Notes

A presumption is not evidence [*People v. Brock* (2006) 143 CA4th 1266, 1279, 49 CR3d 879 (trial court improperly interpreted substantive undue influence provisions of Civil Code to be presumptions applicable under *Penal Code* § 1102 to criminal action for theft)].

[a] Presumptions

The mandatory and permissive presumptions contemplated by *Evid Code* § 600 are rebuttable. Whether the fact finder may find the elemental fact on proof of the basic fact (a permissive presumption) or must find the elemental fact upon proof of the basic fact (a mandatory presumption), the defendant has the opportunity to rebut the presumed connection between the basic and ultimate facts [*People v. McCall* (2004) 32 C4th 175, 8 CR3d 337, 82 P3d 351 (phrase "shall be deemed" established substantive rule of law, not mandatory presumption)].

A presumption arises when the foundational facts for the presumption are established [*Coso Energy Developers v. County of Inyo* (2004) 122 CA4th 1512, 19 CR3d 669].

A presumption of incompetence of a child by virtue of age is rebuttable with evidence that supports a finding of competence at an earlier time [*In re Daniel Z.* (1992) 10 CA4th 1009, 13 CR2d 139].

When two presumptions are in conflict, the more specific presumption must control over the more general presumption [*In re Marriage of Brinkman* (2003) 111 CA4th 1281, 4 CR3d 722].

[b] Inferences

The term "inference" is defined by statute, while the term "likelihood" is not. *Evid Code* § 600(b), which defines the term "inference," does not state how strong the inference must be. That standard is provided by the applicable burden of proof [*People v. Johnson* (2003) 30 C4th 1302, 1 CR3d 1, 71 P3d 270] .

Evid Code § 600(b) defines an inference as 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. In other words, the inference supports a plaintiff's prima facie case and avoids the risk of nonsuit. It is important to distinguish an inference (which may, in the discretion of the trier of fact, support a plaintiff's claim) from a presumption, or an assumption of fact that the law requires to be made from another group of facts [*Ortega v. Kmart Corp.* (2001) 26 C4th 1200, 114 CR2d 470, 36 P3d 11 (in shopper's suit against store for slipping on a puddle of milk, evidence of store's failure to inspect premises within reasonable period of time was sufficient to allow an inference that condition existed long enough for the store to discover it)].

An inference does not follow from the nonexistence of a fact. It cannot be based on speculation, supposition, conjecture, or guesswork [*Traxler v. Thompson* (1970) 4 CA3d 278, 84 CR 211 (act from which inference flows must be established); *Ruth v. Lytton Sav. & Loan Ass'n* (1968) 266 CA2d 831, 72 CR 521 (loan for down payment is not construction loan)].

Although there can be factual situations where a lay person, without expert testimony, may infer that an injury would not occur without negligence from the fact of the accident alone, usually the plaintiff must produce some expert testimony that would support the inference [*Fraser v. Sprague* (1969) 270 CA2d 736, 76 CR 37 (medical malpractice)].

Whether a particular inference can be drawn from certain evidence is a question of law, but whether it should be drawn in any given case is a question of fact [*Wigodsky v. Southern Pacific Co.* (1969) 270 CA2d 51, 75 CR 419 ; *Conservatorship of Geiger* (1992) 3 CA4th 127, 4 CR2d 252].

The trial court has the power to draw its own reasonable inferences from the evidence and to make its own determinations as to the credibility of the witnesses. Thus, on a review of an administrative hearing, the trial court is not bound by the inferences drawn by a hearing officer nor by its determination on the credibility of witnesses. However, on appeal from the trial court's judgment, where the evidence supports more than one reasonable inference, the appellate court may not substitute its deductions for those of the trial court [*Morrison v. Housing Authority* (2003) 107 CA4th 860, 132 CR2d 453].

[c] Inference-on-Inference Rule

When dealing with an inference on an inference, the final inference should be judged on remoteness and speculation, and if too remote, it should be rejected [*Walton v. Anderson* (1970) 6 CA3d 1003, 86 CR 345 (court disbelieved that defendants had acted in good faith); *People v. Warner* (1969) 270 CA2d 900, 76 CR 160 (telephone calls to bookmaking establishment)].

Evidence based on an inference drawn from an inference can support a judgment only where the first inference is drawn from sufficient evidence and the second inference is not too remote [*Louis & Diederich, Inc. v. Cambridge European Imports* (1987) 189 CA3d 1574, 234 CR 889].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Inferences & Presumptions Exceptions Statutory Presumptions Governments Agriculture & Food Product Quality



124 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.02

15.02 Conclusive or Rebuttable Presumptions--Definition--Evid Code § 601

[1] Evid Code § 601 Text

■ Evid Code § 601.

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The Evidence Code reflects the view that presumptions are created for a variety of reasons. To meet these several reasons, two types of rebuttable presumptions are recognized. *Evid Code* §§ 603 and 605 define the two classes. *Evid Code* §§ 604, 606, and 607 prescribe their effect. Also, while *Evid Code* §§ 630-668 classify many presumptions, many others will be developed by the court and Legislature over the years [Cal Law Rev Com Comment].

[3] Case Notes

A conclusive presumption is an evidentiary concept which means that once the foundational facts upon which such a presumption is based are established, the assumed fact may not be controverted by contrary evidence [*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 CA4th 1, 84 CR2d 715].

There is no special presumption that smokers are aware of the addictiveness or health hazards of smoking, but there is a general, rebuttable presumption that a plaintiff has knowledge of the wrongful cause of his or her injury. In a personal injury action against a tobacco company, plaintiff failed to plead specific facts justifying the delay in discovering her smoking addiction, such as reasonable reliance on tobacco company misrepresentations [*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 C4th 623, 647, 54 CR3d 735, 151 P3d 1151].

The conclusive presumption under CC § 2924 did not apply on instant facts because party was not bona fide purchaser [*Melendrez v. D & I Investment, Inc.* (2005) 127 CA4th 1238, 1250 n17, 26 CR3d 413].

Legal Topics:

For related research and practice materials, see the following legal topics:

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125 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.03

15.03 Prima Facie Evidence--Evid Code § 602

[1] Evid Code § 602 Text

- *Evid Code § 602.*

A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 602 indicates the construction to be given the large number of statutes scattered through the codes that state that one fact or group of facts is prima facie evidence of another fact. In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof. It seems likely, however, that in many instances such statutes are not intended to affect the burden of proof but only the burden of producing evidence. *Evid Code § 602* provides that these statutes are to be regarded as rebuttable presumptions. Hence, unless some specific language applicable to the particular statute in question indicates whether it affects the burden of proof or only the burden of producing evidence, the courts will be required to classify these statutes as presumptions affecting the burden of proof or the burden of producing evidence in accordance with the criteria set forth in *Evid Code §§ 603 and 605* [Cal Law Rev Com Comment].

[3] Case Notes

CC § 1105 establishes a rebuttable presumption that "a fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended" [*Munger v. Moore* (1970) 11 CA3d 1, 89 CR 323 (presumption implements public policy favoring stability of titles); *Develop-Amatic Engineering v. Republic Mortgage Co.* (1970) 12 CA3d 143, 91 CR 193 (to have deed absolute in form declared a mortgage, there must be proof by clear and convincing evidence)].

The legal presumption that a certified reporter's transcript is correct [*CCP § 273*] was not overcome by a judge's testimony that it was his habit and custom to read instructions verbatim from a printed form [*People v. Kronemyer*

(1987) 189 CA3d 314, 234 CR 442].

CCP § 1209.5 establishing a mandatory presumption and requiring the trier of fact to find a prima facie case of contempt whenever a valid court order is not obeyed is constitutionally defective unless the basic fact proved compels the inference of guilt beyond a reasonable doubt [*In re Feiok* (1986) 180 CA3d 649, 225 CR 748 (noncompliance with valid court order)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceCompetencyJudgesEvidenceInferences & PresumptionsRebuttal of PresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



126 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.04

15.04 Singular Purpose of Presumption Affecting Burden of Producing Evidence--Evid Code § 603

[1] Evid Code § 603 Text

- *Evid Code § 603.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of proof by applying the standards contained in *Evid Code* §§ 603 and 605 [Cal Law Rev Com Comment].

Evid Code § 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases [Cal Law Rev Com Comment].

[3] Case Notes

The purpose of the rebuttable presumption of *Evid Code* § 603 relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked. A presumption affecting the burden of producing evidence is based on an underlying logical inference that the presumed fact very likely follows from the proved fact.

The presumption is designed to avoid unnecessary proof of facts likely to be true if not disputed. Such a rebuttable presumption is designed to place the responsibility for establishing the nonexistence of certain facts on the party most able to do so [*Fisher v. City of Berkeley* (1984) 37 C3d 644, 694, 209 CR 682, 693 P2d 261].

The evidence presented by the owner of a rent-controlled mobile home park on its application for a special adjustment of rents did not serve to rebut an evidentiary presumption that the existing rent adjustment formulas contained within the city's rent control ordinance provided a fair return [*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 CA4th 1355, 68 CR3d 320].

In a dissolution of marriage action in which ownership of property was contested, the trial court correctly applied the preponderance of evidence standard to rebut the presumption of *Fam Code* § 760 that property acquired by either spouse during marriage was community property. The husband established by a preponderance of the evidence that the contested property was a gift to him alone [*In re Marriage of Ettefagh* (2007) 150 CA4th 1578, 59 CR3d 419 (affirming judgment)].

Although called a presumption, a disputed section of the Capitola Municipal Code preliminarily allocated the burden of proof and established a procedure for a trailer park owner to challenge the current controlled-rent rate by requiring the park owner to initiate the process by submitting evidence showing that the current rent did not provide a fair rate of return. This municipal ordinance affected the burden of producing evidence because it operated to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied [*Los Altos El Granada Investors v. City of Capitola* (2006) 139 CA4th 629, 657, 43 CR3d 434] .

Presumption is one affecting the burden of proof. Mere production of evidence sufficient to support a finding that presumed facts were false is insufficient to dispel the presumption [*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co. of Pittsburgh* (1993) 12 CA4th 501, 15 CR2d 726 (injured party has the burden of producing by a preponderance of the evidence the basic or foundational facts of the settlement)].

The presumption provided in *Cal Rules Ct, Rule 185.5(a)* that a defendant who is represented by appointed counsel at a misdemeanor trial is presumed indigent on appeal is rebuttable and affects the burden of producing evidence [*Hernandez v. Superior Court* (1992) 9 CA4th 1183, 12 CR2d 55].

Legal Topics:

For related research and practice materials, see the following legal topics:

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127 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.05

15.05 Effect of Presumption Affecting the Burden of Producing Evidence--Inferences--Evid Code § 604

[1] Evid Code § 604 Text

■ *Evid Code § 604.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

A presumption affecting the burden of producing evidence is merely a preliminary assumption in the absence of contrary evidence. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict [Cal Law Rev Com Comment].

If a presumption affecting the burden of proof is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is no evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge should instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, by stipulation, by judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge should charge the jury that, if it finds the basic fact, the jury must also find the presumed fact [Cal Law Rev Com Comment].

[3] Case Notes

There is no special presumption under California law based on common knowledge that a plaintiff is aware that smoking is addictive or harmful. On the other hand, California law recognizes a general, rebuttable presumption, that

plaintiffs have knowledge of the wrongful cause of an injury. In order to rebut that presumption, a plaintiff must plead facts showing an inability to have discovered that addiction, such as reasonable reliance on tobacco company misrepresentations [*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 C4th 623, 54 CR3d 735, 151 P3d 1151] .

When used in appropriate cases, permissive inferences do not shift the burden of production or lower the prosecution's burden of proof. Because they may or may not be drawn by the jury, they do not operate in an unconstitutionally pernicious manner. For these reasons, CALJIC No. 12.61.1 (providing that blood alcohol level at time of arrest "may be inferred" from results of test given later) may be given regardless of whether there is other evidence admitted at trial "rebutting" the inference. However, the evidence in this case did not support this instruction. While in isolation either blood alcohol test was sufficient to allow for the inference permitted, together they showed that appellant's blood alcohol level was rising from the time he was stopped until three hours later. Both parties' expert witnesses hypothesized that, assuming the reliability of the test results, appellant's blood alcohol was under the legal limit when he was driving. Since the entire conviction rested on the inferred fact that the driver had an illegal blood alcohol level at the time of driving, which was not established beyond a reasonable doubt, giving this jury instruction was constitutional error that improperly lowered the prosecution's burden of proof [*People v. Beltrane* (2007) 157 CA4th 235, 68 CR3d 489] .

When the effect of a rebuttable presumption is to shift the burden of producing evidence, and the presumption applies to a proposition, the proponent of the proposition need not prove it unless the opposing party produces evidence undermining it, in which case the presumption is disregarded and the trier of fact must decide the question without regard to it [*Pellerin v. Kern County Employees' Retirement Assn.* (2006) 145 CA4th 1099, 1106, 52 CR3d 201 (appeal from determination of disability)].

A marital settlement agreement was by its terms intended to be a complete and binding settlement of all custody, support, and property issues, and there is no dispute that the agreement itself was admissible. The agreement strongly supported a finding of the nonexistence of the presumed undue influence and thereby negated that presumption under *Evid Code* § 604. That did not prevent the wife from showing that undue influence was exerted; it only meant that she had the burden of proof in so doing [*In re Marriage of Kieturakis* (2006) 138 CA4th 56, 91, 41 CR3d 119] .

The presumption that a letter sent is delivered [*Evid Code* § 641] was rebutted by uncontradicted declarations; therefore, the presumption ceased to exist [*Bonzer v. City of Huntington Park* (1993) 20 CA4th 1474, 25 CR2d 278] .

When at trial a child is found incompetent to testify, there is a rebuttable presumption that the child was incompetent at an earlier time [*In re Basilio T.* (1992) 4 CA4th 155, 5 CR2d 450 (court created a nonstatutory rebuttable presumption of incompetency at an earlier proceeding where the child is incompetent to testify at trial); *In re Daniel Z.* (1992) 10 CA4th 1009, 13 CR2d 139 (in molestation case, children's hearsay statements in social service reports were inadmissible where children were incompetent to testify at trial); *In re Dorinda A.* (1992) 10 CA4th 1657, 13 CR2d 653 (child's statements at prior dependency hearing were inadmissible where child found incompetent to testify at trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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128 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.06

15.06 General Purpose of Presumption Affecting Burden of Proof--Evid Code § 605

[1] Evid Code § 605 Text

■ *Evid Code § 605.*

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 title to property, or the security of those who entrust themselves or their property to the administration of others.

LegH: 1965 ch. 299; 1975 ch. 1244.

[2] Commission Comments

This section includes all rebuttable presumptions that are designed to promote a social policy other than, or in addition to, the policy of facilitating the trial of actions. The basic distinction between a presumption affecting the burden of proof and a presumption affecting the burden of producing evidence is primarily a distinction between that of some further social policy and trial facilitation. Therefore, what makes a presumption one affecting the burden of proof is the fact that there is always some further reason of social policy for the establishment of the presumption [Cal Law Rev Com Comment].

The lack of a logical inference to any extrinsic social policy is a hint that the presumption is one affecting the burden of proof. For example, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workers' compensation is a clear indication that the presumption is based on public policy and affects the burden of proof. The basic distinction between social policy and trial facilitation must be kept in mind when classifying presumptions [Cal Law Rev Com Comment].

[3] Case Notes

In an action challenging the California Industrial Welfare Commission's authority to pass a regulation exempting employers from providing certain meal breaks, the presumption of *Labor Code § 1200* implemented the public policy in favor of the validity of IWC work orders, and thus constituted a presumption shifting the burden of proof under *Evid*

Code § 605. It placed the burden of proof as to the nonexistence of the presumed fact on the party against whom the presumption operates. Plaintiffs satisfied their burden by establishing that the contested portion of the wage order conflicted with *Labor Code § 512* by creating a new exception not authorized by the Legislature, overcoming the presumption of section 1200 [*Bearden v. U.S. Borax, Inc.* (2006) 138 CA4th 429, 437, 41 CR3d 482] .

Implementation of public policy of protecting confidential information is purpose of presumption in conflicts of interest case that former employee of attorney used or disclosed information in current employment and, hence, presumption is one affecting burden of proof [*Shadow Traffic Network v. Superior Court* (1994) 24 CA4th 1067, 29 CR2d 693 (application for disqualification based on nonlawyer employee conflict of interest)].

Once confidential information has been shared with an expert, a rebuttable presumption arises that the same information has been used by or disclosed to the subsequent employer. The effect of this type of presumption is to impose on the party against whom it operates the burden of proof as to the nonexistence of the presumed fact [*Evid Code § 606*]. The rebuttable presumption should not apply where the expert has remained under the control of the moving party, and there is no evidence counsel knowingly retained the opposing party's expert or that the expert intentionally advised both sides. In such a case, the moving party has the burden of proving that the confidential information it imparted to its expert witness has been transmitted to the opposing party [*Collins v. State of California* (2004) 121 CA4th 1112, 18 CR3d 112].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsConflicting PresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsEvidenceProcedural ConsiderationsBurdens of ProofAllocation



129 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.07

15.07 Effect of Presumption Affecting Burden of Proof--Proof of Presumed Fact--Evid Code § 606

[1] Evid Code § 606 Text

■ *Evid Code § 606.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof. Such is a greater burden and requires proof of the nonexistence of the presumed fact sufficiently strong to command the unhesitating assent of every reasonable mind [Cal Law Rev Com Comment].

If the party against whom the presumption operates already has the burden of proof on the presumed fact, the presumption has no effect on the case and no instruction should be given on the presumption [Cal Law Rev Com Comment].

If the evidence is not sufficient to counter the presumption, the court's instructions will be as if dealing with a presumption affecting the burden of producing evidence as discussed under *Evid Code § 604* [Cal Law Rev Com Comment].

If there is evidence of the nonexistence of the presumed fact, then either of two methods of instruction may apply:

1. If the basic fact from which the presumption arises is so established that it is not a question of fact (for example, a pleading, stipulation, or judicial notice), that the jury should be instructed that the presumed fact is to be assumed unless and until contrary evidence of the requisite degree of proof is received. If this occurs at the end of the trial, the last qualifying phrase would not seem to be necessary.

2. If the basic fact is a question of fact, the jury should be instructed that if it finds the basic fact to be true, it must also

find the presumed fact. Of course, the finding on the basic fact is dependent on the requisite degree of proof [Cal Law Rev Com Comment].

[3] Case Notes

The effect of some rebuttable presumptions is to shift the burden of proof: Where, absent the presumption, one party would have the burden of proving some proposition, the presumption means the proposition is presumed true unless the other party proves it false. Cal Govt Code § 31720.5 (presuming that certain public safety workers' heart conditions result from their employment) creates a presumption affecting the burden of proof, not one merely affecting the burden of producing evidence [*Pellerin v. Kern County Employees' Retirement Assn.* (2006) 145 CA4th 1099, 1106, 52 CR3d 201 (appeal from determination of disability)].

In a medical malpractice action, the trial court erred in granting defendant's motion to disqualify plaintiff's counsel, based on plaintiff's counsel's associate having contacted and named defendant's expert as a potential expert for plaintiff. The trial court erroneously placed the burden of persuasion on plaintiff to disprove that confidential information was imparted to plaintiff's counsel, and instead should have placed the burden of proof on defendant to prove confidential information was imparted to plaintiff's counsel, especially since defendant continued to employ the expert witness. Defendant failed to carry the burden of persuasion to show that plaintiff's counsel did obtain confidential information from defendant's expert during the conversation. The burden-shifting (rebuttable) presumption applicable to former employees and the burden-shifting (conclusive) presumption applicable to former attorneys did not apply [*Shandralina G. v. Homonchuk* (2007) 147 CA4th 395, 411-413, 54 CR3d 207] .

The presumptions of industrial causation found in *Lab Code § 3212 et seq.* are rebuttable; and, because they reflect public policy, they are presumptions affecting the burden of proof. The effect of a presumption affecting the burden of proof is to impose, on the party against whom it operates, the burden of proof as to the nonexistence of the presumed fact. Here, the statutory language unambiguously allocates the respective burdens of proof between the employee and employer. To invoke the presumption, the employee must demonstrate, by a preponderance of the evidence, that he or she was exposed, while in the service of the employer, to a known carcinogen. If the employee clears this hurdle, he or she is entitled to the presumption that the cancer arose out of and in the course of the employment. The presumption is "disputable." It may be controverted only in a clearly specified and limited manner: by a preponderance of the evidence that (1) the primary site of the cancer has been established; and (2) that the carcinogen to which the employee has demonstrated exposure was not reasonably linked to the cancer. A preponderance of the evidence means evidence which, when weighed with contrary evidence, has more convincing force and the greater probability of truth. The 1999 amendments removed the requirement that the employee prove a reasonable link and shifted the burden of proof to the employer to disprove a reasonable link, and to establish the primary site of the cancer. As noted, where facts are proven giving rise to a presumption under one of the workers' compensation presumption statutes, the burden of proof shifts to the party, against whom it operates, to prove the nonexistence of the presumed fact, to wit, an industrial relationship. The inescapable conclusion is that the Legislature intended to remove the burden from employees and enable them to obtain benefits even when it was not possible to prove the cancer was linked to the particular carcinogen [*City of Long Beach v. Workers' Compensation Appeals Bd.* (2005) 126 CA4th 298, 23 CR3d 782 (affirming order denying reconsideration of award for employee)].

The presumption of *Lab Code § 1200* implements the public policy in favor of the validity of work orders, and thus constitutes a presumption shifting the burden of proof [*Evid Code § 605*]. It places the burden of proof as to the nonexistence of the presumed fact on the party against whom the presumption operates. Plaintiffs satisfied their burden by establishing that Wage Order section 10(E) conflicts with *Evid Code § 512* by creating a new exception not authorized by the Legislature. The presumption of section 1200 was overcome [*Bearden v. U.S. Borax, Inc.* (2006)].

When the parent with custody of a child objects to grandparent visitation, *Fam Code § 3104(f)* imposes a rebuttable presumption, affecting the burden of proof, that grandparent visitation is not in the child's best interest [*In re*

Marriage of Harris (2004) 34 C4th 210, 17 CR3d 842, 96 P3d 141].

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 to facilitate the determination of the particular action [*Hewitt v. Meaney (1986) 181 CA3d 361, 226 CR 349* (presumption to create an easement serves public policy of freeing land for use); *Hernandez v. Superior Court (1992) 9 CA4th 1183, 12 CR2d 55* (presumption of policy in favor of parent-child relationship); see *Evid Code §§ 603, 604*].

The presumption in *Lab Code § 2922* that employment is terminable at will is a presumption affecting the burden of proof because it is premised on public policy considerations. The effect of the presumption is that the trier of fact must decide whether there is sufficient evidence to overcome the presumption and determine that there was an implied-in-fact contract to only terminate for good cause [*Haycock v. Hughes Aircraft Co. (1994) 22 CA4th 1473, 28 CR2d 248*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence Inferences & Presumptions Effects Family Law Child Custody Visitation Awards Third Parties Grandparents Labor & Employment Law Employment Relationships At-Will Employment Exceptions Public Policy



130 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.08

15.08 Operation of Presumption in Criminal Action--Evid Code § 607

[1] Evid Code § 607 Text

■ *Evid Code § 607.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The prosecution must establish all underlying facts of a presumption affecting the burden of proof on a fact essential to the defendant's guilt beyond a reasonable doubt [Cal Law Rev Com Comment].

The defendant thereafter, except for insanity issues, need only raise a reasonable doubt as to the underlying facts which give rise to a presumption affecting the burden of proof. This gives the defendant two chances: (1) he can dispute the presumption by raising a reasonable doubt as to its validity, or (2) he can raise a reasonable doubt regarding the facts underlying the presumption [Cal Law Rev Com Comment].

The instructions in a criminal case will be similar to those given on issues relating to the guilt or innocence of the defendant where he has the burden of proof [Cal Law Rev Com Comment; *see Evid Code § 501*].

Whether there is no evidence or some evidence offered by the defendant to show the nonexistence of the presumed fact, the jury is instructed that if they find beyond a reasonable doubt the facts giving rise to the presumption, they should also find the presumed fact. Where contrary evidence is offered, they should also be instructed that if they find the contrary evidence has raised a reasonable doubt as to the existence of the presumed fact, then the prosecution has failed in its burden of proof [Cal Law Rev Com Comment].

Since there is no longer a presumption of sanity, that issue is controlled by *Evid Code § 522* [Cal Law Rev Com

Comment].

[3] Case Notes

The presumption of innocence is not a true presumption but affects the burden of proof on the issue of guilt [*People v. Pizarro* (2003) 110 CA4th 530, 3 CR3d 21].

The presumption that an official duty has been regularly performed is a presumption affecting the burden of proof, which, in a criminal case, operates only if the facts giving rise to the presumption have been found or otherwise established beyond a reasonable doubt [*People v. Acevedo* (2003) 105 CA4th 195, 129 CR2d 270].

The error of giving an instruction on a presumption of an essential fact without qualification as to the effect of the presumption was to invade the presumption of innocence and to dilute the prosecution's burden of proof. The court questions the validity of *Evid Code* § 607 in light of *Sandstrom v. Montana* (1979) 99 S Ct 2450 .

(1) If there is no evidence to rebut the presumption as to a fact essential to establish guilt, can the trial court instruct the jury that it should find the presumed fact if it found beyond a reasonable doubt the facts giving rise to the presumption?

(2) If the facts giving rise to the presumption of an essential fact have been proven beyond a reasonable doubt, can the defendant be required to adduce evidence to raise a reasonable doubt as to the existence of the presumed fact? Doesn't this shift the burden of proof from the prosecution to the defense? [*People v. Burres* (1980) 101 CA3d 341, 161 CR 593].

When a jury is informed that it must find a presumed fact if it finds the basic fact, the presumption is invalid, judging it on its face, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt [*People v. Henderson* (1980) 109 CA3d 59, 167 CR 47].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Burdens of Proof Prosecution Criminal Law & Procedure Jury Instructions General Overview Evidence Procedural Considerations Burdens of Proof Burden Shifting



131 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.09

15.09 General Provisions--Evid Code § 620

[1] Evid Code § 620 Text

- *Evid Code § 620.*

The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

LegH: 1965 ch. 299.

[2] Commission Comments

Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Therefore, those presumptions brought into the Code are essentially taken, without substantive change, from former *CCP § 1962* [Cal Law Rev Com Comment].

There are conclusive presumptions not codified in the Evidence Code but found in other codes; some of those concern [Cal Law Rev Com Comment]:

- Permissive use [*CC § 1008*].
- Fraud against creditors [*CC § 3440*].
- Filing of a map with recorder [*Gov Code § 71042.6*].
- Payment of an insurance premium [*Ins Code § 484*].
- Establishing the primary and excess insurer when one insured is in a business related to vehicles [*Ins Code § 11580.9(a)(2)*].
- Workers' compensation benefits [*Lab Code §§ 4155, 4662, 3501(b)*].

- Missing person [Prob Code § 291].
- Rights of survival [Prob Code § 296].
- Sanity under certain conditions [Prob Code § 1016].
- Payment of property tax [R&T Code § 2195].

Since "law" is defined as including decisional law [*Evid Code § 160*] several conclusive presumptions have developed in this area [Cal Law Rev Com Comment]:

- That there is an agency doctrine of implied notice in civil actions [*Freeman v. Superior Court* (1955) 44 C2d 533, 282 P2d 857].
- That a woman is capable of bearing children [*Fletcher v. Los Angeles Trust & Savings Bank* (1920) 182 C 177, 187 P 425].
- That a person has knowledge of the law [*Estate of Hein* (1939) 32 CA2d 438, 90 P2d 100 (widow's agreement to accept certain sum waives her statutory claim to husband's estate)].

[3] Case Notes

A statute providing that possession of certain chemical precursors "shall be deemed" to be possession of hydriodic acid with intent to manufacture methamphetamine, created a rule of substantive law and not a mandatory rebuttable presumption. There was no ultimate fact to be presumed from one or more basic facts [*People v. McCall* (2004) 32 C4th 175, 8 CR3d 337, 82 P3d 351].

If, by law, certain facts are deemed a conclusive presumption, then evidence cannot be received to contradict those facts [*Gayton v. Pacific Fruit Express Co.* (1932) 127 CA 50, 15 P2d 217].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesControlled SubstancesPossessionGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsInsurance LawExcess InsuranceGeneral Overview



132 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.10

15.10 Repealed--Evid Code § 621

LegH: Enacted 1965. Repealed 1992 ch. 162, oper. Jan. 1, 1994.



133 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.11

15.11 Repealed--Evid Code § 621.1

LegH: Enacted 1992. Repealed 1993 ch. 219.



134 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.12

15.12 Facts in Written Instruments--Evid Code § 622

[1] Evid Code § 622 Text

■ *Evid Code § 622.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This restates and supersedes former *CCP § 1962(2)* [Cal Law Rev Com Comment].

[3] Case Notes

Assuming that *Evid Code § 622* applies to a written medical consent form, the statute provides no relief to defendants because the Spanish language consent form was never translated into English at trial. In the absence of a proper translation of the document, we simply have no way of knowing the content of any recitals in the consent form or whether the form constitutes an instrument within the meaning of the *Evid Code § 622* [*Quintanilla v. Dunkelman* (2005) 133 CA4th 95, 116-117, 34 CR3d 557 (concluding that *Evid Code § 622* provided no basis for reversal of judgment)].

The word instrument, as used in *Evid Code § 622*, usually refers to a contract, although it has been applied to documents other than contracts, such as a transfer of property and an estoppel certificate. However, application of the conclusive presumption of *Evid Code § 622* to recitals in a waiver form would not foster the purposes behind the informed consent rule. Where, as here, there is substantial evidence that the patient was rushed through the admission process without a real opportunity to read the consent form, she was not able to read the language on the form, and she did not understand what procedures were going to be performed upon her, the conclusive presumption of *Evid Code § 622* is inapplicable [*Quintanilla v. Dunkelman* (2005) 133 CA4th 95, 117, 34 CR3d 557].

This conclusive presumption expresses the doctrine of estoppel by contract [*In re Estate of Wilson* (1976) 64 CA3d

786, 134 CR 749] .

A tenant is bound by an acknowledgment in the lease [*Sanders Construction Company, Inc. v. San Joaquin First Federal Savings and Loan Assoc.* (1982) 136 CA3d 387, 186 CR 218].

Extrinsic evidence regarding time and manner of payment is admissible to explain ambiguities in a contract [*Hennefer v. Butcher* (1986) 182 CA3d 492, 227 CR 318 ; *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 CA3d 886, 222 CR 455].

A document entitled "Estoppel Certificate" signed by a tenant, which stated that the tenant had no option rights except those listed in the certificate (and then listed none), did not create a conclusive presumption under *Evid Code* § 622 that the tenant had lost the option rights contained in the original lease, which remained in full force and effect under the terms of the estoppel certificate [*Robert T. Miner, M.D., Inc. v. Tustin Ave. Investors* (2004) 116 CA4th 264, 10 CR3d 178].

Documents restructuring financial transactions which borrower read, approved, and signed without oral or written objections, conclusively bound him [*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 CA3d 973, 285 CR 870].

An estoppel certificate signed by a commercial tenant that specified the lease termination date, is a written "instrument" within the meaning of section 622 [*Plaza Freeway Ltd. v. First Mountain Bank* (2000) 81 CA4th 616, 96 CR2d 865].

The doctrine of estoppel by contract is inapplicable to the question whether a public utility holds a constitutional franchise under *Cal Const*, art XI, § 19, which does not involve arm's length negotiations [*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 CA4th 1167, 99 CR2d 198].

Evid Code § 622 does not apply to the recital of a consideration. The rate of interest on a loan obviously is a consideration for the loan agreement. In an action alleging a usurious loan, the factual matters asserted in a loan document, affecting the interest rate, went to the issue of consideration, and were thus not conclusively presumed to be true. Because the assertions are not presumed true, they become subject to the mistake doctrine of *Civ Code* § 1640, which the trial court properly followed [*Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P.* (2007) 153 CA4th 1373, 64 CR3d 61 (affirming judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewEvidenceDocumentary

EvidenceWritingsTranscripts & TranslationsTranslationsEvidenceInferences & PresumptionsRebuttal of Presumptions



135 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.13

15.13 Intentional Misleading Statement--Bar to Contradiction--Evid Code § 623

[1] Evid Code § 623 Text

■ *Evid Code § 623.*

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.

LegH: 1965 ch. 299

[2] Commission Comments

This restates and supersedes former *CCP § 1962(3)* [Cal Law Rev Com Comment].

[3] Case Notes

[a] Construction of Statute

The doctrine of estoppel is an equitable one. It rests essentially upon the general principle that when one of two innocent persons must suffer a loss, the loss must be borne by the one whose conduct, acts, or omissions brought about the injury [*Jessup v. Cattle Center, Inc.* (1968) 259 CA2d 434, 66 CR 361].

Four elements must ordinarily be proved to establish an equitable estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on, or must so act that the party asserting the estoppel had a right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely on the conduct to his injury [*In re Marriage of Brinkman* (2003) 111 CA4th 1281, 4 CR3d 722 (elements of estoppel must be shown by clear and convincing evidence); *Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 C4th 24, 37, 24 CR3d 179, 105 P3d 544 (matter remanded for further proceedings on whether facts established estoppel); *Skulnick v. Roberts Express, Inc.* (1992) 2 CA4th 884, 3 CR2d 597; *Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 CA4th 477, 18 CR2d 198].

The elements of reliance and detriment are necessary to estop party from contradicting statement or conduct in litigation arising out of such statement or conduct [*Westoil Terminals Co. v. Industrial Indemnity Co.* (2003) 110 CA4th 139, 1 CR3d 516 (no estoppel found); *In re Marriage of Cesnalis* (2003) 106 CA4th 1267, 131 CR2d 436 (wife reasonably and detrimentally relied on husband's removal of language from spousal support agreement that would have terminated support after her remarriage); *Aragon-Haas v. Family Sec. Ins. Services, Inc.* (1991) 231 CA3d 232, 282 CR 233].

[b] Question of Fact or Law

The existence of an estoppel is generally a question of fact for the trial court, but where the evidence is not in conflict and is susceptible of only one reasonable inference, it is a question of law [*Driscoll v. City of Los Angeles* (1967) 67 C2d 297, 61 CR 661, 431 P2d 245 ; *Johnson v. San Diego Unified School Dist.* (1990) 217 CA3d 692, 266 CR 187].

[c] When Estoppel Applies

Estoppel is operative against the government where "the injustice which would result from a failure to uphold an estoppel is [of] sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel" [*City of Long Beach v. Mansell* (1970) 3 C3d 462, 91 CR 23, 476 P2d 423 ; *House v. State of California* (1981) 119 CA3d 861, 174 CR 279].

The burden of proving estoppel or waiver rests on the party in whose favor the doctrines are claimed to inure [*Gaunt v. Prudential Insurance Co.* (1967) 255 CA2d 18, 62 CR 624].

Estoppel may arise from silence as well as from words or conduct. This is only when there is a duty to speak, however, and when the party on whom the duty rests has an opportunity to speak, and knowing that the circumstances require the party to speak, remains silent [*Skulnick v. Roberts Express, Inc.* (1992) 2 CA4th 884, 3 CR2d 597 (statutory employers of negligent truck driver estopped from asserting indemnification when silent at driver's open declaration at settlement of release of all claims); *Elliano v. Assurance Co. of America* (1970) 3 CA3d 446, 83 CR 509].

In the absence of written notice to an insured regarding the one-year limitations period for filing suit, concluding an agreement, or instituting arbitration procedures under the uninsured motorist provisions of a policy, an insurer is estopped from holding that the insured's claim is barred by statute [*Pugh v. State Farm Ins. Companies* (1991) 227 CA3d 816, 278 CR 149 (State Farm claimed that Pugh had been represented by an attorney, which would excuse it from giving notice)].

Plaintiff investors were not entitled to invoke the doctrine of equitable estoppel when they did not identify any specific conduct by defendant law firm that they claim induced them to delay filing their suit for professional malpractice. The allegation that the law firm belated produced documents was belied by evidence that it did produce documents promptly, sending approximately 1,000 pages of material to the bankruptcy trustee 30 days after he requested them on behalf of the firm's former clients. There was no evidence to show that plaintiffs made any prior unsuccessful request for these files. An estoppel cannot be based on a plaintiff's bare assertion that the defendant is continuing to withhold relevant documents in its possession, or else statutes of limitations would be eviscerated in every case involving a discovery dispute. Plaintiffs did not explain how any improper withholding of documents actually and reasonably induced the investors to delay filing suit [*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 CA4th 658, 687, 35 CR3d 31 (plaintiffs did not provide evidence to support application of doctrine of equitable estoppel in professional malpractice action against law firm, and plaintiffs did not establish likelihood of prevailing on these claims for purposes of motion to strike)].

Once a party has gained an advantage on the basis of specific representation to the trial court, it is not thereafter entitled to disavow the previous representation [*Alling v. Universal Manufacturing Corp.* (1992) 5 CA4th 1412, 7 CR2d 718 (representation that suit was not based upon patent but upon purchase agreement)].

[d] When Estoppel Does Not Apply

In an action for damages, the evidence did not support the trial court's finding that a landowner was equitably estopped from seeking damages, based on the benefits a trespasser obtained by reason of its wrongful occupation of the landowner's leasehold. Both the trial court and the parties construed a prior judgment between the parties as giving the trespasser a right to occupy the leasehold, so a demand to vacate would have been futile [*Bailey v. Outdoor Media Group* (2007) 155 CA4th 778, 66 CR3d 322] .

When estoppel is sought against the government, the weighing of policy concerns is, in part, a question of law. Whether the injustice that would result from a failure to uphold an estoppel is of sufficient dimension to justify the effect of the estoppel on the public interest must be decided by considering the matter from the point of view of a court of equity. In this case, the record did not support a finding of estoppel against the government, which had ordered removal of a private golf course from coastal property [*Feduniak v. California Coastal Com.* (2007) 148 CA4th 1346, 56 CR3d 591 (reversing judgment)].

A worker who did not disclose that he was not licensed is not estopped to deny status as an independent contractor, when he at no time represented that he held a valid contractor's license [*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 C3d 5, 219 CR 13, 706 P2d 1146] .

When the facts and law are known to both parties, there can be no estoppel [*People v. Stuyvesant Ins. Co.* (1968) 261 CA2d 773, 68 CR 389 (refusal to vacate bail forfeiture); *California Cigarette Concessions, Inc. v. City of Los Angeles* (1960) 53 C2d 865, 3 CR 675, 350 P2d 715 (full knowledge of plain provisions of the law no estoppel)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Defenses Equitable Estoppel General Overview Family Law Marital Termination & Spousal Support Spousal Support General Overview Torts Premises Liability & Property General Premises Liability Duties of Care Duty on Premises Trespassers General Overview



136 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.14

15.14 Title Held by Landlord--Evid Code § 624

[1] Evid Code § 624 Text

■ *Evid Code § 624.*

A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 624 restates and supersedes *CCP § 1962(4)* [Cal Law Rev Com Comment].

Historically, this rule arose from actions wherein the landlord sued the tenant for rent. It is based on estoppel and the concept that to allow the tenant to defend against the person who put him in possession upon the ground that the latter had no title or that another had paramount title would be against public policy [*Cal Law Rev Com Comment; Hancock Oil Co. v. Hopkins* (1944) 24 C2d 497, 150 P2d 463].

The exceptions to this rule are when the tenant was not in possession when the action was filed, or when the lease was executed through fraud or misapprehension as to the actual title [*Cal Law Rev Com Comment; Stratton v. Hanning* (1956) 139 CA2d 723, 294 P2d 66 ; *Yuba River Sand Co. v. City of Marysville* (1947) 78 CA2d 421, 177 P2d 642 (quiet title)].



137 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.15

15.15 Presumptions Affecting Burden of Producing Evidence--Evid Code § 630

[1] Evid Code § 630 Text

■ *Evid Code § 630.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The list of presumptions in this article is not exclusive. Other presumptions affecting the burden of producing evidence may be found in other codes. Others will be found in the common law. Further presumptions may be added by judicial or legislative action [Cal Law Rev Com Comment].

[3] Case Notes

A rebuttable presumption of a 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 [*Estate of Obernolte (1979) 91 CA3d 124, 153 CR 798*].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsExceptionsCommon Law PresumptionsEvidenceInferences & PresumptionsRebuttal of Presumptions



138 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.16

15.16 Money Delivered by One to Another--Evid Code § 631

[1] Evid Code § 631 Text

■ *Evid Code § 631.*

Money delivered by one to another is presumed to have been due to the latter.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(7)* [Cal Law Rev Com Comment].

[3] Case Notes

This presumption is a rebuttable presumption which disappears when sufficient evidence to controvert the presumption has been received [*Estate of Miller (1956) 143 CA2d 544, 299 P2d 1005*].



139 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.17

15.17 Thing Delivered by One to Another--Evid Code § 632

[1] Evid Code § 632 Text

■ *Evid Code § 632.*

A thing delivered by one to another is presumed to have belonged to the latter.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(8)* [Cal Law Rev Com Comment].



140 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.18

15.18 Obligation Delivered Up to the Debtor--Evid Code § 633

[1] Evid Code § 633 Text

■ *Evid Code § 633.*

An obligation delivered up to the debtor is presumed to have been paid.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(9)* [Cal Law Rev Com Comment].

[3] Case Notes

When a note past due bears no endorsement of payment, the fact that the maker possesses it is presumptive evidence of its having been paid [*Shammas v. Boyett* (1952) 114 CA2d 139, 249 P2d 880] .



141 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.19

15.19 Person in Possession of Order on Self for Payment or Delivery--Evid Code § 634

[1] Evid Code § 634 Text

■ *Evid Code § 634.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(13)* [Cal Law Rev Com Comment].

[3] Case Notes

The fact that a note, or a fragment of a note, containing the signature thereto, was in the possession of the maker at the time of his death gives rise to a presumption of payment and cancellation [*Black v. Meyer (1928) 204 C 504, 269 P 173* (fragment of a promissory note found on body of maker after death)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesDrawers & MakersContracts LawNegotiable InstrumentsEnforcementProof of Signature



142 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.20

15.20 Obligation Possessed by Creditor--Evid Code § 635

[1] Evid Code § 635 Text

■ *Evid Code § 635.*

An obligation possessed by the creditor is presumed not to have been paid.

LegH: 1965 ch. 299.

[2] Commission Comments

This presumption is a codification of a judicially recognized presumption [Cal Law Rev Com Comment].

[3] Case Notes

When a lender holds an uncanceled promissory note, there is a presumption that the note has not been paid [*Remington Investments, Inc. v. Hamedani* (1997) 55 CA4th 1033, 64 CR2d 376].



143 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.21

15.21 Payment of Earlier Rent or Installments--Evid Code § 636

[1] Evid Code § 636 Text

■ *Evid Code § 636.*

The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(10)* [Cal Law Rev Com Comment].

[3] Case Notes

A transferee of an installment note may assume that the regular course of business has been followed and that each matured installment was paid when due unless the transferee has notice that installments due on the face have not been paid [*Bliss v. California Cooperative Producers (1947) 30 C2d 240, 181 P2d 369*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & Assignors



144 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.22

15.22 Things Possessed--Evid Code § 637

[1] Evid Code § 637 Text

- *Evid Code § 637.*

The things which a person possesses are presumed to be owned by him.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(11)* [Cal Law Rev Com Comment].

[3] Case Notes

Although possession is presumptive evidence of ownership, the presumption is rebuttable and may be overcome by showing the nature of possession [*Thorne v. McKinley Bros. (1936) 5 C2d 704, 56 P2d 204* (subsequent conveyance by third person to one already in possession rebuts presumption)].

The presumption of ownership which arises from possession embraces the equitable as well as the legal title [*Lane v. Whitaker (1942) 50 CA2d 327, 123 P2d 53* (trust)].



145 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.23

15.23 Exercise of Act of Ownership--Evid Code § 638

[1] Evid Code § 638 Text

- *Evid Code § 638.*

A person who exercises acts of ownership over property is presumed to be the owner of it.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes the first part of the presumption found in former *CCP § 1963(12)*. It is now clear that common reputation of ownership is not admissible to prove private title to property [Cal Law Rev Com Comment].

[3] Case Notes

Under the statute that permits a criminal's assets to be frozen for the purpose of restitution, the prosecution's showing that the defendant controlled money in a bank account gave rise to the presumption that he owned the account [*Evid C § 638*]. The relative whose name was on the bank account failed to carry her burden of producing a preponderance of contrary evidence: she made no statement under oath asserting ownership nor any claim for restitution for defendant's use of those funds. None of her signatures on financial or legal documents were authenticated. Undisputed evidence showed that she was out of the country while the account was used to pay defendant's expenses [*People v. Semaan* (2007) 42 C4th 79, 88-89, 64 CR3d 1, 163 P3d 949].

The selling and conveying of property constitute acts of ownership of the highest character [*Bickerdike v. State* (1904) 144 C 698, 78 P 277 (holder who assigns certificate presumed owner); *Keele v. Clouser* (1928) 92 CA 526, 268 P 682 (at time of contract of sale plaintiff was in possession of the property; no evidence of title in others)].

The leasing of lots, receiving of rents, and paying of taxes are acts of ownership [*Lowe v. Penn* (1930) 105 CA 366, 287 P 509].

Shipping of goods is act of exercising ownership over them [*Schuette v. Larson* (1941) 44 CA2d 296, 112 P2d 275].

Possession gives rise to a presumption of ownership that must prevail in the absence of any other evidence of title [*Kunza v. Gaskell* (1979) 91 CA3d 201, 154 CR 101 (plaintiff's possession of land would confer on him superior title to all unable to establish a more superior title); *People ex rel. Dept. of Public Works v. Shasta Pipe and Supply Co.* (1968) 264 CA2d 520, 70 CR 618].

Licensing an electric company's use of an area raises a disputable presumption of ownership in the licensor which, in the absence of evidence to the contrary, is decisive [*Colvin v. Southern California Edison Co.* (1987) 194 CA3d 1306, 240 CR 142].

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law Utility Companies Ownership & Restructuring Evidence Inferences & Presumptions Rebuttal of Presumptions Public Contracts Law Performance Assignment & Novation



146 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.24

15.24 Judgment Determines, Sets Forth Rights of Parties--Evid Code § 639

[1] Evid Code § 639 Text

- *Evid Code § 639.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(17)* with a proviso. The rule and proviso state that the presumption does not apply to the facts underlying the judgment. However, in a few cases, a judgment may be used as evidence of the facts determined by the judgment [Cal Law Rev Com Comment; *see, e.g., CCP § 1300 et seq.*].

[3] Case Notes

No presumption of validity may be indulged in support of a judgment of contempt, as would be the case with respect to ordinary judgments [*Freeman v. Superior Court (1955) 44 C2d 533, 282 P2d 857*].

Presumption as to correctness of judicial records is applicable in habeas corpus proceedings [*In re Carr on Behalf of Steve (1946) 73 CA2d 697, 167 P2d 243*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsGeneral OverviewGovernmentsCourtsCourt Records



147 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.25

15.25 Writing--Evid Code § 640

[1] Evid Code § 640 Text

- *Evid Code § 640.*

A writing is presumed to have been truly dated.

LegH: 1965 ch. 299.

[2] Commission Comments

This is almost a verbatim restatement of former *CCP § 1963(23)* [Cal Law Rev Com Comment].

[3] Case Notes

Other evidence may be used to controvert the date of a writing [*Gas Appliance Sales Co. v. W.B. Bastian Mfg. Co.* (1927) 87 CA 301, 262 P 452].

The term "date" includes both time and place when and where the instrument is deemed to have been made [*Gas Appliance Sales Co. v. W.B. Bastian Mfg. Co.* (1927) 87 CA 301, 262 P 452].



148 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.26

15.26 Letter Properly Addressed and Mailed--Evid Code § 641

[1] Evid Code § 641 Text

- *Evid Code § 641.*

A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(24)* [Cal Law Rev Com Comment].

[3] Case Notes

Mailing is generally a reliable form of notice. Numerous statutes permit notice by mail. *Evid Code § 641* establishes a rebuttable presumption that a letter correctly addressed and properly mailed has been received in the ordinary course of mail. This enactment demonstrates the Legislature's belief that ordinarily mailing is a reliable method of notifying the addressee [*People v. Smith* (2004) 32 C4th 792, 11 CR3d 290, 86 P3d 348].

Telegrams are subject to this presumption [*Eppinger v. Scott* (1896) 112 C 369, 44 P 723].

The law presumes that items mailed are received [*Evid Code § 641*] because the presumed fact is so likely to be true that the law requires it to be assumed in the absence of contrary evidence. If, normally, an item properly mailed is received, then evidence of nonreceipt is logically probative of nonmailing [*Him v. City and County of San Francisco* (2005) 133 CA4th 437, 445, 34 CR3d 838 (plaintiff's evidence of nonreceipt of claim rejection notices was legally insufficient to raise triable issue of fact negating statute of limitations defense; in view of defendant's evidence of proof of mailing, trial court correctly concluded that plaintiff's lawsuit was barred)].

The disappearance of the presumption [*Evid Code § 641*] does not mean there is insufficient evidence to support the trial court's finding of receipt of notice. The trier of fact must then weigh the denial of receipt against the inference of

receipt arising from proof of mailing and decide whether or not the letter was received. Where a statute provides for service by registered or certified mail, the addressee cannot assert failure of service by willfully disregarding a notice of certified mail delivered to his or her address under circumstances where it could be reasonably inferred that the addressee was aware of the nature of the correspondence [*Bear Creek Master Assn. v. Edwards* (2005) 130 CA4th 1470, 1486-1487, 31 CR3d 337 (trial court correctly found that notice of liens was properly served)].

The receipt of the notice of a security interest is presumed from the mailing of the notice [*Estate of Hinds* (1970) 10 CA3d 1021, 89 CR 341].

On presentation of credible evidence by the alleged recipient and employees of no actual delivery, the presumption of receipt of notice ceases to exist [*Bonzer v. City of Huntington Park* (1993) 20 CA4th 1474, 25 CR2d 278 ; *In re Leon S.* (2005) 133 CA4th 1556, 1562-1563, 35 CR3d 679 (reversing juvenile court's finding that notice of suspension had been properly mailed)].

This is a rebuttable presumption [*Bottom v. Bottom* (1961) 190 CA2d 237, 12 CR 137 (question of fact)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview



149 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.27

15.27 Trustee's Conveyance to a Particular Person--Evid Code § 642

[1] Evid Code § 642 Text

■ *Evid Code § 642.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(37)* [Cal Law Rev Com Comment].



150 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.28

15.28 Older Document to Affect Real or Personal Property Interest--Evid Code § 643

[1] Evid Code § 643 Text

■ *Evid Code § 643.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes the presumption found in former *CCP § 1963(34)* [Cal Law Rev Com Comment].

Evid Code § 643 limits the application of the ancient document presumption rule to dispositive instruments, that is, deeds and wills affecting an interest in real or personal property [Cal Law Rev Com Comment].

The requirement that the document be acted upon as genuine is a requirement of possession of property by those persons who would be entitled to such possession under the document if it were genuine [Cal Law Rev Com Comment].



Strategic Point:

It should be noted that all four requirements set forth in the section should be complied with. Hence, counsel should take care when attempting to introduce an ancient document that the proper foundation has been laid for this presumption to come into effect.



151 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.29

15.29 Book Purporting to be Published by Public Authority--Evid Code § 644

[1] Evid Code § 644 Text

■ *Evid Code § 644.*

A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(35)* [Cal Law Rev Com Comment].



152 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.30

15.30 Book Purporting to Contain Reports of Adjudged Cases--Evid Code § 645

[1] Evid Code § 645 Text

■ *Evid Code § 645.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(36)* [Cal Law Rev Com Comment].



153 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.31

15.31 Newspaper and Periodical Presumption--Evid Code § 645.1

[1] Evid Code § 645.1 Text

■ *Evid Code § 645.1.*

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.

LegH: 1986 ch. 330.



154 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.32

15.32 Res Ipsa Loquitur--Evid Code § 646

[1] Evid Code § 646 Text

■ *Evid Code § 646.*

(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 there from 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.

LegH: 1970 ch. 69.

[2] Commission Comments

This section clarifies the manner in which the doctrine of res ipsa loquitur functions in an action to recover damages for negligence under the Evidence Code. The doctrine only applies if [Cal Law Rev Com Comment]:

■ The accident or injury is of the kind which does not ordinarily occur in the absence of someone's

negligence.

- It was caused by an agency or instrumentality within the exclusive control of the defendant.
- It was not due to any voluntary action or contribution on the part of the plaintiff.

Since this section clearly states that the doctrine of *res ipsa loquitur* is a presumption affecting the burden of producing evidence, once the plaintiff has established the three conditions that give rise to the doctrine, the defendant should introduce evidence that would support a contrary finding. If he does not, the jury is required to find that the accident resulted from the defendant's negligence [Cal Law Rev Com Comment].

If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, 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 [Cal Law Rev Com Comment].

The defendant may introduce such conclusive evidence that the inference of negligence is dispelled as a matter of law [Cal Law Rev Com Comment].

If plaintiff fails to introduce sufficient evidence to establish all the elements of *res ipsa loquitur*, the jury can still find an inference of negligence, and hence find that it is more probable than not that the defendant was negligent. The jury may be so instructed [Cal Law Rev Com Comment].

In cases where the doctrine of *res ipsa loquitur* coincides with another presumption or rule of law which requires the defendant to discharge the burden of proof, the doctrine of *res ipsa loquitur* serves no function other than to be used as circumstantial evidence to rebut the evidence produced by the party with the burden of proof. An example of the aforementioned situations would be the rule that a bailee who received undamaged goods and returns them damaged has the burden of proving that the damage was not caused by his negligence unless the damage resulted from a fire [Cal Law Rev Com Comment].

Four situations may be distinguished for application of the doctrine [Cal Law Rev Com Comment]:

- Where facts giving rise to the doctrine arise as a matter of law with no contrary evidence to show cause of accident was not defendant's negligence or his lack of due care.
- Where facts giving rise to the doctrine are established as a matter of law, but defendant has introduced evidence to show due care or some cause for accident other than his negligence.

Distinguish:

In such a situation, the presumptive effect of the doctrine vanishes. When requested, the court may instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. In such an instruction, the court should make it clear that proximate cause exists only when the jury, after weighing the evidence, believes that it is more probable than not that the accident was caused by the defendant's negligence [Cal Law Rev Com Comment].

- Where the defendant introduces evidence tending to show nonexistence of the essential conditions of the doctrine but does not introduce evidence to rebut the presumption.

Distinguish:

In this situation the court must instruct the jury on what has become known as conditional res ipsa loquitur. This means that if the jury finds the basic facts of doctrine have been established by a preponderance of the evidence, then it must also find the accident was caused by some negligent conduct on the part of the defendant. If defense counsel wishes to prevent application of the doctrine of res ipsa loquitur, he may do so by attacking the elements of the doctrine. But as a precautionary measure counsel should also introduce rebuttal evidence [Cal Law Rev Com Comment].

- Where the defendant introduces evidence to contest both the conditions of the doctrine and the conclusion that his negligence caused the accident.

Distinguish:

In such a situation, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have is to support an inference that the accident resulted from the defendant's negligence [Cal Law Rev Com Comment].

[3] Case Notes

[a] Construction of Statute

Generally, res ipsa loquitur applies when the occurrence of an injury is of such a nature that, in the light of past experience, it probably resulted from someone's negligence and that the defendant is probably the one responsible [*Bardessono v. Michels* (1970) 3 C3d 780, 91 CR 760, 478 P2d 480 (cortisone injection); *Clark v. Gibbons* (1967) 66 C2d 399, 58 CR 125, 426 P2d 525 (local anesthetic)].

The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence [*Fraser v. Sprague* (1969) 270 CA2d 736, 76 CR 37 (medical malpractice)].

Res ipsa loquitur is a doctrine affecting the burden of producing evidence applicable to certain kinds of accidents that are so likely to have been caused by a defendant's negligence that, in the Latin equivalent, the thing speaks for itself. If applicable, the doctrine of res ipsa loquitur establishes a presumption of negligence requiring the defendant to come forward with evidence to disprove it [*Baumgardner v. Yusuf* (2006) 144 CA4th 1381, 1389, 51 CR3d 277 (medical malpractice action)].

[b] Presumption of Negligence Applies

An inference of negligence based on res ipsa loquitur arises in a case where a passenger on a common carrier is injured as a result of the operation of the vehicle [*Irwin v. Pacific Southwest Airlines* (1982) 133 CA3d 709, 184 CR 228 (airline not relieved of liability because accident involved another plane not in its control)].

Although there are situations in which a lay person, without expert testimony, may infer as a matter of common knowledge that an injury would not have occurred unless someone were negligent, ordinarily, plaintiff must produce some expert testimony which would support an inference of negligence from the fact of the accident itself [*Curtis v. Santa Clara Valley Medical Center* (2003) 110 CA4th 796, 2 CR3d 73 (blindness after surgery in prone position); *Fraser v. Sprague* (1969) 270 CA2d 736, 76 CR 37 (injury to nerve during surgery)].

[c] Presumption of Negligence Can Apply in Unusual Situations

The doctrine of res ipsa loquitur may apply even when the accident occurs after the defendant relinquishes control of the instrumentality [*Albers v. Greyhound Corp.* (1970) 4 CA3d 463, 84 CR 846].

The fact that an injury rarely occurs does not in itself justify an inference of negligence, but when combined with other evidence indicating negligence, a conditional res ipsa loquitur instruction may be needed [*Hale v. Venuto* (1982) 137 CA3d 910, 187 CR 357].

The requirement of "exclusive control" is not absolute. Res ipsa loquitur may still apply even though plaintiff participated in the event leading to the accident, if plaintiff's conduct was not the primary cause of the accident [*In re E.H.* (2003) 108 CA4th 659, 133 CR2d 740 (parents reasonably should have known that baby was being harmed by someone in the house); *Emerick v. Raleigh Hills Hospital-Newport Beach* (1982) 133 CA3d 575, 184 CR 92 (recovering alcoholic injured when she leaned on improperly installed sink)].

[d] Medical Malpractice Cases

In medical malpractice action, arising from injuries caused by a sponge left in plaintiff from surgery, the trial court prejudicially erred in failing to instruct the jury on res ipsa loquitur [*Baumgardner v. Yusuf* (2006) 144 CA4th 1381, 1389, 51 CR3d 277] .

Under conditions giving rise to the res ipsa loquitur doctrine, 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, must go beyond showing that it was unlikely or improbable that he was negligent and must establish his freedom from negligence by evidence that cannot be rationally disbelieved [*Clark v. Gibbons* (1967) 66 C2d 399, 58 CR 125, 426 P2d 525].

In medical malpractice cases, evidence that an accident rarely occurs when due care is exercised does not, without more, justify an inference of negligence, but evidence of rarity, together with some other evidence indicating negligence, may warrant a conditional res ipsa instruction [*Quintal v. Laurel Grove Hospital* (1964) 62 C2d 154, 41 CR 577, 397 P2d 161 (cardiac arrest during administration of anesthetic); *Fraser v. Sprague* (1969) 270 CA2d 736, 76 CR 37 (injury to nerve during surgery); *Berkey v. Anderson* (1968) 1 CA3d 790, 82 CR 67 (insertion of needle in myelogram procedure)].

Res ipsa loquitur doctrine is especially suited to a medical or dental malpractice setting where the often unconscious or semiconscious patient has an evidentiary disadvantage to demonstrate what occurred [*Blackwell v. Hurst* (1996) 46 CA4th 939, 54 CR2d 209 (error not to give conditional instruction where patient died from swallowing dental crown)].

[e] Presumption of Negligence Not Applicable

The presumption of negligence was not applicable where:

- A surgeon did not use the type of clamps found in patient's abdomen [*Leonard v. Watsonville Community Hospital* (1956) 47 C2d 509, 305 P2d 36].
- A doctor was not shown to be the proximate cause of negligent administration of an injection [*Frantz v. San Luis Medical Clinic* (1978) 81 CA3d 34, 146 CR 146].
- Plaintiff failed to present evidence that injuries like hers do not ordinarily occur in the absence of defendants' negligence, or were caused by instrumentality within defendants' exclusive control [*Elcome v. Chin* (2003) 110 CA4th 310, 1 CR3d 631].
- The plaintiff had a rare injury from a complex medical procedure [*Clemens v. Regents of University of California* (1970) 8 CA3d 1].

● The plaintiff may have contributed to the injuries [*Griffin v. Sardella* (1967) 253 CA2d 937, 61 CR 834].

The doctrine of res ipsa loquitur relates to cases involving negligence and has no application to an alleged breach of warranty [*Tresham v. Ford Motor Co.* (1969) 275 CA2d 403, 79 CR 883].

When a party relies on the rule of strict liability, the requirement of showing a defect cannot be satisfied by reliance on the doctrine of res ipsa loquitur [*Tresham v. Ford Motor Co.* (1969) 275 CA2d 403, 79 CR 883].

Mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed facts under the doctrine of res ipsa loquitur causes the presumption of negligence to disappear as a matter of law [*Slater v. Kehoe* (1974) 38 CA3d 819, 113 CR 790].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceCausationProximate CauseGeneral Overview



155 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.33

15.33 Process Server Returned--Evid Code § 647

[1] Evid Code § 647 Text

■ *Evid Code § 647.*

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.

LegH: 1978 ch. 528.



156 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.34

15.34 Presumptions Affecting the Burden of Proof--Evid Code § 660

[1] Evid Code § 660 Text

■ *Evid Code § 660.*

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.

LegH: 1965 ch. 299

[2] Commission Comments

The list of presumptions in Article 4 is not exclusive as no attempt was made to classify all existing presumptions. Other statutory and common law presumptions that affect the burden of proof must await classification by the courts [Cal Law Rev Com Comment].

[3] Case Notes

A patent is presumed to be valid until the presumption is overcome by convincing evidence [*Adkins v. Lear, Inc.* (1967) 67 C2d 882, 64 CR 545, 435 P2d 321].

The doctrine of res ipsa loquitur does not shift the burden of proof to the defendant, and the plaintiff must still prove the case by a preponderance of the evidence [*Griffin v. Sardella* (1967) 253 CA2d 937, 61 CR 834 (plaintiff may have contributed to injuries)].

The DMV can rely on rebuttable presumption contained in *Evid Code § 664* to show chemical test results were obtained in compliance with statutory and regulatory requirements [*Morgenstern v. Department of Motor Vehicles* (2003) 111 CA4th 366, 4 CR3d 46 ; *Davenport v. California Department of Motor Vehicles Director* (1992) 6 CA4th 133, 7 CR2d 818].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsExceptionsCommon Law PresumptionsPatent LawInequitable ConductGeneral
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157 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.35

15.35 Repealed--Evid Code § 661

LegH: Enacted 1965. Repealed 1975 ch. 1224.



158 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.36

15.36 Owner of Legal title is Owner of Beneficial Title--Evid Code § 662

[1] Evid Code § 662 Text

- *Evid Code § 662.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section requires clear and convincing evidence to prove that property is held in trust or that beneficial ownership is not in the hands of the legal title holders [Cal Law Rev Com Comment].

[3] Case Notes

[a] Application of Rule

The receipt of rent for leased property is not the only way to prove the beneficial use of property under *Evid Code § 662*. A lease that required the lessee to pay millions of dollars to construct a building that was subject to the lessor's right of sale or eviction during the lease, and that, when surrendered in good condition, would belong to the lessor at the end of the lease, gave the lessor beneficial use of the property, so the building would be considered part of the property owned by the trust [*Auerbach v. Assessment Appeals Bd. No. 1* (2006) 39 C4th 153, 163, 45 CR3d 774, 137 P3d 951 (tax assessment appeal)].

The presumption of ownership under *Evid Code § 662* did not apply when a party disputed the genuineness of a third party's title to a bank account and the funds in it [*People v. Semaan* (2007) 42 C4th 79, 88-89, 64 CR3d 1, 163 P3d 949] .

In an action to quiet title to a condominium, the nearly overwhelming weight of the evidence proved that defendant intended to, and did, take legal title in her name for the benefit of her parents who lived in the condo, which satisfied the

"clear and convincing evidence" standard of *Evid Code* § 662. The case was almost a paradigm of a resulting trust [*In re Marriage of Ruelas* (2007) 154 CA4th 339, 64 CR3d 600 (affirming judgment for parents)].

Evid Code § 662 applies only when there is no dispute as to legal title and when the dispute involves only beneficial title, and thus the section does not apply to all quiet title actions [*Murray v. Murray* (1994) 26 CA4th 1062, 31 CR2d 855 (section did not apply to claim that defendant's title was void because title had been fraudulently transferred by forged deed; plaintiff did not claim defendant held property subject to constructive trust)].

Evid Code § 662 does not apply to ambiguous transfers of property between spouses [*In re Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378 (presumption based on confidential fiduciary relationship between spouses must prevail over presumption based on record title); *In re Marriage of Barneson* (1999) 69 CA4th 583, 81 CR2d 726 (presumption does not apply to transmutation test)].

[b] Rebuttal of Presumption

Although respondent contends that the plaintiffs failed to demonstrate by clear and convincing proof that a trust existed in favor of the plaintiffs, this is really nothing more than an argument that the finding of the existence of a trust was not supported by substantial evidence. The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal [*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 CA4th 754, 17 CR3d 442].

The presumption of *Evid Code* § 662 may not be rebutted by a preponderance of the evidence, only by clear and convincing proof [*In re Marriage of Weaver* (1990) 224 CA3d 478 (in dissolution of marriage proceeding, *Evid Code* § 662 applied to claim of oral transmutation of separate property into community property, and court erred in applying preponderance of evidence standard); see *Nwosu v. Uba* (2004) 122 CA4th 1229, 19 CR3d 416 (plaintiff failed to meet clear and convincing evidence standard)].

A claim of a contractual agreement to divide or purchase property with another falls under *Evid Code* § 662 and may not be rebutted by a preponderance of the evidence, only by clear and convincing proof [*Tannehill v. Finch* (1986) 188 CA3d 224, 232 CR 749 (*Marvin claim of implied agreement to divide acquired property equally*) ; *Toney v. Nolder* (1985) 173 CA3d 791, 219 CR 497 (in claim of oral agreement to purchase property as equal partners, no "confidential relationship" exception exists to rule that an oral trust in derogation of title may be shown only by clear and convincing evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawLandlord & TenantGeneral Overview



159 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.37

15.37 Ceremonial Marriage--Evid Code § 663

[1] Evid Code § 663 Text

- *Evid Code § 663.*

A ceremonial marriage is presumed to be valid.

LegH: 1965 ch. 299.

[2] Commission Comments

This section codifies a common law presumption recognized in California cases [Cal Law Rev Com Comment].

[3] Case Notes

The presumption of the validity of the second marriage was rebutted by a showing that the affidavit of application for the license for the second marriage relied solely on an invalid Mexican divorce decree. In addition, both the first and the second wife testified that she knew of no other divorce or annulment decree [*In re Estate of Atherley* (1975) 44 CA3d 758, 119 CR 41].

A party assailing the validity of a second marriage has the burden of proof on the issue of lack of an annulment or dissolution of the first marriage either by divorce or death [*Vargas v. Superior Court* (1970) 9 CA3d 470, 88 CR 281].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsExceptionsCommon Law PresumptionsFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageValidityPresumptions



160 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.38

15.38 Official Duty Regularly Performed--Lawful Arrest--Evid Code § 664

[1] Evid Code § 664 Text

■ *Evid Code § 664.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section establishes a rebuttable presumption that official duty has been regularly performed except for an arrest made without a warrant [Cal Law Rev Com Comment].

An arrest made without a warrant is presumptively unlawful according to the common law [Cal Law Rev Com Comment].

The first sentence of this section restates and supersedes former *CCP § 1963(15)* [Cal Law Rev Com Comment].

[3] Case Notes

[a] Burden of Proof

Because of the presumption that official duty has been properly, hence constitutionally, performed, the defendant has the burden of proof in establishing the defense of discriminatory enforcement of the law [*People v. Superior Court (Hartway)* (1977) 19 C3d 338, 138 CR 66, 562 P2d 1315 (soliciting prostitution)].

Statutes may be borrowed in the negligence context for one of two purposes:

(1) to establish a duty of care, or

(2) to establish a standard of care [*Elsner v. Uveges* (2004) 34 C4th 915, 928 n8, 22 CR3d 530, 102 P3d 915].

Plaintiff's claim of a violation of a reporting statute was merely a theory of liability under *Evid Code* § 669. His cause of action was for negligence against a health care provider [*David M. v. Beverly Hospital* (2005) 131 CA4th 1272, 1279, 32 CR3d 649 (applicable limitations period for actions against health care provider was not general statute of limitations with tolling during minority under CC §§ 338 and 352, but rather specific limitations period in CC § 340.5)].

A presumption affects the burden of proof; that is, the person against whom it operates has the burden of proof as to the nonexistence of the presumed fact [*In re Karla C.* (2003) 113 CA4th 166, 6 CR3d 205 (in proceeding to terminate parental rights, parents rebutted presumption that agency complied with notice requirements)].

The presumption is overcome if the record affirmatively shows a failure to perform duty:

- Fish and Game Commission failed to satisfy every requirement of its certified regulatory program [*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 C4th 105, 65 CR2d 580, 939 P2d 1280].

- Blood alcohol tests were set aside because they were conducted by unsupervised, unqualified trainees [*Shea v. Department of Motor Vehicles* (1998) 62 CA4th 1057, 72 CR2d 896].

[b] Official Duty Presumed to Have Been Performed

Although courts would normally presume that official duties are correctly carried out, and would assume that judgment was properly entered because the trial court had ordered judgment entered, defendants' failure to produce a copy of a formal judgment for purposes of their own appeal, particularly after the matter had been repeatedly pointed out, bespoke an inability to do so, which supported plaintiff's claim that no such document existed. It was clear that an appealable judgment should have been rendered. Therefore, the appellate court was empowered to order the trial court to enter the judgment nunc pro tunc. The judgment would then be treated as entered when it should have been entered [*ABF Capital Corp. v. Grove Properties Co.* (2005) 126 CA4th 204, 213, 23 CR3d 803 (ordering trial court to enter judgment nunc pro tunc)].

It was presumed that official duty was regularly performed in the following cases:

- Police officer who issued regular citation to motorcyclist for not wearing helmet could be presumed to have found circumstances disqualifying a "fix-it" ticket [*Department of California Highway Patrol v. Superior Court* (2008) 158 CA4th 726, 70 CR3d 280].

- Social workers who consistently indicated that child had no Native American ancestry could be presumed to have followed court order to inquire [*In re Rebecca R.* (2006) 143 CA4th 1426, 1430, 49 CR3d 951].

- State controller gave proper notice in escheated property case [*Fong v. Westly* (2004) 117 CA4th 841, 12 CR3d 76].

- Governor's review of parole board decision [*In re McClendon* (2003) 113 CA4th 315, 6 CR3d 278].

- Irregularity in breath test affidavit overcome by testimony [*Morgenstern v. Department of Motor*

Vehicles (2003) 111 CA4th 366, 4 CR3d 46].

- Observation prior to administration of breath test sufficient [*Manriquez v. Gourley* (2003) 105 CA4th 1227, 130 CR2d 209].

- It is presumed that a voluntary declaration of paternity, once signed, has been filed [*In re Raphael P.* (2002) 97 CA4th 716, 118 CR2d 610].

- Even if a jury did not expressly agree to perform a duty, such as deliberating or following the instructions given, the appellate court must presume that an official duty has been performed [*People v. Cruz* (2001) 93 CA4th 69, 113 CR2d 86].

- DMV procedures in collecting blood sample [*Petrica v. Department of Motor Vehicles* (2001) 89 CA4th 1341, 107 CR2d 909].

- DMV procedures in evaluating blood alcohol level [*Baker v. Gourley* (2000) 81 CA4th 1167, 97 CR2d 451]. *But see* *Glatman v. Valverde* (2006) 146 CA4th 700, 705-706, 53 CR3d 319 (Evid Code § 664 does not create presumption that DMV analysts timely recorded blood alcohol test results; driver's license suspension would be reversed in absence of evidence of departmental procedures).

- Court reporter presumed to have reread requested testimony to jury as directed by judge [*People v. Wader* (1993) 5 CA4th 610, 20 CR2d 788].

- Preliminary alcohol screening (PAS) test results are not presumed to have been regularly or properly performed [*Coniglio v. Department of Motor Vehicles* (1995) 39 CA4th 666, 46 CR2d 123].

- Chemical tests in compliance with statutory and regulatory requirements [*Davenport v. California Department of Motor Vehicles Director* (1992) 6 CA4th 133, 7 CR2d 818].

- DMV not required at every administrative suspension hearing to prove that blood alcohol level test was properly administered and machine was working properly [*McKinney v. Department of Motor Vehicles* (1992) 5 CA4th 519, 7 CR2d 18].

- DMV burden regarding officer taking breath test [*Wilson v. Zolin* (1992) 9 CA4th 1104, 11 CR2d 870].

- County board of supervisors [*Midway Orchards v. County of Butte* (1990) 220 CA3d 765, 269 CR 796].

- Sentencing court, attorney general [*People v. Fugate* (1990) 219 CA3d 1408, 269 CR 37].

- Police officers [*Fisk v. Director of Dept. of Motor Vehicles* (1981) 127 CA3d 72, 179 CR 379].

- Public defender, certified law student [*People v. Perez* (1979) 24 CA3d 133, 155 CR 176, 594 P2d 1].

- Coastal commission [*Old Santa Barbara Pier Co. v. State of California* (1977) 71 CA3d 250, 139 CR 332].

- Writ of execution [*Wyshak v. Wyshak* (1977) 70 CA3d 384, 138 CR 811].

- Trial court [*In re Marriage of Drivon* (1972) 28 CA3d 896, 105 CR 124].
- Grand juror [*People v. Boehm* (1969) 270 CA2d 13, 75 CR 590].
- Alcoholic Beverage Control Appeals Board [*Samsom Market Co. v. Alcoholic Beverage Control Appeals Board* (1969) 71 C2d 1215, 81 CR 251, 459 P2d 667].
- Tax assessment [*Bank of America v. County of Los Angeles* (1964) 224 CA2d 108, 36 CR 413].
- City Board of Recreation and Park Commissioners [*Griffith v. Los Angeles* (1959) 175 CA2d 331, 346 P2d 49].
- Warden [*McCracken v. Teets* (1953) 41 C2d 648, 262 P2d 561].
- State Board of Equalization [*Reynolds v. State Board of Equalization* (1946) 29 C2d 137, 173 P2d 551].
- Guardian ad litem [*In re Daniel S.* (2004) 115 CA4th 903, 9 CR3d 646].
- State Bar committee [*Werner v. Hearst Publications, Inc.* (1944) 65 CA2d 667, 151 P2d 308].

This presumption does not require the court to defer to administrative agencies when reviewing the propriety of the agency's decision-making criteria [*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 CA4th 498, 130 CR2d 823].

Regular performance of official duty is presumed in the absence of contrary evidence. Thus, the relevant inquiry is not whether the record establishes compliance with official duty, but whether the record contains evidence the agency failed to comply with the requirements of its regulatory program [*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 CA4th 911, 919, 45 CR3d 102 (following city's certification of environmental impact report, affirming denial of writ of mandate)].



Cross Reference:

On the inference that an act was not done or a condition did not exist, based on the absence of business records, see *Evid Code* § 1272.

The court will determine as a matter of law the questions raised by the portions of the doctrine of negligence per se that are codified at *Evid Code* § 669(a)(3) and *Evid Code* § 669(a)(4) [*Quiroz v. Seventh Ave. Center* (2006) 140 CA4th 1256, 1285, 45 CR3d 222] .

The doctrine of negligence per se does not establish tort liability. Rather, it merely codifies the rule that a presumption of negligence arises from the violation of a statute that 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. The doctrine operates to establish a presumption of negligence, for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action. Thus, even after the trial court struck the Elder Abuse Act allegations from plaintiff's pleading, to the extent plaintiff wished to invoke the doctrine of negligence per se to prove her remaining case at trial, she was free to argue the application of *Evid Code* § 669, to offer evidence of defendants' alleged statutory violations to support the presumption of negligence, and to submit proposed jury instructions on the

point [*Quiroz v. Seventh Ave. Center* (2006) 140 CA4th 1256, 1285-1286, 45 CR3d 222 (holding that *Evid Code* § 669 did not provide plaintiff with private right of action for violation of statute)].

[c] Lawfulness of Arrest

In a false imprisonment case, the presumption of the unlawfulness of an arrest without a warrant places the burden of producing evidence of justification on the defendant. No reason appears why a presumption of lawfulness should attach to an arrest by a private citizen when the Legislature has chosen to deny such a presumption to a warrantless arrest by a peace officer [*Cervantez v. J.C. Penney, Inc.* (1979) 24 C3d 579, 156 CR 198, 595 P2d 975 (arrest by off-duty police officer on second job as paid security guard)].

The defendant has the burden of producing evidence that removes the case from the ambit of the first sentence of *Evid Code* § 664 and puts it into that of the second sentence (arrest without a warrant) when moving for the suppression of evidence under *Pen Code* § 1538.5 [*People v. Carson* (1970) 4 CA3d 782, 84 CR 699].

When the record was silent as to whether a police officer had arrest and search and seizure warrants, it must be presumed that the officer had reasonable cause for the defendant's arrest, and that he had a search warrant, and therefore the search and seizure was lawful [*People v. Smith* (1959) 171 CA2d 568, 340 P2d 640 (burden is on the defendant to show illegality of arrest and search)].

[d] Habeas Corpus Proceedings

The presumption in *Evid Code* § 664 applies to habeas corpus proceedings [*In re Steele* (2004) 32 C4th 682, 10 CR3d 536, 85 P3d 444 (court would presume that prosecutors performed continuing duty to disclose information favorable to the defense, unless defendant overcomes this presumption as to specific evidence)].

[e] Clerks of Court

Although there is an evidentiary presumption a court clerk regularly performs his or her duties [*Evid Code* § 664], the clerk must also comply with the applicable statutory requirements [*American Contractors Indemnity Co. v. County of Orange* (2005) 130 CA4th 579, 29 CR3d 916 (trial court erroneously found notice of forfeiture was mailed in compliance with statutory law; appellate court would not reverse where record showed that party received actual notice of forfeiture)].

Presumption also applies to clerks of court [*Van Beurden Insurance Services, Inc. v. Customized Worldwide Insurance Agency, Inc.* (1997) 15 C4th 51, 61 CR2d 166, 931 P2d 344 (no official duty for clerk to mail notice of entry of judgment); *People v. American Contractors Indemnity Co.* (2004) 33 C4th 653, 16 CR3d 76, 93 P3d 1020 (presuming that clerk of court served debtor with notice of entry of judgment as required by statute)].

It is presumed the clerk "regularly performed" the official duties and submitted to the jury only the admissible portions of any exhibits they requested [*People v. Jackson* (1996) 13 C4th 1164, 56 CR2d 49, 920 P2d 1254 (correct transcript presumed given to jury); *People v. Mitcham* (1992) 1 C4th 1027, 5 CR2d 230, 824 P2d 1277 (on three exhibits, even if inadmissible material was submitted to the jury, there is no reasonable possibility the jury would not have imposed the death penalty)].

[f] Judges

The Supreme Court presumes that judicial duty is regularly performed, in the absence of any indication to the contrary [*People v. Visciotti* (1992) 2 C4th 1, 5 CR2d 495, 825 P2d 388 ; *El Morro Comm. Ass'n v. California Dept. of Parks & Recreation* (2004) 122 CA4th 1341, 19 CR3d 445 (plaintiffs did not contradict evidence that deputy director was authorized decision-maker or presumption that he properly carried out duties)].

It is a basic presumption indulged in by reviewing courts that the trial court knew and applied the correct statutory and case law in the exercise of its official duties [*In re Karen A.* (2004) 115 CA4th 504, 9 CR3d 369 (juvenile court presumed to have followed applicable law); *People v. Woods* (1993) 12 CA4th 1139, 15 CR2d 906 (magistrate knew and applied the proper law); *In re Marriage of Everett* (1990) 220 CA3d 846, 269 CR 917 (where there is no evidence to the contrary, presumption is that the trial court adhered to the dictates of the governing statute in setting amount of child support); *People v. Henson* (1991) 231 CA3d 172, 282 CR 222 (court's silence insufficient to sustain defendant's burden of proving that trial court did not exercise its discretion in ordering her to participate in AIDS education program as condition of probation); *People v. Mack* (1986) 178 CA3d 1026, 224 CR 208 (where record is silent as to whether or not court was aware of and exercised its discretion mandated by Prob Code § 1385); *In re M.S.* (1993) 17 CA4th 1328, 22 CR2d 560 (presumption that judge exercised discretion as to whether offenses were felonies)].

An incarcerated parent appealed a court's order reducing his visitation schedule with his minor daughter, allegedly made without notice or hearing. Although lower courts are presumed to act properly in reaching their decisions [*Evid Code* § 664], that presumption alone was not sufficient in the highly irregular situation presented in this case. The only possible support for the court's reduction of visitation was a rather suspect "stipulation" that was altered by a handwritten interlineation, without explanation and under circumstances no one seemed able to explain. The altered language in the visitation provision was not signed off by any counsel and was thus suspicious on its face, particularly in light of undisputed evidence that visitation had been proceeding positively. The order reducing visitation could not be sustained on the basis of either the evidence before the court or the purported stipulation presented by counsel, and would be reversed [*In re Elizabeth M.* (2008) 158 CA4th 1551, 70 CR3d 746] .

[g] School District

No substantial evidence supported the school's position that a notice of suspension from school had been served on the student by certified or registered mail, as required by statute. At best, there was evidence that the assistant principal relied on his secretary to mail the notice, and that he believed she had done so in this instance. Even if the statutory presumption of performance of official duty initially created a presumption of compliance with the statutory requirements, it was overcome by specific evidence from the student's mother that no notice was received prior to the student's return to school [*In re Leon S.* (2005) 133 CA4th 1556, 1562-1563, 35 CR3d 679 (reversing juvenile court's finding that notice of suspension had been properly mailed)].

Courts will not require the same exactness in keeping the records of a town as in the case of court records. In keeping records of councils of small cities and towns the same exactness is not required as in the more important urban centers, because usually such records are kept by inexperienced persons [*City of King City v. Community Bank of Central California* (2005) 131 CA4th 913, 947 n23, 32 CR3d 384].

Notwithstanding the presumption that official records are correctly kept, there is no categorical rule against looking beyond the minutes of local agency action to ascertain the meaning and intent of a patently ambiguous enactment. On the contrary, where the issue is not the beliefs and motives of individual members, but the collective intent of the Legislature, as objectively manifested in the adoption of particular measures, courts may and must consult extrinsic evidence, including circumstances and information known to the Legislature at the time of the enactment, public records of their collective deliberations, and expressions of intent collectively adopted by them. Nothing in California law prevents evidence of what legislators said about a proposal before them in the presence of the body, even if their statements can be conceived as reflecting a mental state or process, provided the evidence is offered to show what the body was voting on when it adopted the measure [*City of King City v. Community Bank of Central California* (2005) 131 CA4th 913, 943-944, 32 CR3d 384 (in action for return of redevelopment project money, trial court erred in excluding testimony concerning what was intended or understood by city officials, to contradict or supplement official records)].

A court could presume that a school district will properly interpret its own regulations and will not expel student except for specified conduct [*T.H. v. San Diego Unified School District (2004)* 122 CA4th 1267, 19 CR3d 532].

[h] Completion of Prison Term

The admission of an abstract of judgment and a commitment form, considered in light of the official duty presumption, supports an inference that the official into whose custody defendant was placed regularly performed his or her duty to convey the defendant to prison. It is likewise reasonable to infer that prison officials regularly performed their duty to see that defendant's sentence was carried out. These reasonable inferences, together with evidence indicating that defendant was out of custody when he or she committed the later offense, support a finding that defendant completed a prior prison term [*People v. Tenner (1993)* 6 C4th 559, 24 CR2d 840, 862 P2d 840].

[i] Administration of Breath Test

In an administrative DMV hearing to suspend a driver's license, the DMV bears the burden of proving by a preponderance of the evidence certain facts, including that the driver was operating a vehicle with a blood alcohol level of 0.08 percent or higher. The DMV may satisfy its burden via *Evid Code* § 664, which creates a rebuttable presumption that blood alcohol test results are valid. The officer's sworn statement that the breath-testing device recorded a certain blood alcohol level is sufficient to establish the foundation, without testimony at the hearing establishing the reliability of the test. Once the DMV establishes its prima facie case, the driver must show, through cross-examination of the officer or by the introduction of affirmative evidence, that official standards were in any respect not observed. Once this showing has been made, the burden shifts to the DMV to prove that the test was reliable despite the violation [*Manriquez v. Gourley (2003)* 105 CA4th 1227, 130 CR2d 209].

The requirement that the subject be continuously observed for 15 minutes before the breath test does not require that a single person do all of the observation. Observation by two or more officers is sufficient [*Taxara v. Gutierrez (2003)* 114 CA4th 945, 8 CR3d 172].

The 15-minute observation need not be made by a peace officer who is also a certified intoxilyzer operator, nor by the same officer who performs the breath test [*Hernandez v. Gutierrez (2003)* 114 CA4th 168, 7 CR3d 307].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
 Probate General Overview
 Family Law
 Parental Duties & Rights
 General Overview
 Torts
 Negligence
 General Overview



161 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.39

15.39 Intention of Ordinary Consequences of Voluntary Act--Evid Code § 665

[1] Evid Code § 665 Text

■ *Evid Code § 665.*

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.

LegH: 1965 ch. 299.

[2] Case Notes

The presumption did not apply when the court failed to perform the duty of determining whether a juvenile's offense was a misdemeanor or a felony [*In re Manzy W.* (1997) 14 C4th 1199, 60 CR2d 889, 930 P2d 1255].



162 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.40

15.40 Any Court, Judge Acting as Such--Evid Code § 666

[1] Evid Code § 666 Text

■ *Evid Code § 666.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The first sentence of this section restates and supersedes former *CCP § 1963(16)* [Cal Law Rev Com Comment].

The second sentence of this section makes it clear that the presumption of lawful jurisdiction applies only when the act of the court or judge is under collateral attack, not when under direct attack [Cal Law Rev Com Comment].

The presumption extends to all California courts and all federal courts but does not extend to courts of limited or special jurisdiction in other states [Cal Law Rev Com Comment].

[3] Case Notes

A company that had posted bail collaterally attacked the trial court's declaration of forfeiture of bail as procedurally improper, allegedly because it was not declared in open court. In the absence of evidence on the record suggesting the trial judge failed to declare a forfeiture of bail in open court, the Supreme Court would not presume, contrary to *Evid Code § 666*, that a court would fail to perform its statutorily mandated duty [*People v. Allegheny Casualty Co. (2007) 41 C4th 704, 718, 61 CR3d 689, 161 P3d 198* (holding that trial court properly refused to discharge forfeiture of bail bond)].

The burden of showing that the trial court lacked jurisdiction is on the party who attacks the judgment [*Branson v. Martin (1997) 56 CA4th 300, 65 CR2d 401* (appointment of commissioner to traffic court); *Hicks v. Hicks (1968) 264*

CA2d 890, 70 CR 878 (in absence of contrary proof jurisdiction of authenticated judgment presumed); *Muller v. Reagh* (1959) 173 *CA2d* 1, 343 *P2d* 135 (collateral attack on jurisdiction of judgment confined to judgment roll)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil
ProcedureJudicial OfficersGeneral OverviewCriminal Law & ProcedureBailDenial of Bail



163 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.41

15.41 Presumption of Death--Five Year Absence--Evid Code § 667

[1] Evid Code § 667 Text

- *Evid Code § 667.*

A person not heard from in five years is presumed to be dead.

LegH: 1965 ch. 299; 1983 ch. 201.

[2] Commission Comments

This section is an almost verbatim restatement of former *CCP* § 1963(26) [Cal Law Rev Com Comment].

[3] Case Notes

The absence of a person coupled with other circumstances may be sufficient to prove death at a much earlier time than expiration of the statutory time period [*Pollack v. Hamm* (1970) 3 C3d 264, 90 CR 181, 475 P2d 213 (lost at sea in boating accident); *Western Grain and Sugar Products Co. v. Pillsbury* (1916) 173 C 135, 159 P 423 (circumstantial evidence of murder)]. This presumption is disputable and may be overcome by other evidence [*People v. Stokes* (1886) 71 C 263, 12 P 71 (evidence of marriage)].

This presumption does not arise until the end of the statutory time period [*Liberty Transport, Inc. v. Harry W. Gorst Co., Inc.* (1991) 229 CA3d 417, 280 CR 159 (driver missing for fifteen months not presumed dead even though driver had been missing for more than six and a half years when case came to trial)].

Whether there must be proof that a diligent effort has been made to locate an absentee person before the presumption of death can apply to him depends on the circumstances of the individual case [*In re Estate of Bassi* (1965) 234 CA2d 529, 44 CR 541].

The presumption of life for the statutory time period is not exclusive and may be rebutted by evidence, direct or circumstantial [*People v. Niccoli* (1951) 102 CA2d 814, 228 P2d 827 (not rebutted by evidence that person was a fugitive from justice)].

The presumption is based on public policy and therefore affects the burden of proof [*Conservatorship of Geiger* (1992) 3 CA4th 127, 4 CR2d 252].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawPersonal InjuriesDeath ActionsGeneral OverviewEvidenceInferences & PresumptionsGeneral Overview



164 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.42

15.42 Doing an Unlawful Act--Evid Code § 668

[1] Evid Code § 668 Text

- *Evid Code § 668.*

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 the specific intent is an element of the crime charged.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1963(2)* [Cal Law Rev Com Comment].

[3] Case Notes

The presumption of an unlawful intent is sufficiently rebutted when a reasonable doubt is raised as to the defendant's guilt, and if such doubt is raised, the burden is lifted and the jury must presume an absence of such criminal intent [*People v. Ah Gee Yung (1890) 86 C 144, 24 P 860*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureScienterGeneral IntentCriminal Law & ProcedureScienterSpecific Intent



165 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.43

15.43 Failure of Person to Exercise Due Care--Rebuttal--Evid Code § 669

[1] Evid Code § 669 Text

■ *Evid Code § 669.*

(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.**

LegH: 1967 ch. 650.

[2] Commission Comments

This section codifies the common law presumption of due care. If the conditions listed in *Evid Code § 669(a)* are

established, the presumption is one of simple negligence only, not gross negligence [Cal Law Rev Com Comment].



Strategic Point:

This section establishes a presumption affecting the burden of proof. If the conditions listed in *Evid Code* § 669(a) are met, the burden of proof then shifts to the opponent to show that it is more probable than not that there was some justification for the violation of the statute [Cal Law Rev Com Comment].

If the presumption is rebutted by proof of justification or excuse that satisfies subsection (b), the trier of fact is required to find that the violation of the statute was not negligent unless common law negligence is established [Cal Law Rev Com Comment].

A statutory violation by a child may be rebutted by showing that the child exercised the care that children of his maturity, intelligence, and similar capacity ordinarily exercise under similar circumstances. If a child engages in an activity normally engaged in by adults and requiring adult qualifications, such as driving a motor vehicle, he must meet the standard of conduct for adults to establish a subsection (b) justification [Cal Law Rev Com Comment].

The factors listed in subsection (a)(3) and subsection (a)(4) are questions of law for the court [Cal Law Rev Com Comment].

Whether the violation has proximately caused or contributed to the death or injury under subsection (a)(2) is a question of fact for the jury unless reasonable persons can draw but one inference from the facts. Normally, the issues of justification and excuse under subsection (b) are jury questions [Cal Law Rev Com Comment].



Strategic Point:

An instruction on the issue of excuse or justification should not be given if there is no evidence that would sustain a finding by the jury [Cal Law Rev Com Comment].

[3] Case Notes

[a] Application of Rule

Evid Code § 669 creates a presumption of negligence arising from violation of a statute, but only if the person suffering the injury was one of the class of persons for whose protection the statute was adopted [*Hoff v. Vacaville Unified School Dist.* (1998) 19 C4th 925, 80 CR2d 811, 968 P2d 522 (law requiring supervision of pupils is not intended to protect members of general public not on school property at time of injury)]:

- A contractor owed no duty of care to a subcontractor's employee who was injured on the job, so *Evid Code* § 669 did not apply [*Millard v. Biosources, Inc.* (2007) 156 CA4th 1338, 68 CR3d 177].
- Child Abuse and Neglect Reporting Act was intended to protect only those children in the custodial care of the person charged with reporting the abuse, and not all children who may at some future time be abused by the same offender [*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 C4th 1066, 60 CR2d 263, 929 P2d 582].
- A prohibition against parking on a sidewalk was not designed to prevent injury to person struck on

the sidewalk by a vehicle other than that illegally parked [*Victor v. Hedges* (1999) 77 CA4th 229, 91 CR2d 466].

- Building code standards are for safety of persons using stairs, not to prevent owners from incurring costs in connection with remediation of building code violations [*Morris v. Horton* (1994) 22 CA4th 968, 27 CR2d 585].

- A "no parking" ordinance was not designed to protect a bicyclist [*Capolungo v. Bondi* (1986) 179 CA3d 346, 224 CR 326].

Issues of whether injury resulted from occurrence which statute was designed to prevent and whether plaintiff was member of class protected are questions of law [*Nowlon v. Koram Ins. Center, Inc.* (1991) 1 CA4th 1437, 2 CR2d 683].

All four elements must be shown in order for a claim of negligence per se to succeed. The first two are matters for the trier of fact and the second two are determined by the court as a matter of law [*Norman v. Life Care Centers of America, Inc.* (2003) 107 CA4th 1233, 132 CR2d 765 (in action for elder abuse and wrongful death, all four elements of *Evid Code* § 669 were shown, so trial court erred in refusing instruction on negligence per se); *Newhall Land & Farming Co. v. Superior Court* (1993) 19 CA4th 334, 23 CR2d 377].

Applying the negligence per se doctrine of *Evid Code* § 669 to violations of the Vehicle Code, courts have concluded that violation of a section that was not intended to protect against traffic accidents does not support negligence per se. The statute at issue, *Veh Code* § 22526 (the Anti-Gridlock Act) expressly states that violation of *Veh Code* § 22526 "is not a violation of law relating to the safe operation of vehicles" [*Veh Code* § 22526(e)]. Therefore violation of the statute did not support negligence per se [*Gilmer v. Ellington* (2008) 159 CA4th 190, 70 CR3d 893 (defects in pleading could not be cured by amendment; no abuse of discretion in sustaining demurrer without leave to amend)].

A woman using crutches fell on a disabled access ramp. While it was foreseeable that a level surface might have prevented the plaintiff's fall, the purpose of disabled access regulations was not to prevent such falls but to provide a secure platform for the disabled to enter and exit their vehicles. Accordingly, plaintiff's claim for negligence per se under *Evid Code* § 669(a) failed because her injury did not result from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent [*Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 CA4th 254, 65 CR3d 838].

The presumption of negligence created by *Evid Code* § 669 concerns the standard of care, rather than the duty of care [*Rosales v. City of Los Angeles* (2000) 82 CA4th 419, 98 CR2d 144 (police officer had no remedy for wrongful disclosure of his personnel files in action against city based on his alleged conduct against plaintiff)].

When the negligence per se statute is adopted as the standard of care, it is error for the court to instruct only on the reasonable person standard [*Casey v. Russell* (1982) 138 CA3d 379, 188 CR 18].

The state will not permit a plaintiff to pursue a private cause of action for damages for the violation of federal law, basing it on a negligence per se theory, when the federal government itself has declined to recognize such a cause of action [*Sierra-Bay Federal Land Bank v. Superior Court* (1991) 227 CA3d 318, 277 CR 753 (plaintiff alleged negligence in lender's failure to accept his proposals for restructure of defaulted loans)].

[b] Statutory Violation

The Legislature's enactment of various statutes regulating the operation of personal watercraft was not intended to

abrogate or preempt the existing common law. Operating a jet ski watercraft is the type of sporting activity that meets all the criteria governing application of the doctrine of primary assumption of risk [*Peart v. Ferro* (2004) 119 CA4th 60, 13 CR3d 885 (primary assumption of risk was complete defense to action for personal injuries)].

Verbal encouragement is within the parameters of the statute making it a crime to solicit another to commit an assault with a deadly weapon. Depending on the facts, encouragement may constitute negligence per se [*Michael R. v. Jeffrey B.* (1984) 158 CA3d 1059, 205 CR 312 ("go for it" shouted just before minor was struck in the eye by a marble)].

The 1978 amendments to *B&P Code* § 25602 and *CC* § 1714 abrogated the judicial rule that a commercial vendor of alcoholic beverages is liable for injuries proximately caused by the sale of liquor to an obviously intoxicated person [*Fosgate v. Gonzales* (1980) 107 CA3d 951, 166 CR 233].

The statutory scheme concerning the confidentiality of police personnel records [*Evid Code* § 1043 *et seq.*] does not create a duty of care on the part of the agency in control of the records; nor does section 669 [*Rosales v. City of Los Angeles* (2000) 82 CA4th 419, 98 CR2d 144 (police officer had no remedy for wrongful disclosure of his personnel files in action against city based on his alleged conduct against plaintiff)].

[c] Violation of Work Safety Law

The second paragraph of *Lab Code* § 6304.5 catalogs the rules for the admissibility of Cal-OSHA provisions in trial court personal injury and wrongful death actions. In general, plaintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party. The lone exception arises when the state is the defendant based on actions it took or failed to take in its regulatory capacity. In such cases, Cal-OSHA provisions remain inadmissible to show liability based on breach of the statutory duty to inspect worksites and enforce safety rules [*Elsner v. Uveges* (2004) 34 C4th 915, 936, 22 CR3d 530, 102 P3d 915].

Lab Code § 6304.5 restricts the scope of *Evid Code* § 669 by precluding the introduction into evidence or use in any other way of administrative code safety orders in actions by employees against parties other than their employers [*Spencer v. G.A. MacDonald Constr. Co.* (1976) 63 CA3d 836, 134 CR 78].

The fact that the state has a mandatory duty to inspect and enforce the Occupational Safety and Health Act [*Lab Code* § 6300 *et seq.*] is irrelevant to the issue of whether those provisions can be relied on in a personal injury action against the state, when the state is not the employer [*Brock v. State of California* (1978) 81 CA3d 752, 146 CR 716].

[d] Violation of Ordinance

Violation of a county ordinance for safe skiing could not be used to bring a negligence action under *Evid Code* § 669 [*Cheong v. Antablin* (1997) 16 C4th 1063, 68 CR2d 859, 946 P2d 817 (no effect on duty and assumption of risk doctrines for sports settings)].

[e] Violation of Regulation

In a negligence action against a residential drug treatment facility for injuries caused by escaped residents, plaintiffs could not invoke the doctrine of negligence per se under *Evid Code* § 669. Defendants' alleged failure to comply with policy or procedures for the safe operation of a residential drug treatment facility did not alter the conclusion that a residential treatment facility does not owe a duty to the general public to exercise ordinary care to control the criminal behavior of its program participants. Contrary to plaintiffs' assertion, this conclusion does not leave residential treatment facilities unaccountable for public safety. The facility was licensed by the state and subject to oversight. Failure to comply with applicable state regulations or defendants' written agreement with the state could result in civil penalties or

the revocation of the facility's license [*Rice v. Center Point, Inc.* (2007) 154 CA4th 949, 65 CR3d 312] .

An administrative code safety order has the same effect as a statute: A violation of such a safety order gives rise to a rebuttable presumption that the person who failed to comply with the safety order was negligent [*Short v. State Compensation Ins. Fund* (1975) 52 CA3d 104, 125 CR 15].

A federal aviation safety regulation can be given the same weight as a statute, ordinance, or regulation of a public entity [*McGee v. Cessna Aircraft Co.* (1983) 139 CA3d 179, 188 CR 542 (error for court not to instruct that burden of proof shifted to manufacturer if it violated regulation)].

[f] Effect of Rule Other Than Statute, Ordinance, or Regulation

The internal guidelines of a police agency are not the equivalent of a statute, ordinance, or regulation so as to justify an instruction on negligence per se [*Knott v. State of California* (1994) 28 CR2d 514 (California Highway Patrol internal guidelines on complaints against officers)].

By its terms, *Evid Code* § 669(a) embraces only the regulation of a public entity, not its manuals or operating procedures [*McDaniel v. Sunset Manor Co.* (1990) 220 CA3d 1, 269 CR 196 (HUD guidelines)].

It is a question of fact whether a failure to follow a FAA maintenance checklist proximately caused an accident [*Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 236 CR 633].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Practice & Procedure Federal Preemption Torts Transportation Torts General Overview Transportation Law Commercial Vehicles Maintenance & Safety



166 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.44

15.44 Local Rules of Public Employment Conduct--Evid Code § 669.1

[1] Evid Code § 669.1 Text

■ *Evid Code § 669.1.*

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.

LegH: 1987 ch. 1207.

[2] Case Notes

Although the CHP Officer Safety Manual was not formally adopted as regulations, nevertheless it can play a role in a negligence action. Under *Evid Code § 669.1*, the manual cannot be read to establish a standard of care within the meaning of *Evid Code § 669*; however, it may be admitted into evidence for the trier of fact's consideration in determining the issue of negligence if there otherwise is a duty. The provisions of the manual would be admissible evidence on the question of breach of duty but do not substitute for judicial determination whether a duty was owed [*Minch v. Department of California Highway Patrol* (2006) 140 CA4th 895, 907-908, 44 CR3d 846 (holding that plaintiff did not raise triable issue of duty)].

Under *Evid Code § 669.1*, the provisions of the California Highway Patrol Officer Safety Manual may not properly be viewed as establishing the applicable standard of care, but they may be considered by the trier of fact in determining whether or not an officer was negligent in a particular case. The manual cannot be read to establish the standard of care, because there is no indication that the manual was adopted pursuant to the state (or federal) Administrative Procedure

Act. Absent that adoption, Section 669.1 forbids the use of the manual to establish the presumption of negligence that otherwise would arise under *Evid Code* § 669. At the same time, Section 669.1 specifies that it is not intended to affect the admissibility of such a manual into evidence, and thus it is clear that the manual may be considered as evidence on the question of negligence [*Lugtu v. California Highway Patrol* (2001) 26 C4th 703, 110 CR2d 528, 28 P3d 249 (officer who pulled vehicle over to center median, where it was hit by truck, could be liable for negligence under reasonable prudent person standard; relevant provisions of the CHP Officer Safety Manual submitted by plaintiffs indicated strong preference for stopping vehicle on the right shoulder rather than in center median)].

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceStandards of CareGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation
LawCommercial VehiclesMaintenance & Safety



167 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.45

15.45 Presumption of Impact on Housing Supply--Ordinance Limiting Building--Evid Code § 669.5

[1] Evid Code § 669.5 Text

■ *Evid Code § 669.5.*

(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 of 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 of 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) of *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.

LegH: 1980 ch. 1144; 1988 ch. 541.

[2] Case Notes

The constitutionality of *Evid Code* § 669.5 was upheld by the Supreme Court [*Building Industry Association of Southern California, Inc. v. City of Camarillo* (1986) 41 C3d 810, 226 CR 81, 718 P2d 68].

Evid Code § 669.5 operates prospectively, since it does not deprive anyone of rights held when the suit was commenced, but only prescribes the conditions upon which a suit may be brought and maintained. In any event, the Legislature intended the section to have retroactive effect, except as to certain ordinances specified in *Evid Code* § 669.5(d) [*Murphy v. City of Alameda* (1992) 11 CA4th 906, 14 CR2d 329].

This section applies to all ordinances enacted either by a legislative body or by voters. The city, not the taxpayers challenging an ordinance that limited construction of residences, had the burden of proof on the issue of the ordinance being reasonably related to the public welfare [*Hernandez v. City of Encinitas* (1994) 28 CA4th 1048, 33 CR2d 875 (city's determination there was adequate zoning of land to accommodate regional housing needs); *Lee v. City of Monterey Park* (1985) 173 CA3d 798, 219 CR 309].

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Equal Protection Poverty Governments Local Governments Elections Real Property Law Zoning & Land Use Ordinances



168 of 168 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

E. Burdens, Presumptions, and Inferences (Evid Code §§ 500-670)

Chapter 15 Presumptions and Inferences Evidence Code §§ 600-670

1-15 California Courtroom Evidence 15.46

15.46 Evidence Raising Presumption of Payment in Disputes Concerning Payment by Check--Evid Code § 670

[1] Evid Code § 670 Text

■ *Evid Code § 670.*

(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."

LegH: 1992 ch. 914; 2001 ch. 854.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral Overview



1 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.syn

§ 16.syn Synopsis to Chapter 16: Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence Code §§ 700-795

16.01 Qualifications--Evid Code § 700

[1] Evid Code § 700 Text

[2] Commission Comments

[3] Case Notes

16.02 Disqualified Persons--Evid Code § 701

[1] Evid Code § 701 Text

[2] Commission Comments

[3] Case Notes

[a] Incapable of Self-Expression

[b] Child as Witness

[c] Other Disability Not Causing Incompetence

[d] Testimony of Incompetent Witness

16.03 Personal Knowledge of Matter--Evid Code § 702

[1] Evid Code § 702 Text

[2] Commission Comments

[3] Case Notes

16.04 Judge Presiding at Trial--Evid Code § 703

[1] Evid Code § 703 Text

[2] Legislative Committee Comments

16.05 Testimony by Judge, Arbitrator or Mediator Prohibited--Evid Code § 703.5

[1] Evid Code § 703.5 Text

[2] Case Notes

16.06 Juror Impaneled at Trial--Evid Code § 704

[1] Evid Code § 704 Text

[2] Legislative Committee Comments

16.07 Oath, Affirmation, Declaration--Evid Code § 710

[1] Evid Code § 710 Text

[2] Case Notes

16.08 Witness Confrontation--Evid Code § 711

[1] Evid Code § 711 Text

[2] Case Notes

[a] Sixth Amendment

[b] Application of Rule and Sixth Amendment

16.09 Blood Sample Admissible from Nurse, Technologist--Evid Code § 712

[1] Evid Code § 712 Text

16.10 Expert Witness Qualification to Testify--Evid Code § 720

[1] Evid Code § 720 Text

[2] Commission Comments

[3] Case Notes

[a] Qualification as Expert Is Legal Question

[b] Whether Purported Expert Is Qualified

[c] Subjects for Expert Testimony

[d] Weight of Expert Testimony

[e] Qualifying as Medical Expert Witness

[f] Qualifying as Expert in Legal Malpractice Case

16.11 Cross-Examination of Expert--Evid Code § 721

[1] Evid Code § 721 Text

[2] Commission Comments

[3] Case Notes

[a] Permissible Cross-Examination

[b] Use of Treatise or Like Work

16.12 Expert Witness Appointment--Notice to Jury--Compensation Subject to Inquiry--Evid Code § 722

[1] Evid Code § 722 Text

[2] Commission Comments

[3] Case Notes

16.13 Limit to Expert Witnesses--Evid Code § 723

[1] Evid Code § 723 Text

16.14 Appointment Provision--Evid Code § 730

[1] Evid Code § 730 Text

[2] Commission Comments

[3] Case Notes

16.15 Expert Witness Compensation--Evid Code § 731

[1] Evid Code § 731 Text

16.16 Expert Examination and Cross-Examination--Evid Code § 732

[1] Evid Code § 732 Text

[2] Commission Comments

16.17 Other Witnesses Called by Parties--Payment--Evid Code § 733

[1] Evid Code § 733 Text

[2] Case Notes

16.18 Interpreters, Translators Subject to Rules for Witnesses--Evid Code § 750

[1] Evid Code § 750 Text

[2] Commission Comments

[3] Case Notes

16.19 Oath for Interpreter, Translator--Evid Code § 751

[1] Evid Code § 751 Text

[2] Case Notes

16.20 Appointment Basis--Oral--Evid Code § 752

[1] Evid Code § 752 Text

[2] Commission Comments

[3] Case Notes

16.21 Appointment Basis--Written--Evid Code § 753

[1] Evid Code § 753 Text

[2] Commission Comments

16.22 Assistance for the Deaf and Hard-of-Hearing--Evid Code § 754

[1] Evid Code § 754 Text

[2] Commission Comments

[3] Case Notes

16.23 Use of an Interpreter Does Not Waive Valid Privilege--Evid Code § 754.5

[1] Evid Code § 754.5 Text

16.24 Presence of Interpreter in Certain Domestic Violence Proceedings--Evid Code § 755

[1] Evid Code § 755 Text

16.25 Interpreters--Certification, Costs--Evid Code § 755.5

[1] Evid Code § 755.5 Text

[2] Commission Comments

[a] 1995 Amendments

16.26 Direct Examination--Evid Code § 760

[1] Evid Code § 760 Text

[2] Commission Comments

[3] Explanation of Section

16.27 Cross-Examination--Evid Code § 761

[1] Evid Code § 761 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Section

[b] Constitutional Ramifications

[c] Cross-Examination in Criminal Case

16.28 Redirect Examination--Evid Code § 762

[1] Evid Code § 762 Text

[2] Commission Comments

[3] Case Notes

16.29 Recross--Examination--Evid Code § 763

[1] Evid Code § 763 Text

[2] Commission Comments

[3] Case Notes

16.30 Leading Questions--Evid Code § 764

[1] Evid Code § 764 Text

[2] Commission Comments

[3] Case Notes

16.31 Court Control Over Interrogation of Witnesses--Evid Code § 765

[1] Evid Code § 765 Text

[2] Commission Comments

[3] Case Notes

[a] Court's Power to Control Interrogation

[b] Judge's Power to Interrogate Witness

[c] Interrogation of Minor as Witness

16.32 Responsive Answers--Evid Code § 766

[1] Evid Code § 766 Text

[2] Commission Comments

[3] Case Notes

16.33 Use of Leading Questions--Evid Code § 767

[1] Evid Code § 767 Text

[2] Legislative Committee Comments

[3] Case Notes

[a] Discretion of Court

[b] Leading Questions in Cross-Examination

[c] Special Circumstances for Leading Questions

16.34 Writings Examination--Evid Code § 768

[1] Evid Code § 768 Text

[2] Legislative Committee Comments

16.35 Inconsistent Statement or Conduct of Witness--Evid Code § 769

[1] Evid Code § 769 Text

[2] Legislative Committee Comments

16.36 Exclusion of Extrinsic Evidence of Inconsistent Statement--Evid Code § 770

[1] Evid Code § 770 Text

[2] Commission Comments

[3] Case Notes

16.37 Production of Writings to Refresh Memory--Exceptions--Evid Code § 771

[1] Evid Code § 771 Text

[2] Legislative Committee Comments

[3] Case Notes

16.38 Phases of Examination--Evid Code § 772

[1] Evid Code § 772 Text

[2] Legislative Committee Comments

16.39 Cross-Examination--Evid Code § 773

[1] Evid Code § 773 Text

[2] Commission Comments

[3] Case Notes

[a] Purpose of Cross-Examination

[b] Discretion of Court

[c] Cross-Examination of Criminal Defendant

[d] Cross-Examination of Prosecution Witness

[e] Preservation of Issue on Appeal

16.40 Reexamination--Evid Code § 774

[1] Evid Code § 774 Text

[2] Commission Comments

[3] Case Notes

16.41 Court Calling, Interrogation of Witnesses--Cross-Examination--Evid Code § 775

[1] Evid Code § 775 Text

[2] Commission Comments

[3] Case Notes

16.42 Examining Adverse Witnesses--Evid Code § 776

[1] Evid Code § 776 Text

[2] Commission Comments

[3] Case Notes

16.43 Court Exclusion of Witnesses from Courtroom--Evid Code § 777

[1] Evid Code § 777 Text

[2] Commission Comments

[3] Case Notes

16.44 Excused Witnesses--Evid Code § 778

[1] Evid Code § 778 Text

[2] Commission Comments

[3] Case Notes

16.45 Basis of Credibility--Evid Code § 780

[1] Evid Code § 780 Text

[2] Commission Comments

[3] Case Notes

[a] Discretion of Court

[b] Attitude Toward Testifying--Fearful Witness

[c] Bias, Interest, or Other Motive

[d] Capacity to Perceive and Recollect

[e] Character for Honesty or Veracity

[f] Demeanor and Manner While Testifying

[g] Impeachment of Criminal Defendant as Witness

[h] Credibility of Child as Witness

[i] Impeachment of Expert Witness

[j] Prior Inconsistent Statements

[k] Nonexistence of Fact That Witness Asserted

16.46 Procedure to Determine Relevancy of Sexual Conduct Evidence Proposed to Attack Credibility of Complaining Witness--Evid Code § 782

[1] Evid Code § 782 Text

[2] Legislative Notes

[a] Short Title

[b] 1989 Amendments

[3] Case Notes

16.47 Sexual Harassment--Plaintiff's Sexual Conduct--Discovery Procedure--Evid Code § 783

[1] Evid Code § 783 Text

[2] Legislative Notes

[3] Case Notes

16.48 Attacking or Supporting Credibility of Witness--Evid Code § 785

[1] Evid Code § 785 Text

[2] Commission Comments

[3] Case Notes

16.49 Traits of Character--Evid Code § 786

[1] Evid Code § 786 Text

[2] Commission Comments

[3] Case Notes

16.50 Specific Instances of Conduct--Evid Code § 787

[1] Evid Code § 787 Text

[2] Commission Comments

[3] Case Notes

[a] Criminal Case--Rule of People v. Wheeler

[b] Effect of Other Evidence Code Sections

16.51 Convictions of Felony--Evid Code § 788

[1] Evid Code § 788 Text

[2] Commission Comments

[3] The Victims' Bill of Rights

[4] Case Notes

[a] Discretion of Court

[b] Civil Cases

[c] Criminal Cases Generally

[d] Definition of "Convicted"

[e] Constitutionally Invalid Prior Conviction

[f] Nonretroactivity of Victims' Bill of Rights

[g] Impact of Victims' Bill of Rights on People v. Beagle

[h] Moral Turpitude

[i] When Defendant Testifies

[j] When Defendant Does Not Testify

[k] When Defendant Waives Jury Trial

[l] Performing On-the-Record Balancing Test

[m] Same or Similar Conduct

[n] More Than One Prior Conviction

[o] Remoteness

[p] Witness Other Than Criminal Defendant

[q] Other Issues

[r] Foreign Conviction

[s] Sanitizing the Prior

[t] Prior Arrest

[u] Juvenile Adjudication and Commitment to Youth Authority

[v] Bifurcation

[w] Trier of Fact's Knowledge of Prior Convictions

[x] Expunged Conviction

[y] Plea Bargain or Immunity Agreements

16.52 Religious Belief or Lack--Evid Code § 789

[1] Evid Code § 789 Text

[2] Commission Comments

[3] Case Notes

16.53 Good Character of Witness--Evid Code § 790

[1] Evid Code § 790 Text

[2] Commission Comments

[3] Case Notes

16.54 Previous Statements--Evid Code § 791

[1] Evid Code § 791 Text

[2] Commission Comments

[3] Case Notes

[a] Use of Prior Consistent Statement

[b] Bias or Motive to Fabricate

16.55 Previous Hypnosis of Witness--Admissibility of Evidence--Evid Code § 795

[1] Evid Code § 795 Text

[2] Case Notes



2 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code § 700 et seq.* on the competency of witnesses, the oath, confrontation, qualification of experts, interpreters, examination of witnesses, credibility, and hypnosis.

► Cross Reference:

Further discussion regarding witnesses and appropriate forms, see *California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence, §§ 22.10, 22.11* (Matthew Bender); *California Forms of Pleading and Practice, Ch. 551, Trial, § 551.110 et seq.* (Matthew Bender).

Foundational discussion, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 3, *The Competency of Witnesses*, Ch. 5, *Limitations on Credibility Evidence* (Matthew Bender).

Discussion of interpreters, see Matthew Bender(R) *Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 8, *Interpreters*.



3 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.01

16.01 Qualifications--Evid Code § 700

[1] Evid Code § 700 Text

- *Evid Code § 700.*

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.

LegH: 1965 ch. 299; 1985 ch. 884.

[2] Commission Comments

This section makes it clear that all grounds for disqualification of witness must be based on statute and that there can be no non-statutory grounds for disqualification [Cal Law Rev Com Comment].

This broad rule is substantially qualified by statutory restrictions appearing in the Evidence Code and other California codes. See, for example [Cal Law Rev Com Comment]:

- *Evid Code § 701* (mental or physical capacity to be a witness).
- *Evid Code § 702* (requirement of personal knowledge).
- *Evid Code § 703* (judge as witness).
- *Evid Code § 704* (juror as witness).
- *Evid Code §§ 900-1070* (privileges).
- *Evid Code § 1150* (continuing prior law limiting use of juror's evidence concerning jury misconduct).

- Veh Code § 40804 (speed trap evidence).

[3] Case Notes

The party challenging the witness's competency bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion [*People v. Mincey* (1992) 2 C4th 408, 6 CR2d 822, 827 P2d 388] .

A finding that a child is not competent because of the inability to differentiate between truth and falsehood, or to understand the duty to tell the truth at the time of testifying, is not an absolute bar to the admission of child hearsay testimony, but only one circumstance to be considered when determining if the child's statement is reliable [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803, 947 P2d 1340 ; see Evid Code §§ 1350, 1360]. A child's testimony cannot be deemed insubstantial merely because of his or her youth. Under present law, no distinction is made between the competence of young children and that of other witnesses [*People v. Jones* (1990) 51 C3d 294, 270 CR 611, 792 P2d 643 (prosecution for multiple counts of sexual molestation)]. However, a child witness is deemed incompetent if incapable of expression to be understood [*In re Basilio T.* (1992) 4 CA4th 155, 5 CR2d 450] .

Accomplices who enter into agreements with prosecutors are competent witnesses against a defendant [*People v. Maldonado* (1999) 72 CA4th 588, 84 CR2d 898 (agreement only goes to bias; court cannot formulate common law competency rule to exclude testimony)].

Indications of emotional instability of a witness and bias against the defendant do not translate into incompetency. Whether or not the witness testifies accurately and truthfully are questions of credibility to be resolved by the jury [*People v. Hall* (1984) 157 CA3d 538, 223 CR 267 (witness is presumed competent in the absence of contrary showing)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of WitnessesChild WitnessesCriminal Law & ProcedureWitnessesPresentationEvidenceCompetencyDisabilityChildren



4 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.02

16.02 Disqualified Persons--Evid Code § 701

[1] Evid Code § 701 Text

■ *Evid Code § 701.*

(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.

LegH: 1965 ch. 299; 1985 ch. 884.

[2] Commission Comments

The competency of a person to be a witness is a question to be determined by the trial court in the exercise of its discretion [Cal Law Rev Com Comment].

This section requires the court to determine only the prospective witness's capacity to communicate and his understanding of the duty to tell the truth [Cal Law Rev Com Comment].

A witness's capacity to perceive and to recollect is a condition for the admission of his testimony concerning a particular matter instead of a condition for his competency to be a witness, as it was under former law [Cal Law Rev Com Comment].

If there is evidence that a witness has those capacities (to perceive and to recollect), the determination whether he in fact perceived and does recollect is left to the trier of fact [Cal Law Rev Com Comment].

This section modifies the prior law with respect to determining the competency of witnesses. It was enacted so that children and persons suffering from mental impairment can testify in some instances where they had been disqualified from testifying. Practically speaking, courts have permitted children and persons with mental impairment to testify [Cal Law Rev Com Comment; *e.g.*, *People v. McCaughan* (1957) 49 C2d 409, 317 P2d 974 ; *Bradburn v. Peacock* (1955) 135 CA2d 161, 286 P2d 972] .



Strategic Point:

Although this section supersedes former CCP § 1880(1) and (2), it would seem that because of the changes made by the statute, prior case law construing that section would be of little persuasive value.

[3] Case Notes

[a] Incapable of Self-Expression

There was no substantial basis for a determination that the main prosecution witness in a murder prosecution was incompetent to testify. Although the witness may have suffered from mental disorders and his testimony was difficult to comprehend at times, the record did not support the claim that he was incapable of communicating so as to be understood. Mere difficulty in understanding the witness did not disqualify him under *Evid Code* § 701(a). To the extent his responses were unbelievable, that was an issue for the jury and not relevant to the issue of competency [*People v. Lewis* (2001) 26 C4th 334, 110 CR2d 272, 28 P3d 34] .

The question of a witness's ability to express himself so that he may be understood is for the trial court to decide. In the absence of clear abuse of discretion, its decision will not be disturbed on appeal [*People v. Alvarez* (1996) 14 C4th 155, 58 CR2d 385, 926 P2d 365 (though defendant was under medication while testifying, circumstances of case did not violate *Evid Code* § 701(a)(1)); *People v. Blagg* (1970) 10 CA3d 1035, 89 CR 446 (mentally disordered sex offender)].

[b] Child as Witness

A finding of incompetence to testify is not a categorical bar to the admission of a child's out-of-court statements [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803, 947 P2d 1340 ; *see Evid Code* §§ 1350, 1360 (child-abuse hearsay exception)].

A four-year-old was found competent and testified about observing the mother's murder [*People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680, 950 P2d 1035] .

[c] Other Disability Not Causing Incompetence

The principles governing exclusion of testimony on grounds of the witness's lack of capacity are well settled. Under current law every person is qualified to testify except as provided by statute. A person is disqualified as a witness only if he or she is incapable of expressing himself or herself understandably concerning the testimonial matter, or is incapable of understanding the duty of a witness to tell the truth [*People v. Zambrano* (2007) 41 C4th 1082, 1140, 63 CR3d 297, 163 P3d 4] .

The court did not abuse its discretion in allowing an eyewitness to testify about a robbery and murder, despite the eyewitness's delusions, which affected her memory of the events. The trial court noted the existence of many indicia by which a rational trier of fact could conclude that the eyewitness, despite her specific delusions, was actually present during the robbery and murder and had accurately perceived and recollected those events. The court pointed out that the

witness's description included many details unlikely to be known by a person not present and that her testimony was corroborated by independent evidence. Moreover, as the trial court emphasized, the eyewitness was able, after a long absence from the area where the crime took place, to direct authorities to the significant locations involved in the crime [*People v. Anderson* (2001) 25 C4th 543, 106 CR2d 575, 22 P3d 347] .

Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony do not disqualify a witness. They present questions of credibility for resolution by the trier of fact [*People v. Mincey* (1992) 2 C4th 408, 6 CR2d 822, 827 P2d 388 ; *Adamson v. Department of Social Services* (1988) 207 CA3d 14, 254 CR 667] .

The trial court properly admitted the taped interview of an elderly robbery victim who later died of natural causes [*People v. Tatum* (2003) 108 CA4th 288, 133 CR2d 267] .

A pecuniary interest in litigation, even a direct and substantial one, will not disqualify a person as a witness [*Mathis v. Morrissey* (1992) 11 CA4th 332, 13 CR2d 819] .

The court did not abuse its discretion when it impliedly found that diabetic witness, who became momentarily confused at trial when he suffered a temporary sugar deficiency, was competent. Discrepancies in the witness's testimony were found to apply to the issue of credibility, not competency [*Sanders Construction Company, Inc. v. San Joaquin First Federal Savings and Loan Assoc.* (1982) 136 CA3d 387, 186 CR 218] .

[d] Testimony of Incompetent Witness

Statements of a witness who is incompetent to testify may be admissible if otherwise reliable under an exception to the hearsay rule [*In re Emily A.* (1992) 9 CA4th 1695, 12 CR2d 294] .

However, where examination of the record on appeal indicates that the witness was incompetent, it is manifestly unfair to affirm a conviction merely because counsel failed to make a proper objection [*People v. Lyons* (1992) 10 CA4th 837, 13 CR2d 112 (witness was delusional and unable to tell difference between truth and lies); *but see People v. Augustin* (2003) 112 CA4th 444, 5 CR3d 171 (motion challenging leading questions did not preserve objection to witness's competence; however, record reflected that witness with cerebral palsy was competent)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Witnesses Presentation Evidence Competency General Overview Evidence Testimony General Overview



5 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.03

16.03 Personal Knowledge of Matter--Evid Code § 702

[1] Evid Code § 702 Text

■ *Evid Code § 702.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section states the general requirement that a witness must have personal knowledge of the facts to which he testifies [Cal Law Rev Com Comment].

This requirement is applicable to all witnesses, with the exception that experts may give opinion testimony not based on personal knowledge [Cal Law Rev Com Comment; *Evid Code § 701*].

Comment:

An objection must be made to the testimony of a witness who does not have personal knowledge. If there is no reasonable opportunity to object before the testimony is given, a motion to strike is appropriate after lack of knowledge has been shown [Cal Law Rev Com Comment].

This section limits the ordinary power of the court with respect to the order of proof, in that, if a timely objection is made that a witness lacks personal knowledge, the court may not receive his testimony subject to the condition that evidence of personal knowledge will be supplied later in the trial [Cal Law Rev Com Comment; *see Evid Code §§ 320, 403(b)*].

[3] Case Notes

Even if a witness is not entirely disqualified for incapacity to communicate understandably or grasp the duty to tell the truth, his or her testimony on a *particular matter* is inadmissible if he or she lacks personal knowledge of the subject matter [*Evid Code* § 702(a)]. The capacity to perceive and recollect particular facts is subsumed within the issue of personal knowledge [*People v. Zambrano* (2007) 41 C4th 1082, 1140, 63 CR3d 297, 163 P3d 4 (emphasis in the original)].

In a quantum meruit action for attorney fees, the trial court correctly denied defendant's motion in limine to exclude the attorneys' evidence of their time "estimates" not based on contemporaneous time records. There is no legal requirement that an attorney supply billing statements to support a claim for attorney fees, although the attorney's testimony must be based on the attorney's personal knowledge of the time spent and fees incurred [*Evid Code* § 702(a)]. Precise calculations are not required; fair approximations based on personal knowledge will suffice. Each of the contingency fee lawyers planned to testify that he or she could recall the amount of time spent in total on the case, and the number (or percent) of hours per week that he or she worked on that case [*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 CA4th 257, 62 CR3d 665 (affirming judgment for attorney fees)].

In a murder prosecution, a witness testified that defendant and her daughter quarreled two days after the capital crime, and that defendant threatened to kill them at gunpoint. Defendants objected that the witness lacked personal knowledge about the argument because she did not know its nature. However, the witness did not relay the content of the argument, but only that one occurred. The key point was that defendant reacted to the argument by displaying the murder weapon [*People v. Lewis and Oliver* (2007) 39 C4th 970, 1027, 47 CR3d 467, 140 P3d 775 (no error in overruling objection)].

The personal knowledge requirement applicable to witnesses is equally applicable to hearsay declarants. In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation. The admission of a hearsay statement not based on personal knowledge puts the fact finder in the position of determining the truth of a statement without knowledge of its source and without any means of evaluating the reliability of the source of the information [*People v. Valencia* (2006) 146 CA4th 92, 103-104, 52 CR3d 649 (in sexual abuse case, counsel was prejudicially ineffective for failure to object to testimony regarding a hearsay statement that lacked personal knowledge)].

In a personal injury action turning on the property owner's and contractor's removal of hydraulic lifts (safety equipment that would have prevented a fall by plaintiff, a subcontractor's employee) before work was completed, defendants objected unsuccessfully to related testimony as "hearsay" insofar as it asserted that defendants "wanted" the lifts removed. This testimony may have lacked a foundation in personal knowledge [*Evid Code* § 702]. The testimony might reflect an admissible lay opinion [*Evid Code* § 800], or it might rest on statements that would themselves be admissible as vicarious statements by a party opponent [*Evid Code* § 1222]. In the absence of a foundational objection there was no occasion to identify the factual basis for the testimony. But it was not hearsay. None of the challenged testimony purported to recount a statement, let alone to prove what was stated [*Browne v. Turner Construction Co.* (2005) 127 CA4th 1334, 1348-1349, 26 CR3d 433 (affirming trial court's denial of objection)].

If there is evidence that the witness has the capacity to perceive and to recollect, the determination of whether he or she in fact perceived and does recollect is left to the trier of fact. The capacity to perceive and recollect is only preliminarily determined by the trial judge, and it is ultimately redetermined by the jury. There was no substantial basis for a determination that the main prosecution witness in a murder prosecution was incompetent to testify. Although the testimony may have consisted of inconsistencies, incoherent responses, and possible hallucinations, the witness presented a plausible account of the circumstances of the murder. He testified to many details of the crime, which were independently corroborated by the evidence, and led police to the place where the murder weapon had been discarded. It was up to the jury to determine whether the witness's recollections were true [*People v. Lewis* (2001) 26 C4th 334, 110 CR2d 272, 28 P3d 34] .

A witness challenged for lack of personal knowledge must nonetheless be allowed to testify if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events. Once that threshold is met, it is for the jury to decide whether the witness's perceptions and recollections are credible. The court did not abuse its discretion in allowing an eyewitness to testify about a robbery and murder, despite the eyewitness's delusions, which affected her memory of the events. The trial court noted the existence of many indicia by which a rational trier of fact could conclude that the eyewitness, despite her specific delusions, was actually present during the robbery and murder and had accurately perceived and recollected those events. The court pointed out that the witness's description included many details unlikely to be known by a person not present and that her testimony was corroborated by independent evidence. Moreover, as the trial court emphasized, the eyewitness was able, after a long absence from the area where the crime took place, to direct authorities to the significant locations involved in the crime [*People v. Anderson* (2001) 25 C4th 543, 106 CR2d 575, 22 P3d 347] .

"Personal knowledge" means a present recollection of an impression derived from the exercise of the witness's own senses [*People v. Rodriguez* (1999) 20 C4th 1, 82 CR2d 413, 971 P2d 618 (co-manager of apartment building did not have personal knowledge of whether murder victim had gone onto roof)].

Once a witness is competent to testify, has personal knowledge, and the capacity to perceive and recollect those facts, the court may exclude the testimony of a witness for lack of personal knowledge only if no jury could reasonably find that the witness has such knowledge [*People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680, 950 P2d 1035] .

An incapacity to observe or remember correctly goes to the issue of personal knowledge under *Evid Code* § 702 [*People v. St. Andrew* (1980) 101 CA3d 450, 161 CR 634 (in a prosecution for rape by threat and forcible oral copulation, where the alleged victim was a mental patient, it was error for the trial judge to find her competent to testify at trial without applying the correct legal standard)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceTestimonyGeneral Overview



6 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.04

16.04 Judge Presiding at Trial--Evid Code § 703

[1] Evid Code § 703 Text

■ *Evid Code § 703.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section precludes a judge from testifying if a party objects. After disclosing to the parties out of the presence and hearing of the jury the information he has concerning the case, the judge is permitted, but not required, to testify [Leg Com Comment].

This section is based on the premise that examination and cross-examination of a judge witness may be embarrassing and prejudicial to a party [Leg Com Comment].

Evid Code § 703(c) prevents a plea of double jeopardy by a defendant who either calls or objects to the calling of the judge to testify, in that by doing so the defendant will, in effect, have consented to the mistrial and thus have waived any objection to a retrial [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesGeneral OverviewEvidenceCompetencyJudges



7 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.05

16.05 Testimony by Judge, Arbitrator or Mediator Prohibited--Evid Code § 703.5

[1] Evid Code § 703.5 Text

■ *Evid Code § 703.5.*

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator, 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.

LegH: 1979 ch. 205; 1980 ch. 290; 1988 ch. 281; 1990 ch. 1491; 1993 ch. 1261; 1994 ch. 1269.

[2] Case Notes

The trial judge's declaration was stricken in a writ proceeding to reinstate a public defender [*Ng v. Superior Court* (1997) 52 CA4th 1010, 61 CR2d 49] .

The declaration of a judge, describing settlement proceedings as proper, was disallowed [*Skulnick v. Roberts Express, Inc.* (1992) 2 CA4th 884, 3 CR2d 597] .

Testimony from a mediator is barred where no constitutional right concerning the presentation of evidence is implicated [*Eisendrath v. Superior Court* (2003) 109 CA4th 351, 134 CR2d 716 (mediator could not testify on spousal agreement, absent express waivers); *Rinaker v. Superior Court* (1998) 62 CA4th 155, 74 CR2d 464 (statutory ban on the disclosure of mediation communications yielded to the parties' constitutional rights to confront and cross-examine prosecution witnesses)].

In response to a petition to compel arbitration of employment claims, the college district submitted a copy of an opinion and award of an arbitrator in an unrelated arbitration in which the arbitrator determined that the grievance at issue was

not arbitrable because of the district's collective bargaining agreement. Had this opinion been properly submitted in the form of an expert declaration, the court still would not consider it because *Evid Code* § 703.5 provides that an arbitrator is not competent to testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling made in a prior arbitration [*Hartnell Community College Dist. v. Superior Court* (2004) 124 CA4th 1443, 22 CR3d 410] .

A hearing conducted by an employment termination review panel, as constituted pursuant to an employment contract, was neither an arbitration nor a mediation. Thus, the statements made during the hearing were not protected by the privilege of *Evid Code* § 703.5 [*Saeta v. Superior Court* (2004) 117 CA4th 261, 11 CR3d 610] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionMediations



8 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.06

16.06 Juror Impaneled at Trial--Evid Code § 704

[1] Evid Code § 704 Text

■ *Evid Code § 704.*

(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 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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

It is clear from this section that a juror is precluded from testifying if any party objects. This section was designed to prevent obvious difficulties from arising in a situation where a juror is called as a witness [Leg Com Comment].

This section is concerned only with the problem of a juror who is called to testify before the jury. *Evid Code § 704* does not deal with voir dire examinations of jurors, with testimony of jurors in post-verdict proceedings (such as on motions for new trial), or with the testimony of jurors on any other matter that is to be decided by the court [Leg Com Comment; see *Evid Code § 1150*].

Evid Code § 704(c) prevents a plea of double jeopardy by a defendant who either calls or objects to the calling of the juror to testify, in that by doing so the defendant will, in effect, have consented to the mistrial and thus waived any objections to a retrial [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJurorsSelectionVoir DireCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsEvidenceCompetencyAffirmations & Oaths



9 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.07

16.07 Oath, Affirmation, Declaration--Evid Code § 710

[1] Evid Code § 710 Text

■ Evid Code § 710.

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.

LegH: 1965 ch. 299, oper. Jan. 1, 1967; 1988 ch. 486; 2004 ch. 823.

[2] Case Notes

The necessity of an evidentiary hearing in emancipation proceedings under *Fam Code § 7120 et seq.* is implicit in the statutory requirements of a formal petition, notice of the proceedings before the petition is heard, and formal findings on the petition by the court. Accordingly, the trial court should have placed all witnesses who testified at the emancipation hearing under oath [*Bonnie P. v. Superior Court* (2005) 134 CA4th 1249, 1256, 37 CR3d 77] .

In an attempted rape case, the victim, a severely mentally retarded woman who was incapable of testifying as a witness, was properly "produced" by the prosecution as "an exhibit, demonstrative evidence" of an essential element of the criminal charge failure to give consent. No oath was administered and no testimony concerning facts relevant to the truth or falsity of the charged events was given [*People v. Morgan* (1987) 191 CA3d 29, 236 CR 186] .

Testimony not given under oath is not "evidence" within the meaning of the Evidence Code and may not properly be considered as such by the trial court [*People v. Lee* (1985) 164 CA3d 830, 210 CR 799] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewCriminal Law & ProcedureTrialsJudicial DiscretionEvidenceCompetencyAffirmations & Oaths



10 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.08

16.08 Witness Confrontation--Evid Code § 711

[1] Evid Code § 711 Text

■ *Evid Code § 711.*

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.

LegH: 1965 ch. 299.

[2] Case Notes

[a] Sixth Amendment

The *Sixth Amendment* confrontation guarantee is binding on the states under the *Fourteenth Amendment* [*Pointer v. Texas* (1964) 380 US 400, 85 S Ct 1065, 13 L Ed2d 923 (right to confront and cross-examine is fundamental right essential to fair trial)].

The *Confrontation Clause* does not guarantee criminal defendants the absolute right to a face-to-face meeting with the witnesses against them at trial. Any exception to the right, however, would surely be allowed only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured [*Coy v. Iowa* (1988) 487 US 1012, 108 S Ct 2798, 101 L Ed2d 857 (placement of screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial violated the defendant's right to confrontation because there had been no individualized findings that the witnesses needed special protection)].

The face-to-face confrontation requirement may be abridged only where there is a case-specific finding of necessity. As long as a trial court makes such a finding, the *Confrontation Clause* does not prohibit a state from use of a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case [*Maryland v. Craig* (1990) 497 US 836, 110 S Ct 3157, 111 L Ed2d 666 (a state's interest in protecting child witnesses from the trauma of testifying in a child abuse case may be sufficiently important to justify the use of a special procedure that,

despite the absence of face-to-face confrontation with the defendant, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation)].

Admission of hearsay statements made by a child declarant to an examining pediatrician violated defendant's confrontation rights, for, in viewing the totality of the circumstances surrounding the doctor's interview with the victim, there was no special reason for supposing that the incriminating statements were particularly trustworthy [*Idaho v. Wright* (1990) 497 US 805, 110 S Ct 3139, 111 L Ed2d 638] .



Strategic Point:

A finding of "particularized guarantees of trustworthiness" should be drawn from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. To be admissible under the *Confrontation Clause*, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

The spontaneous-utterance exception to the hearsay rule does not violate the *Sixth Amendment Confrontation Clause* [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145, 73 P3d 1137] .

[b] Application of Rule and Sixth Amendment

Although the exposure through cross-examination of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of confrontation, the *Confrontation Clause* does not prevent a trial court from imposing reasonable limits on a defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude, insofar as the *Confrontation Clause* is concerned, to impose reasonable limits on this type of cross-examination, based on concerns such as harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant [*In re Ryan N.* (2001) 92 CA4th 1359, 112 CR2d 620 (trial court did not unconstitutionally limit a juvenile's cross-examination of the victim or violate the juvenile's right under the *Confrontation Clause* because the excluded questions were clearly cumulative, repetitive, and only marginally relevant)].

Incriminating statements admissible under an exception to the hearsay rule do not meet the requirements of the *Confrontation Clause* unless the prosecution demonstrates the unavailability of the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. The reliability requirement can be met in either of two circumstances: (1) where the hearsay statement "falls within a firmly rooted hearsay exception" or (2) where it is supported by "a showing of particularized guarantees of trustworthiness" [*People v. Martinez* (2003) 113 CA4th 400, 7 CR3d 49 (nontestifying accomplice's extrajudicial statements were presumptively untrustworthy, and their admission violated the *Confrontation Clause*, but error was harmless beyond reasonable doubt)].

The Constitution does not impose any different requirements or fixed set of procedural prerequisites to the admission of out-of-court statements made by children regarding sexual abuse [*In re Daniel W.* (2003) 106 CA4th 159, 130 CR2d 412 (*Confrontation Clause* not violated by admission of statements made by child sexual abuse victim to doctor and nurse; such diagnostic statements were trustworthy, and child was unavailable to testify)].

A defendant's right to confrontation is not violated by the admission of a witness's dying declaration made after the witness's refusal to be placed on artificial life support systems [*People v. Adams* (1990) 216 CA3d 1431, 265 CR 568 (state has no power, and consequently no duty, to ensure a witness's presence at a preliminary examination by compelling him to be placed on a life-support respirator until after the opportunity to confront the witness has passed)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceTestimonyGeneral
OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect



11 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.09

16.09 Blood Sample Admissible from Nurse, Technologist--Evid Code § 712

[1] Evid Code § 712 Text

• *Evid Code § 712.*

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.

LegH: 1978 ch. 93 urgency, eff. Apr. 14, 1978.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceScientific EvidenceBlood & Bodily FluidsHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview



12 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.10

16.10 Expert Witness Qualification to Testify--Evid Code § 720

[1] Evid Code § 720 Text

■ *Evid Code § 720.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates existing law as declared in *CCP § 1870(a)*, which is superseded by *Evid Code §§ 720 and 801* [Cal Law Rev Com Comment].

On objection, the qualification of an expert must be shown as a prerequisite to his testimony. When both parties consent, however, the court may receive a witness's testimony conditionally, subject to the necessary foundation being supplied later in the trial [Cal Law Rev Com Comment; *see Evid Code § 320*].

If the foundation is not later supplied, the court should grant a motion to strike or should order the testimony stricken from the record on the judge's own motion [Cal Law Rev Com Comment].

[3] Case Notes

[a] Qualification as Expert Is Legal Question

The judge's determination that a witness qualified as an expert witness is binding on the trier of fact, but the trier of fact may consider the expert's qualifications in determining the weight to be given the expert's testimony [*People v. Combs* (2004) 34 C4th 821, 849, 22 CR3d 61, 101 P3d 1007 (expert in blood spatter analysis); *Pfingsten v. Westenhaver* (1952) 39 C2d 12, 244 P2d 395 (expert on tractor repairs); *Howland v. Oakland C. St. Ry. Co.* (1895) 110 C 513, 42 P 983 (qualification of expert to answer hypothetical question); see *Evid Code* §§ 405, 406].

The judge must be satisfied that the proposed witness is an expert [*People v. Mendoza* (1986) 183 CA3d 390, 228 CR 308 (toxicologist and blood analysis expert)].

The judgment of the court qualifying a witness as expert will be reversed only when there is a clear abuse of discretion [*People v. King* (1968) 266 CA2d 437, 72 CR 478 (error to qualify voiceprint expert as expert witness); *State Comp. Ins. Fund v. Operated Equipment Co.* (1968) 265 CA2d 759, 71 CR 531 (industrial safety engineer)].

[b] Whether Purported Expert Is Qualified

The foundational requirements of establishing the expert's special knowledge, skill, or experience need not be established in the absence of a specific timely objection. They must be established where the court, in its discretion, requires it [*People v. Rodriguez* (1969) 274 CA2d 770, 79 CR 240] .

A court should not exclude a proposed expert from testifying because that expert has never testified before, otherwise there would be no experts [*McCleery v. City of Bakersfield* (1985) 170 CA3d 1059, 216 CR 852] .

The fact that the purported expert may be qualified in one field vaguely related to another does not mean that he or she is qualified in that other field [*California Shopper, Inc. v. Royal Globe Insurance Co.* (1985) 175 CA3d 1, 221 CR 171 (highly qualified trial attorney not qualified as expert on insurance company practices)].

Work in a particular field is not an absolute prerequisite to qualification as an expert in that field [*Osborn v. Irwin Memorial Blood Bank* (1992) 5 CA4th 234, 7 CR2d 101] .

Whether a person qualifies as an expert in a particular field depends upon the facts of the case and the peculiar qualifications of the witness [*People v. King* (1968) 266 CA2d 437, 72 CR 478] .

When the record clearly shows that the foundations for expert opinion establishing the witness's experience, expertise, and qualifications have been properly laid, the court did not err in admitting expert opinion [*Williams v. Volkswagen Aktiengesellschaft* (1986) 180 CA3d 1244, 226 CR 306 (automotive failure analysis testimony held proper and nonspeculative where witness's expertise in automotive engineering, accident reconstruction, and failure analysis was sufficiently established)].

An expert's opinion in support of a motion for summary judgment is defective if it fails to show the declarant's skill, training, or experience to support the opinion [*Tibor v. Superior Court* (1997) 52 CA4th 1359, 61 CR2d 326] .

Mere fact that police officers have taken numerous reports does not qualify them as experts in judging truthfulness [*People v. Sergill* (1982) 138 CA3d 34, 187 CR 497] .

[c] Subjects for Expert Testimony

In an action for invasion of privacy and defamation, the trial court properly excluded a lay witness's testimony as to the meaning and legal effect of a contract. The manner in which the law should apply to particular facts is a legal question and is not subject to expert, much less lay, opinion [*Morrow v. Los Angeles Unified School Dist.* (2007) 149 CA4th 1424, 57 CR3d 885 (affirming grant of motion to dismiss)].

Testimony by a gang expert was deemed proper [*In re Frank S.* (2006) 141 CA4th 1192, 1196, 46 CR3d 839 ; *People v. Williams* (1997) 16 C4th 153, 66 CR2d 123, 940 P2d 710 ; see *Evid Code* § 801].

Expert testimony offered on the factors that may cause mistaken observation by an eyewitness may not be excluded as being matters of common knowledge or invading the province of the jury [*People v. Brown* (1985) 40 C3d 512, 230 CR 834, 726 P2d 516 (psychologist witness)].

Expert testimony on the psychological factors affecting eyewitness identification is often unnecessary. For this reason, the trial court's discretion regulating its use is rarely disturbed [*People v. Lewis and Oliver* (2007) 39 C4th 970, 995, 47 CR3d 467, 140 P3d 775 (on claim of ineffectiveness of counsel, defendant did not show that expert testimony would have made any difference)].

The fact that an expert's opinion is on an ultimate issue of fact to be determined by the jury is not a ground for its exclusion [*People v. Brown* (1985) 40 C3d 512, 230 CR 834, 726 P2d 516 (psychologist witness); *People v. McDonald* (1984) 37 C3d 351, 208 CR 236, 690 P2d 709] .

If a matter in issue is one within the knowledge of experts only, plaintiff must introduce expert testimony to establish a prima facie case [*Miller v. Los Angeles Flood Control Dist.* (1973) 8 C3d 689, 106 CR 1, 505 P2d 193] .

The subject matter of the testimony has nothing to do with qualifications. The subject matter is relevant only to see whether the person is "an expert on the subject to which the testimony relates" [*McCleery v. City of Bakersfield* (1985) 170 CA3d 1059, 216 CR 852] .

[d] Weight of Expert Testimony

It is for the jury to resolve conflicts in expert testimony, accepting some of it or none of it, as they see fit [*People v. Carter* (1961) 56 C2d 549, 15 CR 645, 364 P2d 477] .

When an expert (psychiatrist) is asked to speculate about the accused's state of mind at the time of the commission of the offense charged, the trial court is free to reject his testimony since the psychiatrist is not an expert when it comes to making a determination of the accused's legal responsibility under California law [*In re Thomas* (1986) 183 CA3d 786, 228 CR 430 (opinion of psychiatrist on the existence of malice aforethought at time of killing)].

Party offering an expert witness may examine the witness concerning his qualifications and experience so that the weight to be accorded his testimony becomes apparent. The fact that this evidence may enhance the witness's credibility does not make it inadmissible [*Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 174 CR 348] .

Party offering expert witness must demonstrate that the expert's knowledge of subject is sufficient. The determinative issue is whether or not witness has sufficient skill or experience in field so his testimony will likely assist the jury [*Alef v. Alta Bates Hospital* (1992) 5 CA4th 208, 6 CR2d 900] .

Trial court abused its discretion in failing to qualify witness as expert who disclosed sufficient knowledge of subject [*Alef v. Alta Bates Hospital* (1992) 5 CA4th 208, 6 CR2d 900] .

The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that persons of ordinary education are able to reach the conclusion as intelligently as the witness or whether the matter is sufficiently beyond common experience that expert opinion would assist the jury [*Conservatorship of Person of Noe Torres* (1986) 180 CA3d 1159, 226 CR 142 (psychiatrist's testimony on effect of mental disorder on ability to provide for basic needs); *Smith v. Lockheed Propulsion Co.* (1967) 247 CA2d 774, 56 CR

128 (admissible to show recognized standards of practice); *People v. Arguello* (1966) 244 CA2d 413, 53 CR 245 (opinion that possession of heroin was for purposes of sale)].

[e] Qualifying as Medical Expert Witness

Record did not reflect that a criminalist with 10 years of experience clearly lacked qualifications to offer opinions on blood spatters where his work as a criminalist involved the examination of serological evidence, as well as crime scene reconstruction "by examining the totality of the physical evidence" [*People v. Farnam* (2002) 28 C4th 107, 121 CR2d 106, 47 P3d 988] .

California is a part of the general trend toward liberalizing the rules concerning the qualifications of medical experts [*Mann v. Cracchiolo* (1985) 38 C3d 18, 210 CR 762, 94 P2d 1134 (abuse of discretion to find insufficient foundation where witness has disclosed knowledge sufficient to assist jury); *Brown v. Colm* (1974) 11 C3d 639, 114 CR 128, 522 P2d 688 (does witness have skill or experience sufficient so that testimony will aid jury)].

The Supreme Court has rejected the rule requiring experts to have acquired a personal, working knowledge of the standard of care at the precise time when the alleged malpractice occurred. While a lay person's testimony concerning a fact he has learned only by reading a medical book is not permitted, there is no question that a medical text may be relied upon by a professional physician as the basis for his testimony [*Miller v. Silver* (1986) 181 CA3d 652, 226 CR 479 (while a psychiatrist lacks the credentials to qualify him as an expert concerning surgical techniques in plastic surgery, his educational and internship training qualifies him to research and testify on the role of prophylactic antibiotics in surgery); *Mann v. Cracchiolo* (1985) 38 C3d 18, 210 CR 762, 94 P2d 1134] .

An expert qualified to testify whether or not stains were blood was not qualified to testify whether blood was spattered or wiped [*People v. Hogan* (1982) 31 C3d 815, 183 CR 817, 647 P2d 93] .

A podiatrist, even though not a medical doctor, is competent to testify as to the applicable standard of practice where the podiatrist's qualifications are such as to permit the court to conclude he is familiar with the standards required of physicians with defendant's qualifications [*Chadock v. Cohn* (1979) 96 CA3d 205, 157 CR 640 (alleged medical malpractice of medical doctor in care of foot injury)].

Although a witness's diagnostic impression cannot be excluded on the grounds that the witness is not a licensed physician, the witness must have spent a sufficient amount of time with the person being examined to provide the basis for a meaningful opinion [*People v. James* (1989) 208 CA3d 1155, 256 CR 661 (testimony by psychotherapist that he normally spent two hours with a patient to make an accurate diagnostic impression but spent less than half an hour with the defendant rendered the witness unqualified to testify that the defendant showed signs of acute paranoid disorder)].

In an administrative hearing to investigate an immunologist for negligence and incompetence in treating patients with "alternative" therapies, the Medical Board of California's disqualification of petitioner's experts rendered his hearing fundamentally unfair as a matter of law and required remand. The Board did not argue that petitioner's experts lacked the credentials or the knowledge to qualify as experts, pursuant to *Evid Code* § 720. Rather, the Board argued that the experts were not qualified because they did not review the individual cases in sufficient detail and offer opinions specific to the allegations against the petitioner. The Board's objections went to the weight, not to the admissibility, of the expert testimony [*Sinaiko v. Superior Court* (2004) 122 CA4th 1133, 19 CR3d 371] .

[f] Qualifying as Expert in Legal Malpractice Case

The law favors permitting experts to testify in malpractice cases if they demonstrate sufficient knowledge of the subject so that their opinions would be helpful to the jury in the search for the truth. Once this threshold is met, the degree of the witness's knowledge goes to the weight, not admissibility [*Seneris v. Haas* (1955) 45 C2d 811, 291 P2d 915] .

The law's treatment of medical malpractice experts is sufficiently analogous to legal malpractice to serve as a guide. Thus, a broad standard with regard to qualifications is used [*Jeffer, Mangels & Butler v. Glickman* (1991) 234 CA3d 1432, 286 CR 243] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence
Testimony
General Overview
Torts
Intentional Torts
Defamation
Defenses
Fair Comment & Opinion
Torts
Malpractice & Professional Liability
Healthcare Providers



13 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.11

16.11 Cross-Examination of Expert--Evid Code § 721

[1] Evid Code § 721 Text

■ *Evid Code § 721.*

(a) Subject to subdivision (b), a witness testifying as an expert witness 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.

LegH: 1965 ch. 299; 1997 ch. 892.

[2] Commission Comments

Evid Code § 721(b) clearly delineates the standards of cross-examination of an expert witness with regards to treatises, publications, etc. In defining these standards, the confusion existing on this topic in California case law is resolved [Cal

Law Rev Com Comment].

Evid Code § 721(b) does not permit cross-examinations of an expert witness on scientific, technical, or professional works not referred to, considered, or relied on by him in forming his opinion [Cal Law Rev Com Comment].

Distinguish:

The expert witness may be cross-examined in regard to those books on which he relied in forming or arriving at his opinion [*Cal Law Rev Com Comment; Lewis v. Johnson (1939) 12 C2d 558, 86 P2d 99* (textbooks relied on by expert were used on cross-examination)].

Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him, even though not specifically relied on by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing on the credibility of his testimony [Cal Law Rev Com Comment].

A rule permitting cross-examination on technical treatises not considered by an expert would allow the cross-examiner the opportunity to bring before the trier of fact the opinions of absentee authors without the safeguard of cross-examination. Therefore, such cross-examination is not allowable per this section [Cal Law Rev Com Comment].

[3] Case Notes

[a] Permissible Cross-Examination

In a murder prosecution in which defendant's alleged mental impairments were at issue, the trial court did not err in requiring disclosure to the prosecution of defendant's psychotherapist's notes, test data, and test materials under *Evid Code §§ 771 and 721*, even though the prosecution did not cross-examine the expert but asked its own expert, at the sanity hearing, to comment the psychotherapist's tests. Preparation for cross-examination properly includes a review of the documents and records examined by an expert witness in preparing his or her testimony [*People v. Smith (2007) 40 C4th 483, 509, 54 CR3d 245, 150 P3d 1224*, cert den *2007 US LEXIS 11906*].

Cross-examination of an expert under *Evid Code § 721(a)* properly includes documents and records examined by an expert witness in preparing his or her testimony [*People v. Smith (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224* (prosecution for murder and theft)].

In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct by furnishing a defense psychologist with information about criminal activity that the defendant had engaged in as a juvenile, and then asking about it on cross-examination, since the expert reviewed the juvenile record, and the cross-examination was probative of whether the expert took the record into account in forming his opinion of the defendant's capacity to adjust to prison life [*People v. Osband (1996) 13 C4th 622, 55 CR2d 26, 919 P2d 640*].

The court did not abuse its discretion in allowing cross-examination of an expert witness psychologist on three uncharged homicides [*People v. Hendricks (1985) 44 C3d 635, 244 CR 181, 749 P2d 629*].

Permitting the cross-examination of an expert psychiatric witness concerning the hearsay contents of letters of a homicide victim that accused the defendant of threats of violence was an abuse of discretion because of the inflammatory nature of the hearsay and because the opinions of the experts could be effectively undermined only if the allegations were true [*People v. Coleman (1985) 38 C3d 69, 211 CR 102, 695 P2d 189*].

An expert who offers an opinion is thereby exposed to the kind of inquiry that ordinarily has no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his or her knowledge, the

reasons for the opinion, including facts and other matters on which it is based, and which the expert took into consideration, and may be subjected to the most rigid cross-examination concerning qualifications, and the opinion and its sources [*People v. Nye* (1969) 71 C2d 356, 78 CR 467, 455 P2d 395] .

[b] Use of Treatise or Like Work

An expert may be cross-examined with a scholarly work when the expert testifies that he or she relied on training, was formerly associated with the author, and was familiar with the work [*People v. Clark* (1993) 5 C4th 950, 22 CR2d 689, 856 P2d 1099] .

Evid Code § 721 did not apply to cross-examination of an expert using statistical information in a state report, because the report was not a text, treatise, or journal as those terms are used in the section [*Genrich v. State of California* (1988) 202 CA3d 221, 248 CR 303] .

Although an opposing expert may be questioned about the subject matter of the expert's opinion, the opposing party may not introduce evidence of the content of material unless the expert referred to, considered, or relied on the material [*McGarity v. Department of Transportation* (1992) 8 CA4th 677, 10 CR2d 344] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Witnesses General Overview Evidence Testimony General Overview



14 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.12

16.12 Expert Witness Appointment--Notice to Jury--Compensation Subject to Inquiry--Evid Code § 722

[1] Evid Code § 722 Text

■ *Evid Code § 722.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 722(a) codifies a rule recognized in California decisions [Cal Law Rev Com Comment].

The rule enunciated in *Evid Code § 722* is a desirable rule. The tendency of some experts to become advocates for the party employing them has been recognized. The jury can better appraise the extent to which bias may have influenced an expert's opinion if it is informed of the amount of his fee and, hence, the extent of his possible feelings of obligation to the party calling him [Cal Law Rev Com Comment].

[3] Case Notes

Pen Code § 987.9 (requiring confidentiality for the application of funds to retain expert witnesses in capital cases) does not require an exception to the *Evid Code § 722* rule that the compensation of expert witnesses is admissible [*People v. Barryman* (1993) 6 C4th 1048, 25 CR2d 867, 864 P2d 40].

Evid Code § 722(b) does not limit an impeachment inquiry into payments made to an expert for the case at hand. General rules of evidence prevail, and the mere fact that *Evid Code § 722(b)* does not mention other types of impeachment evidence does not make such evidence inadmissible [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106,

821 P2d 610 (prosecutor did not commit misconduct by questioning defense expert who testified about domestic homicide syndrome about fee he was receiving)].

The employment of an expert by a party, along with the amount of compensation, is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his or her testimony [*People v. Washington* (1969) 71 C2d 1061, 80 CR 567, 458 P2d 479] .

Evidence that an expert usually testifies for the defense in personal injury cases is some indication of advocacy [*Allen v. Superior Court* (1984) 151 CA3d 447, 198 CR 737] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Witnesses General Overview Evidence Testimony Experts Court-Appointed
Experts Compensation Evidence Testimony Experts Credibility Impeachment



15 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.13

16.13 Limit to Expert Witnesses--Evid Code § 723

[1] Evid Code § 723 Text

■ *Evid Code § 723.*

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.

LegH: 1965 ch. 299.



16 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.14

16.14 Appointment Provision--Evid Code § 730

[1] Evid Code § 730 Text

■ *Evid Code § 730.*

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.

LegH: 1965 ch. 299; 1979 ch. 746, oper. Jan. 1, 1983; 1990 ch. 295.

[2] Commission Comments

This section restates the substance of and supersedes the first paragraph of former *CCP § 1871* [Cal Law Rev Com Comment].

[3] Case Notes

In an action to terminate parental rights, the trial court acted within its discretion when it appointed an expert witness to conduct an observation of the sibling relationships during one of the visits. The expert was a neutral observer whose testimony supported the caseworker's conclusions [*In re Valerie A.* (2007) 152 CA4th 987, 61 CR3d 403] .

A trial court must (1) decide whether an appointed evaluator should receive any compensation for his or her services, (2) determine a reasonable amount of compensation, and (3) state which party or parties will bear what portion of the fees and costs. In this case, the trial judge failed to determine a reasonable amount of compensation, and erred in

instructing the plaintiff to "work it out" with the evaluator [*In re Marriage of Laurenti* (2007) 154 CA4th 395, 64 CR3d 449 (remanded for determination)].

For ancillary criminal defense services other than expert witnesses, such as investigators and law clerks, funds may be authorized under *Pen Code* §§ 987.2, 987.8, and 987.9 [*Tran v. Superior Court* (2001) 92 CA4th 1149, 112 CR2d 506 ; *People v. Gaglione* (1994) 26 CA4th 1291, 32 CR2d 169] .

Although equal protection demands that in the proper factual setting a court must appoint an expert needed to assist in an indigent defendant's defense, the decision to grant that request for an appointment of an expert remains within the sound discretion of the court [see also *Torres v. Municipal Court* (1975) 50 CA3d 778, 123 CR 553 ; *Collins v. Superior Court* (1977) 74 CA3d 47, 141 CR 273 ; *People v. Hurley* (1979) 95 CA3d 895, 157 CR 364 (defendant's showing that expert was needed was so weak that the trial court denied request for appointment)].

The payment of attorney fees by a defendant's family did not alter the defendant's indigence, and the court could not rewrite his counsel's contract to require her to cover expert and investigative costs in a capital case. The court issued a peremptory writ commanding the superior court to vacate its orders denying defendant's application for ancillary services funds and to grant his application [*Tran v. Superior Court* (2001) 92 CA4th 1149, 112 CR2d 506] .

The burden is on an indigent criminal defendant to show that an expert's services are necessary to the defense, since it is only necessary services to which an indigent defendant is entitled [*People v. Gaglione* (1994) 26 CA4th 1291, 32 CR2d 169 (upholding denial of expert on eyewitness identification since defendant did not enumerate specific psychological factors that might have affected accuracy of witness's identification and jurors might not have understood or might have operated contrary to jurors' intuitive beliefs)].

The trial court did not abuse its discretion by refusing to appoint a psychiatrist to help select jurors, when no proof of need for the expert was submitted [*People v. Hunt* (1982) 133 CA3d 543, 184 CR 197] .

A father was not entitled to appointment by the court of a new independent psychiatric expert for the purpose of reviewing studies and reports on bonding that had already taken place [*In re Jennifer J.* (1992) 8 CA4th 1080, 10 CR2d 813] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Eyewitness Identification General Overview Criminal Law & Procedure Appeals Standards of Review Abuse of Discretion General Overview Evidence Testimony Experts Court-Appointed Experts Compensation



17 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.15

16.15 Expert Witness Compensation--Evid Code § 731

[1] Evid Code § 731 Text

■ *Evid Code § 731.*

(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 several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

LegH: 1979 ch. 746, oper. Jan. 1, 1983.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Witnesses Presentation Governments Local Governments Finance



18 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.16

16.16 Expert Examination and Cross-Examination--Evid Code § 732

[1] Evid Code § 732 Text

■ *Evid Code § 732.*

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.

LegH: 1965 ch. 299

[2] Commission Comments

Evid Code § 775 referred to in this section allows each party to an action to object to questions asked and evidence adduced and, also, to cross-examine any person called by the court as a witness to the same extent as if such person were called as a witness by an adverse party [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsCourt-Appointed ExpertsAppointments



19 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.17

16.17 Other Witnesses Called by Parties--Payment--Evid Code § 733

[1] Evid Code § 733 Text

■ *Evid Code § 733.*

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.

LegH: 1965 ch. 299.

[2] Case Notes

The fees of experts employed by one of the parties are normally not allowable as costs [*Rabinowitch v. California Western Gas Co. (1967) 257 CA2d 150, 65 CR 1* ; but see *Evid Code § 731; CCP § 998* (expert's fee may be allowable as costs)].

In a child custody matter, the court did not suppress a father's right to offer expert testimony to rebut the court-appointed expert's opinion regarding the child's custody preferences. Although the expert witness recused himself, the court did not prevent the father from forcing the witness to testify, by use of a proper subpoena. In fact, the court offered to let the witness testify as a percipient or expert witness instead of a witness under *Evid Code § 733* [*Niko v. Foreman (2006) 144 CA4th 344, 366-367, 50 CR3d 398*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses Evidence Testimony Experts Court-Appointed
Experts Appointments Evidence Testimony Experts Court-Appointed Experts Compensation



20 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.18

16.18 Interpreters, Translators Subject to Rules for Witnesses--Evid Code § 750

[1] Evid Code § 750 Text

■ *Evid Code § 750.*

A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.

LegH: 1965 ch. 299.

[2] Commission Comments

This section codifies existing law [Cal Law Rev Com Comment; *e.g.*, *People v. Lem Deo* (1901) 132 C 199, 64 P 265 ; *People v. Bardin* (1957) 148 CA2d 776, 307 P2d 384 (bookmaking symbols)].

[3] Case Notes

The right to an interpreter is expressly guaranteed by the Constitution and cannot be waived without an affirmative showing on the record of an intelligent and voluntary waiver by the defendant [*People v. Chavez* (1981) 124 CA3d 215, 177 CR 306] . The constitutional right to a defense interpreter may not be waived by mere acquiescence or nonverbal conduct by defendant [*People v. Carreon* (1984) 151 CA3d 559, 198 CR 843] .

The role of a defense interpreter, whose function is to provide translation for conversations between defendant and his or her counsel is different from that of a witness interpreter, whose work becomes part of the trial record, and since the defense interpreter does not interpret testimony, the constitution and the statutes do not require the defense interpreter to take an oath. Should an oath be requested or required of the defense interpreter, it should be given at the earliest possible opportunity so as to provide for conferences between the defendant and defense counsel [*People v. Carreon* (1984) 151 CA3d 559, 198 CR 843] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceCompetencyInterpreters



21 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.19

16.19 Oath for Interpreter, Translator--Evid Code § 751

[1] Evid Code § 751 Text

■ *Evid Code § 751.*

(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's 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.

LegH: 1965 ch. 299; 1984 ch. 30 urgency, eff. Mar. 7, 1984; 1990 ch. 1450; 1997 ch. 376.

[2] Case Notes

Administration of precisely formulated oath to interpreter is mandatory in a criminal prosecution [*People v. Chavez* (1981) 124 CA3d 215, 177 CR 306 (oath not properly administered to attorney-interpreter)].

Whether the interpreter's oath is considered to be optional or mandated, failure to make a timely request or objection constitutes a waiver of oath [*People v. Carreon* (1984) 151 CA3d 559, 198 CR 843 ; *People v. Mora* (1984) 153 CA3d 18, 199 CR 904] .

The original interpreter of a transcribed tape recording must testify to the true interpretation and translation of the recording as a condition precedent to admissibility. Failure to call the original interpreter denies criminal defendants an opportunity to cross-examine the translator concerning qualifications and accuracy of translation [*People v. Torres* (1985) 164 CA3d 266, 210 CR 375 (not reversible error where defendant didn't show he suffered prejudice or miscarriage of justice)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidenceRecordingsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsTranslationsGovernmentsCourtsClerks of Court



22 of 85 DOCUMENTS

California Courtroom Evidence

Copyright 2008, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.20

16.20 Appointment Basis--Oral--Evid Code § 752

[1] Evid Code § 752 Text

■ *Evid Code § 752.*

(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.

LegH: 1965 ch. 299; 1984 ch. 30 urgency, eff. Mar. 7, 1984; 1984 ch. 768.

[2] Commission Comments

The terms of this section are broad enough so that an interpreter may be used for a person whose inability to be understood stems from physical disability as well as lack of understanding of the English language [*Cal Law Rev Com Comment; People v. Walker (1924) 69 CA 575, 231 P 572*] .

Whether an interpreter should be appointed is a matter within the discretion of the court [*Cal Law Rev Com Comment; People v. Holtzclaw (1926) 76 CA 168, 243 P 894*] .

In an emancipation proceeding, the trial court should have sworn the interpreter who translated for others as a witness and identified him or her on the record [*Bonnie P. v. Superior Court (2005) 134 CA4th 1249, 1256, 37 CR3d 77*] .

Generally, interpreters are treated the same as expert witnesses and are subject to the same rules of competency and examination. This section makes it certain that an interpreter who is required to testify will be reasonably compensated for his services [Cal Law Rev Com Comment; *see Evid Code § 730*].

[3] Case Notes

Because litigants who are unable to speak English usually have alternative means of communicating with their attorneys and other community professionals, a trial court is not constitutionally required to appoint interpreters at public expense to assist indigent but represented litigants [*Jara v. Municipal Court* (1978) 21 C3d 181, 145 CR 847, 578 P2d 94] .

No interpreter was required for a witness with a speech impediment from cerebral palsy who was capable of expressing herself directly [*People v. Augustin* (2003) 112 CA4th 444, 5 CR3d 171] .

Small claims court has the power under *Evid Code* § 752 to appoint interpreters for non-English-speaking litigants acting in forma pauperis. Small claims court also has the power to appoint voluntary interpreters, but in the absence of volunteers the court may pay the interpreters with public funds [*Gardiana v. Small Claims Court* (1976) 59 CA3d 412, 130 CR 675] .

When a declarant makes an out-of-court statement through an interpreter, and that statement is otherwise admissible, the hearsay rule does not bar a percipient witness other than the interpreter from testifying to the content of the out-of-court statement, even though the witness testifies to the words uttered by the interpreter, not the declarant. Based on the theory of agency, the interpreter's statements are regarded as the statements of the declarant who willingly used the services of an interpreter, the translator being no more than a "language conduit." The agency theory applies unless circumstances are present that would negate the presumption of agency [*People v. Torres* (1989) 213 CA3d 1248, 262 CR 323] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceCompetencyInterpretersEvidenceHearsayRule ComponentsStatements



23 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.21

16.21 Appointment Basis--Written--Evid Code § 753

[1] Evid Code § 753 Text

■ *Evid Code § 753.*

(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.

LegH: 1965 ch. 299; 1984 ch. 30 urgency, eff. Mar. 7, 1984.

[2] Commission Comments

The same principles that require the appointment of an interpreter for a witness who is incapable of expressing himself so as to be understood directly apply with equal force to documentary evidence [Cal Law Rev Com Comment; *see Evid Code § 752*].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceCompetencyInterpretersEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsTranslations



24 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.22

16.22 Assistance for the Deaf and Hard-of-Hearing--Evid Code § 754

[1] Evid Code § 754 Text

■ *Evid Code § 754.*

(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 language 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) 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).

LegH: 1965 ch. 299; 1977 ch. 1182; 1984 ch. 768; 1989 ch. 1002; 1990 ch. 1450; 1991 ch. 883; 1992 ch. 118 urgency, eff. July 7, 1992; 1992 ch. 913; 1995 ch. 143 urgency, eff. July 18, 1995.

[2] Commission Comments

This section restates and supersedes former *CCP* § 1885, with the exception of former *CCP* § 1885(c), which is restated and superseded by *Evid Code* § 751 [Cal Law Rev Com Comment].

The court should concern itself with the ability of the person to hear, not with the means by which he might be enabled to hear. Hence, "with or without a hearing aid" has been deleted from the definition of "deaf person" [Cal Law Rev Com Comment].

[3] Case Notes

In criminal prosecution, defendant's hearing impairment does not compromise his or her right to participate in defense and to hear and be personally present at all stages of proceedings where nothing in record indicates defendant's hearing difficulties adversely affect the defense or prejudice defendant in any way [*People v. Freeman* (1994) 8 C4th 450, 34 CR2d 558, 882 P2d 249 (capital homicide prosecution)].

Evid Code § 754 requires only that the proceeding be interpreted by a qualified interpreter in a language the deaf person understands. It does not require complete or total comprehension by the deaf person [*In re Byron S.* (1986) 176 CA3d 822, 223 CR 319] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings General Overview Education Law Discrimination Disability
Discrimination Americans With Disabilities Act General Overview Labor & Employment Law Collective Bargaining &
Labor Relations Judicial Intervention



25 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.23

16.23 Use of an Interpreter Does Not Waive Valid Privilege--Evid Code § 754.5

[1] Evid Code § 754.5 Text

■ *Evid Code § 754.5.*

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.

LegH: 1990 ch. 1450; 1992 ch. 913.



26 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.24

16.24 Presence of Interpreter in Certain Domestic Violence Proceedings--Evid Code § 755

[1] Evid Code § 755 Text

■ *Evid Code § 755.*

(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, 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.

LegH: 1995 ch. 888.



Cross Reference:

Violence Against Women Act (Pub L No 103-322), see *42 USC § 13931 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Civil Rights Acts Violence Against Women Act Family Law Paternity & Surrogacy Establishing Paternity Uniform Parentage Act



27 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.25

16.25 Interpreters--Certification, Costs--Evid Code § 755.5

[1] Evid Code § 755.5 Text

■ *Evid Code § 755.5.*

(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. The interpreter shall be certified pursuant to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

(b) The fees of interpreters used 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 Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 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 use other interpreters.

LegH: 1992 ch. 1302 urgency, eff. Sept. 30, 1992; 1995 ch. 938, oper. July 1, 1997.

[2] Commission Comments

[a] 1995 Amendments

Evid Code § 755.5 is amended to correct references to the Administrative Procedure Act. The former reference in *Evid*

Code § 755.5(a) to January 1, 1994, is deleted as obsolete [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsStipulations



28 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.26

16.26 Direct Examination--Evid Code § 760

[1] Evid Code § 760 Text

■ *Evid Code § 760.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

It is clear that under this section an examination relating to matters not within the scope of the previous examination is a direct examination [Cal Law Rev Com Comment].

Hence, once a cross-examiner goes beyond the scope of the direct examination, he may be found to have "interrupted" his cross-examination and be subject to the rules governing direct examination, that is, no leading questions, unless the witness is one who can be examined "as if under cross-examination" [Cal Law Rev Com Comment; *see Evid Code § 772(c)*].

[3] Explanation of Section

Proper objection is necessary to impose this change in status of the examination and the court has the discretion to either allow counsel, on request, to take the witness on direct as his own or limit the examination to the original subject matter and force recall of the witness at a later and more appropriate time.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExaminationLeading Questions



29 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.27

16.27 Cross-Examination--Evid Code § 761

[1] Evid Code § 761 Text

■ *Evid Code § 761.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes the definition of "cross-examination" found in former CCP § 2045. It limits the cross-examination of a witness to the scope of the witness's direct examination [Cal Law Rev Com Comment].

This section, together with *Evid Code § 773*, retains the pre-code cross-examination rule applicable to a defendant in a criminal action who testifies as a witness in that action [*Cal Law Rev Com Comment*; *People v. Arrighini* (1898) 122 C 121, 54 P 591 (criminal defendant's cross limited to matters touched upon on direct); *People v. O'Brien* (1885) 66 C 602, 6 P 695 (cross of defendant limited to matters examined on direct)].

[3] Case Notes

[a] Construction of Section

The chief purpose of cross-examination is said to be to test the credibility, knowledge, and recollection of the witness [*Sharp v. Hoffman* (1889) 79 C 404, 21 P 846 (credibility, knowledge, recollection); *Razzo v. Varni* (1889) 81 C 289, 22 P 848 (cross-examination may show grounds of witness's damage estimates)].

[b] Constitutional Ramifications

The exclusion of evidence which would impeach the credibility of a witness by showing a motive to lie deprives a

defendant of the *Sixth Amendment* right to confront the witness [*Olden v. Kentucky* (1988) 488 US 227, 109 S Ct 480, 102 L Ed2d 513 (speculation as to effect of jurors' racial biases cannot justify exclusion of cross-examination having strong potential to demonstrate falsity of testimony)].

Prior consistent or inconsistent statements on matters within the scope of direct examination are admissible during cross-examination [*California v. Green* (1969) 399 US 149, 90 S Ct 1930, 26 L Ed2d 489 (inconsistent); *In re Hill* (1969) 71 C2d 997, 80 CR 537, 498 P2d 449 (consistent)].

The scope of direct examination determines the extent to which the defendant in a criminal action waives his constitutional privilege against self-incrimination by electing to testify at all [*People v. Lynn* (1971) 16 CA3d 259, 94 CR 16 (general denial)].

Due process of law is denied to a litigant who is not permitted the right to cross-examine a witness who testifies against him [*Long v. Long* (1967) 251 CA2d 732, 59 CR 790] .

[c] Cross-Examination in Criminal Case

The prosecution could properly impeach the defendant by bringing out all circumstances of a prior incident [*People v. Visciotti* (1992) 2 C4th 1, 5 CR2d 495, 825 P2d 388] .

By cross-examination, an accused has an opportunity not only of testing the recollection and sifting the conscience of the witness but also of compelling the witness to stand face to face with the jury in order that they may look at the witness and judge, by demeanor on the stand and the manner in which the witness gives testimony, whether he or she is worthy of belief [*People v. Green* (1969) 70 C2d 654, 75 CR 782, 451 P2d 422] .

In a criminal case, the judge has no discretion to allow the defendant, over objection, to be cross-examined beyond the scope of the matters to which the defendant voluntarily testified on direct examination [*People v. Lynn* (1971) 16 CA3d 259, 94 CR 16] .

A witness may not be cross-examined on a collateral matter for the purpose of eliciting testimony thereafter to be contradicted [*People v. Epps* (1981) 122 CA3d 691, 176 CR 332 (specific denial of sexual activity with complainant not a basis for impeachment by showing conduct with others); *People v. St. Andrew* (1980) 101 CA3d 450, 161 CR 634] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Examination of Witnesses Cross-Examination Criminal Law & Procedure Witnesses General Overview Evidence Testimony Examination Direct Examination



30 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.28

16.28 Redirect Examination--Evid Code § 762

[1] Evid Code § 762 Text

■ *Evid Code § 762.*

"Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

LegH: 1965 ch. 299.

[2] Commission Comments

The scope of redirect and recross-examination is limited by *Evid Code § 774* [Cal Law Rev Com Comment].

The definition of redirect examination provided in this section not only includes the examination immediately following cross-examination of the witness but also any subsequent reexamination of the witness by the direct examiner [Cal Law Rev Com Comment].

[3] Case Notes

Redirect examination must ordinarily be confined to the scope of the cross-examination [*People v. Barnes* (1947) 30 C2d 524, 183 P2d 654 (clarification of terms); *Ellsworth v. Palmtag* (1914) 168 C 360, 143 P 602 (matters not brought up on cross-examination are improper on redirect)].

The principal purposes of redirect examination are to explain or rebut adverse testimony or inferences developed on cross-examination, and to rehabilitate a witness whose credibility has been impeached [*Packard v. Moore* (1937) 9 C2d 571, 71 P2d 922 (explanation of answer on cross)].

The court may, in its discretion, relax this limitation and permit questions which are outside the scope of the cross-examination and should have been asked on direct examination [*Majors v. Connor* (1912) 162 C 131, 121 P 371] .

Evidence that could not have been admitted on direct examination may be admissible on redirect to rebut evidence produced on cross-examination [*Peterson v. Peterson* (1953) 121 CA2d 1, 262 P2d 613] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of WitnessesGeneral

OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExaminationDirect Examination



31 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.29

16.29 Recross--Examination--Evid Code § 763

[1] Evid Code § 763 Text

■ *Evid Code § 763.*

"Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

LegH: 1965 ch. 299

[2] Commission Comments

The definition of recross-examination includes not only the examination following the first redirect examination of the witness but also any subsequent reexamination of the witness by a cross-examiner [Cal Law Rev Com Comment].

[3] Case Notes

Brief and very general references to subjects are insufficient to "open the door" to examination of unrelated events [*In re Jones* (1996) 13 C4th 552, 54 CR2d 52, 917 P2d 1175 (defendant's reference to "the disturbance before I got there," was insufficient to examine about unrelated armed confrontation and drug transaction)].

The purpose of a recross-examination is to overcome, if possible, the effects of the redirect-examination in re-establishing the redirect examiner's case or in rehabilitating the witness [*Kimic v. San Jose-Los Gatos I. Ry. Co.* (1909) 156 C 379, 104 P 986 (scope limited to subject matter of previous testimony)].

Prior uncharged sex acts may be used to rehabilitate and explain inconsistency in the testimony of a witness whom the defense had attempted to impeach with inconsistent statements [*People v. Belasco* (1981) 125 CA3d 974, 178 CR 461].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsExamination of WitnessesGeneral
OverviewEvidenceTestimonyCredibilityRehabilitation



32 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.30

16.30 Leading Questions--Evid Code § 764

[1] Evid Code § 764 Text

■ *Evid Code § 764.*

A "leading question" is a question that suggests to the witness the answer that the examining party desires.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 767 states the restrictions on the use of leading questions in the examination of a witness. [Cal Law Rev Com Comment; see *Evid Code § 767*].

[3] Case Notes

Discussion and analysis of leading questions by the California Supreme Court [*People v. Williams (1997) 16 C4th 635, 66 CR2d 573, 941 P2d 752*] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsExamination of WitnessesGeneral Overview



33 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.31

16.31 Court Control Over Interrogation of Witnesses--Evid Code § 765

[1] Evid Code § 765 Text

■ *Evid Code § 765.*

(a) The court shall exercise reasonable control over the mode of interrogation of a witness so as to make 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.

LegH: 1965 ch. 299, oper. Jan. 1, 1967; 1985 ch. 884; 1986 ch. 1051; 2004 ch. 823.

[2] Commission Comments

Evid Code § 765 restates the substance of and supersedes section 2044 of the Code of Civil Procedure [Cal Law Rev Com Comment].

[3] Case Notes

[a] Court's Power to Control Interrogation

The control of cross-examination of a witness is within the discretion of the court and its rulings will not be reviewed unless the discretion has been abused [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1, 928 P2d 485 (trial court properly permitted prosecutor to question defendant in detail, although questioning did not always follow strict chronological sequence of events on night in question, and trial court properly gave prosecutor "some latitude" to return

to events that had been subject of previous questioning; however, as soon as cross-examination threatened to become unduly repetitious and unproductive, trial court advised prosecutor he would no longer be permitted to cross-examine in areas previously covered); *People v. Morlock* (1956) 46 C2d 141, 292 P2d 897 (limited cross-examination of expert)].

The court must hold an evidentiary hearing before granting the prosecution's request for any accommodation of an adult witness that would interfere with the defendant's right to confrontation [*People v. Murphy* (2003) 107 CA4th 1150, 132 CR2d 688 (court erred in allowing one-way glass for testifying rape victim, based solely on prosecution's unsworn request)].

[b] Judge's Power to Interrogate Witness

Court's interrogation must be temperate, nonargumentative, and scrupulously fair. Trial court may not withdraw material evidence from the jury's consideration, distort record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power [*People v. Hawkins* (1995) 10 C4th 920, 42 CR2d 636, 897 P2d 574] .

The court's power to examine a witness should be exercised with discretion and in such a way as not to prejudice the rights of the parties. It should not sit quietly by and see one wrongfully acquitted or unjustly punished when a firm question asked from the bench might elicit the truth [*People v. Donovan* (1969) 272 CA2d 413, 77 CR 285 (judge's right to call witness); *People v. Crawford* (1968) 259 CA2d 874, 66 CR 527 (clarification)].

Although a trial judge has the right to examine witnesses, he must not become an advocate for either party, or, under the guise of examining witnesses, comment on the evidence or cast aspersions or ridicule on a witness [*People v. Johnson* (1967) 254 CA2d 119, 61 CR 897] .

[c] Interrogation of Minor as Witness

Nothing in *Evid Code* § 765 gives the trial court the power to order minor complaining victims in a lewd conduct with a minor prosecution to testify at trial via closed circuit television from a room separate from the court, jury, and defendant. This separation would violate the long-standing requirement of physical presence [*Hochheiser v. Superior Court* (1984) 161 CA3d 777, 208 CR 273 (case of first impression)].

Evid Code § 765 does not include a power to exclude all testimony of a child witness [*In re Jennifer J.* (1992) 8 CA4th 1080, 10 CR2d 813] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesGeneral OverviewEvidenceProcedural ConsiderationsJudicial Intervention in TrialsInterrogation of WitnessesEvidenceTestimonyGeneral Overview



34 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.32

16.32 Responsive Answers--Evid Code § 766

[1] Evid Code § 766 Text

■ *Evid Code § 766.*

A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 2056* [Cal Law Rev Com Comment].

[3] Case Notes

A nonresponsive answer on examination at trial is properly the subject of a motion to strike [*Evid Code § 766*], not an objection [*People v. Bell* (2007) 40 C4th 582, 611 n11, 54 CR3d 453, 151 P3d 292 , cert den 2007 US LEXIS 9157] .

The fact that an answer is not responsive to a question does not render it inadmissible; when the answer includes relevant and material facts, it should be permitted to stand, although not strictly responsive [*Van Horn v. Southern Pacific Co.* (1956) 141 CA2d 528, 297 P2d 479] .

When an answer is responsive in part to the question, the responsive part may stand while the unresponsive part may be stricken [*Bates v. Newman* (1953) 121 CA2d 800, 264 P2d 197 (motion to strike should be directed at portion of testimony that is improper); *People v. Reimringer* (1953) 116 CA2d 332, 253 P2d 756 (motion to strike denied where unresponsive answers were relevant and material)].

A motion to strike an unresponsive answer must be precise, definite, and certain, and it must be directed with precision to the matter sought to be stricken [*County of Los Angeles v. Hoe* (1955) 138 CA2d 74, 291 P2d 98] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Defenses, Demurrers, & Objections Motions to Strike General Overview



35 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.33

16.33 Use of Leading Questions--Evid Code § 767

[1] Evid Code § 767 Text

■ *Evid Code § 767.*

(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.

LegH: 1965 ch. 299, oper. Jan. 1, 1967; 1984 ch. 1423, eff. Sept. 26, 1984; 1995 ch. 87; 2004 ch. 823.

[2] Legislative Committee Comments

Evid Code § 767(a) restates and supersedes the last sentence of former CCP § 2046 [Leg Com Comment].

The exception provided at the beginning of this section allows leading questions on direct where there is little danger of improper suggestion and where such questions are necessary to obtain relevant evidence. This would permit leading questions on direct examination for preliminary matters, refreshing recollection, and examining handicapped witnesses, expert witnesses, and hostile witnesses [Leg Com Comment].

The court may also forbid the asking of leading questions on cross-examination where the witness is biased in favor of the cross-examiner and would be unduly susceptible to the influence of questions that suggested the desired answer [Leg Com Comment].

Evid Code § 767(b) is based on and supersedes a phrase that appeared in former CCP § 2048; however, the major

portion of former CCP § 2048 has been superseded by *Evid Code* § 773 [Leg Com Comment].

[3] Case Notes

[a] Discretion of Court

Allowing leading questions to be asked of a witness on direct examination is a matter within the discretion of the court, and the exercise of the trial court's discretion in allowing such questions will not be disturbed on appeal unless a palpable abuse appears [*People v. Williams* (1997) 16 C4th 635, 66 CR2d 573, 941 P2d 752 (trial court has broad discretion when "special circumstances" are present); *Rethorst v. Rethorst* (1968) 261 CA2d 713, 68 CR 263 (questions did not affect opponent's rights to his disadvantage); *People v. Asta* (1967) 251 CA2d 64, 59 CR 206 (no absolute right to ask leading questions of own hostile witness)].

The appellate court would not decide whether a referee abused his discretion to declare defendant's trial attorney a hostile witness during a hearing on ineffectiveness of counsel, because petitioner did not claim that he was precluded from introducing any evidence by the limitation of the examination to nonleading questions or that he was prejudiced in any other way [*In re Burton* (2006) 40 C4th 205, 227, 52 CR3d 86, 147 P3d 1014] .

[b] Leading Questions in Cross-Examination

A prosecutor is not under compulsion to anticipate that a witness's memory of additional details regarding events about which she has testified will suddenly fail on cross-examination. Leading questions are not improper when asked in good faith of a presumptively hostile witness on cross-examination [*People v. Visciotti* (1992) 2 C4th 1, 5 CR2d 495, 825 P2d 388] .

Where a witness called by the prosecution is a hostile witness, the use of leading questions on cross-examination by the defense is not permitted [*People v. Spain* (1984) 154 CA3d 845, 201 CR 555 (witness was defendant's mother); *People v. Grey* (1972) 23 CA3d 456, 100 CR 245 (witness was engaged to marry defendant)].

[c] Special Circumstances for Leading Questions

Leading questions were the most direct and efficient way to circumvent the obstacle of a competent witness's speech impediment from cerebral palsy [*People v. Augustin* (2003) 112 CA4th 444, 5 CR3d 171] .

Subject to the court's discretion, on direct examination counsel may ask leading questions of old, sick, young, expert, or other witnesses in an attempt to revive their recollections, particularly where the question relates to a noncontroversial issue [*People v. Jones* (1963) 221 CA2d 619, 34 CR 618 (reviving memory); *People v. Whitehead* (1957) 148 CA2d 701, 307 P2d 442 (proper to help immature witness)].

When a witness is unfamiliar with the English language, it is within the court's discretion to permit leading questions on direct examination [*People v. McNeal* (1954) 123 CA2d 222, 266 P2d 529] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersRefereesGeneral OverviewConstitutional LawBill of RightsFundamental RightsCriminal ProcessAssistance of CounselEvidenceTestimonyExaminationDirect Examination



36 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.34

16.34 Writings Examination--Evid Code § 768

[1] Evid Code § 768 Text

■ *Evid Code § 768.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

It is clear this section establishes the rule that a writing need not be shown to a witness before he can be examined concerning it [Leg Com Comment].

The best evidence rule [*see Evid Code § 1500*] may in some cases preclude eliciting testimony concerning the content of a writing [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceBest Evidence Rule



37 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.35

16.35 Inconsistent Statement or Conduct of Witness--Evid Code § 769

[1] Evid Code § 769 Text

■ *Evid Code § 769.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section clearly permits a witness to be asked questions concerning a prior inconsistent statement, whether written or oral, even though no disclosure is made to him concerning the prior statement [Leg Com Comment].

Whether a foundational showing is required before other evidence of the prior statement may be admitted is not covered by *Evid Code § 769*; the prerequisites for the admission of such evidence being set forth in *Evid Code § 770* [Leg Com Comment].

Unless a witness's testimony is inconsistent with a prior statement or conduct, the party calling the witness cannot "impeach" the witness by it. There is nothing to counteract to impeach [*People v. Newton* (1970) 8 CA3d 359, 87 CR 394] .

It is improper for the court to order defense counsel to turn over writings used for impeachment to the prosecution and witnesses [*People v. Fatone* (1985) 165 CA3d 1164, 211 CR 288] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewCriminal Law &

ProcedureWitnessesGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent Statements



38 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.36

16.36 Exclusion of Extrinsic Evidence of Inconsistent Statement--Evid Code § 770

[1] Evid Code § 770 Text

■ *Evid Code § 770.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section permits the judge to exclude evidence of an inconsistent statement only if the witness during his examination was not given an opportunity to explain or deny the statement and he has been unconditionally excused and is not subject to being recalled as a witness [Cal Law Rev Com Comment].

Although allowing a witness to explain or deny an alleged inconsistent statement is desirable, there is no compelling reason to have the explanation before the inconsistent statement is introduced into evidence. Hence this section was enacted [Cal Law Rev Com Comment].

Where the interests of justice so require, the provisions of this section may be relaxed in order to permit evidence of an inconsistent statement even though the witness has been excused and has had no opportunity to explain or deny the statement (for example, party seeking to introduce the statement did not learn of its existence until subsequent to witness testifying and witness no longer able to testify) [Cal Law Rev Com Comment].

The foundational requirements for the admission of a hearsay declarant's inconsistent statement are found in *Evid Code*

§ 1202 and the comments thereto [Cal Law Rev Com Comment].

Distinguish:

This section does not require that before counsel can impeach a witness on the basis of any inconsistent statement, he must ask the witness questions regarding such statements, but instead only requires that counsel must at some time give the witness a chance to explain or deny the statements.

[3] Case Notes

A fundamental requirement for admissibility of a prior statement of a witness, whether used to attack credibility or to prove the truth of facts asserted in the statement, is that the out-of-court statement must be inconsistent with some of the witness's current testimony [*People v. Arias* (1996) 13 C4th 92, 51 CR2d 770, 913 P2d 980 (testimony must be materially inconsistent with prior statements)].

Testimony was inadmissible as prior inconsistent statements because statements were not inconsistent with the witness's testimony that the witness did not recall making them [*People v. Levesque* (1995) 35 CA4th 530, 41 CR2d 439] .

A witness's prior statement implicating the defendant was deemed inconsistent with his subsequent evasive denials and "I don't remember" responses during testimony [*People v. Plasencia* (1985) 168 CA3d 546, 214 CR 316] .

Declarations and statements made by the defendant are original evidence against him, and the rules as to the impeachment of witnesses do not apply to the proof thereof, even if he takes the stand in his own defense [*People v. Ashford* (1968) 265 CA2d 673, 71 CR 619] .

A witness's prior inconsistent statements are admissible as substantive evidence when statutory requirements for admission are complied with [*People v. Manson* (1977) 71 CA3d 1, 139 CR 275] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Trials Examination of Witnesses General Overview Evidence Hearsay Credibility of Declarants Impeachment Evidence



39 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.37

16.37 Production of Writings to Refresh Memory--Exceptions--Evid Code § 771

[1] Evid Code § 771 Text

■ *Evid Code § 771.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section grants to an adverse party the right to inspect any writing used to refresh a witness's recollection whether the writing is used by the witness while testifying or prior thereto. This section has no express restrictions on the types of writings or the means used to refresh recollection. It is clear this section grants a right of inspection without regard to when the writing is used to refresh recollection [Leg Com Comment].

Evid Code § 771(b), which allows an adverse party to introduce the refreshing memorandum into evidence, is not an unlimited right. Only those parts of the refreshing memorandum that are pertinent to the testimony given by the witness are admissible under this rule [Leg Com Comment].

Evid Code § 771(c) excuses the nonproduction of the memory-refreshing writing where the writing cannot be produced through no fault of the witness or the party eliciting his testimony concerning the matter [Leg Com Comment].

The limitations on the types of writings that may be used as recorded memory under *Evid Code § 1237* do not limit the types of writings that may be used to refresh memory under *Evid Code § 771* [Leg Com Comment].

Distinguish:

Under former CCP § 2047, which this section restates and supersedes, in order for a writing to be used to refresh a witness's recollection, it had to be made by the witness himself, or under his direction; it had to be made when the fact was fresh in his memory; and the witness had to know that the fact was correctly stated. The current section does away with these requirements.



Strategic Point:

Case law construing these requirements is no longer applicable, yet case law construing the general provisions of former CCP § 2047 should be persuasive authority.

[3] Case Notes

In a murder prosecution in which defendant's alleged mental impairments were at issue, the trial court did not err in requiring disclosure to the prosecution of defendant's psychotherapist's notes, test data, and test materials under *Evid Code §§ 771 and 721*, even though the prosecution did not cross-examine the expert but asked its own expert, at the sanity hearing, to comment the psychotherapist's tests. Preparation for cross-examination properly includes a review of the documents and records examined by an expert witness in preparing his or her testimony [*People v. Smith (2007) 40 CA4th 483, 509, 54 CR3d 245, 150 P3d 1224*, cert den *2007 US LEXIS 11906*].

The writing may be used by the witness solely to assist him in giving his oral testimony. It has no independent evidentiary value for the party calling him and is not admissible in evidence at his insistence [*Estate of DeLaveaga (1913) 165 C 607, 133 P 307* (paper used to refresh inadmissible as evidence except insofar as it is testified to by the witness to be true); *Estate of Packer (1913) 164 C 525, 129 P 778* (party calling witness may not treat material used to refresh memory as evidence)].

Evid Code § 771 requires the production of all documents used to refresh a witness's memory with respect to any matter about which the witness testifies [*International Insurance Co. v. Montrose Chemical Corporation of California (1991) 231 CA3d 1367, 282 CR 783* (witness reviewed a group of documents; there was no need to establish which documents refreshed the witness's memory)].

When an attorney allows a client to refresh his or her memory before testifying by listening to a tape recording of the original lawyer/client discussion of the issue, the lawyer/client privilege is not waived and the recording need not be produced [*Sullivan v. Superior Court (1972) 29 CA3d 64, 105 CR 64*].

A doctor, to refresh his memory at trial, used a summary compiled from hospital records. It is not sufficient to produce the summary for examination at trial by opposing counsel, the records themselves must be produced [*People v. Goff (1981) 127 CA3d 1039, 179 CR 190* (motion to strike doctor's testimony refreshed by summary improperly denied)].

The following types of items have been allowed to refresh a witness's recollection:

- Affidavit [*In re Marzuran* (1928) 88 CA 272, 263 P 33] .
- Books of a bookkeeper [*Treadwell v. Wells* (1854) 4 C 260] .
- Transcript of a conversation recorded by the witness [*People v. Goldberg* (1957) 152 CA2d 562, 314 P2d 151] .
- Copies of documents, if properly authenticated [*Estate of Patten* (1963) 217 CA2d 167, 31 CR 767] .
- Diaries [*People v. Blanchard* (1925) 71 CA 402, 235 P 467] .
- Letters [*Seeger v. Odell* (1944) 64 CA2d 397, 148 P2d 901] .
- Psychological test results, raw data, and doctor's notes [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224 (prosecution for murder and theft)].
- Transcript of previous testimony [*People v. Vassar* (1962) 207 CA2d 318, 24 CR 481] .
- Testimony at a preliminary hearing [*People v. York* (1966) 242 CA2d 560, 51 CR 661] .
- Testimony before a grand jury [*People v. Curtis* (1939) 36 CA2d 306, 98 P2d 228] .

After a doctor was allowed on direct examination to describe statements made to him by defendant in forming his expert opinion of defendant's mental state, on cross-examination the prosecution could challenge the credibility of that opinion by confronting the doctor with defendant's inconsistent statements to other defense experts, as included in testimony or reports to which the doctor had access in forming his own conclusions [*People v. Boyer* (2006) 38 C4th 412, 462, 42 CR3d 677, 133 P3d 581 (affirming murder conviction)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Witnesses
General Overview
Evidence
Privileges
Attorney-Client
Privilege Waiver
Evidence
Testimony
General Overview



40 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.38

16.38 Phases of Examination--Evid Code § 772

[1] Evid Code § 772 Text

■ *Evid Code § 772.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

Evid Code § 772(b) restates and supersedes the second sentence of former CCP § 2045, and in addition, expands that section so that completion of each phase must occur before the succeeding phase begins [Leg Com Comment].

Under *Evid Code § 772(c)* a party examining a witness under cross-examination, redirect examination, or recross-examination may go beyond the scope of the initial direct examination, if the court permits. According to *Evid Code § 760*, such an examination is a direct examination and hence must comply with the rules pertaining to direct examination. Such direct examination may, however, be subject to the rules applicable to a cross-examination by virtue of the provisions of *Evid Code § 776*, *Evid Code § 804*, or *Evid Code § 1203* [Leg Com Comment].

Evid Code § 772(d) states an exception for the defendant-witness in a criminal action that reflects pre-code law [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of

WitnessesCross-ExaminationEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExaminationDirect Examination



41 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.39

16.39 Cross-Examination--Evid Code § 773

[1] Evid Code § 773 Text

■ *Evid Code § 773.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates in substance and supersedes former CC §§ 2045 and 2048 and Pen Code § 1323 [Cal Law Rev Com Comment].

If a witness testifies on direct examination to matters that are, in fact, antagonistic to a party's position, this party may be permitted to cross-examine with leading questions even though from a technical point of view the interest of the cross-examiner is not adverse to that of the direct examiner [Cal Law Rev Com Comment].

[3] Case Notes

[a] Purpose of Cross-Examination

The chief purpose of cross-examination is said to be to test the credibility, knowledge, and recollection of the witness [*Sharp v. Hoffman* (1889) 79 C 404, 21 P 846 (credibility, knowledge, recollection); *Razzo v. Varni* (1889) 81 C 289, 22 P 848 (cross may show grounds of witness's damage estimate); *Neal v. Neal* (1881) 58 C 287 (questions which test accuracy, veracity, and credibility are admissible)].

The other purpose of cross-examination is to elicit additional evidence [*People v. Whitehead* (1952) 113 CA2d 43, 247 P2d 717] .

[b] Discretion of Court

It is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved as far as possible. If a judge desires to be further informed on certain points mentioned in the testimony, it is entirely proper for the judge to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated to both parties. Courts are established to discover where the truth lies when issues are contested, and the final responsibility to see that justice is done rests with the judge. The authority of the trial judge to question witnesses not only applies to cases tried to a jury but also to the court sitting as the fact finder. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed [*Conservatorship of Pamela J.* (2005) 133 CA4th 807, 827, 35 CR3d 228 (at hearing to determine capacity of patient to consent to electro-convulsive therapy, trial judge's questioning of witnesses did not indicate bias and did not violate patient's due process right to fair and impartial hearing)].

The cross-examination is not confined to a mere categorical review of the matters, dates, or times mentioned in the direct examination but may elicit, overcome, or qualify the effect of the testimony given on direct. The extent to which the cross-examination may be carried rests largely in the discretion of the trial court [*In re Hill* (1969) 71 C2d 997, 80 CR 537, 498 P2d 449 (codefendant's confession effect on cross-examination); *People v. McClellan* (1969) 71 C2d 793, 80 CR 31, 457 P2d 871 (scope); *People v. Schader* (1969) 71 C2d 761, 80 CR 1, 457 P2d 841 (protection of defendant)].

Trial judges retain wide latitude, insofar as the *Confrontation Clause* is concerned, to impose reasonable limits on cross-examination based on concerns such as harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant [*In re Ryan N.* (2001) 92 CA4th 1359, 112 CR2d 620 (trial court did not unconstitutionally limit juvenile's cross-examination of victim or violate juvenile's right under *Confrontation Clause* because excluded questions were clearly cumulative, repetitive, and only marginally relevant)].

The trial judge has wide discretion in the control and ultimate scope of cross-examination of a witness [*Kovacs v. Sturgeon* (1969) 274 CA2d 478, 79 CR 426 (plaintiff's drinking habits)].

The discretionary power that the trial court has over the cross-examination will be disturbed on appeal only where there has been an abuse of discretion [*People v. Blackwell* (1967) 257 CA2d 251, 64 CR 761] .

[c] Cross-Examination of Criminal Defendant

Cross-examination of a defendant in a criminal case may not exceed the scope of direct examination. To permit the prosecutor to exceed the scope of direct examination would force the defendant to become the prosecutor's witness [*People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249] .

When on direct examination the defendant attempts to cast a favorable light on the circumstances of a prior conviction, the prosecutor can cross-examine the defendant about all circumstances of the prior conviction [*People v. Visciotti* (1992) 2 C4th 1, 5 CR2d 495, 825 P2d 388] .

If the defendant takes the stand and makes a general denial of the crime with which he or she is charged, the permissible scope of cross-examination is very wide [*People v. Ing* (1967) 65 C2d 603, 55 CR 902, 422 P2d 590 (waives privileges with respect to other offenses showing general scheme or plan)].

A defendant who takes the stand and does not deny the crime charged may be cross-examined only as to matters about which he or she was examined in chief [*People v. Doebke* (1969) 1 CA3d 931, 81 CR 391] .

[d] Cross-Examination of Prosecution Witness

Although the judge has broad discretion to control the ultimate scope of cross-examination, wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case [*People v. Cooper* (1991) 53 C3d 771, 281 CR 90, 809 P2d 865] .

The right of cross-examination is an absolute right, the denial of which may constitute a denial of due process of law [*People v. Hadley* (1967) 257 CA2d Supp 871, 64 CR 777] .

The *Sixth Amendment* is satisfied if the defendant has an opportunity for cross-examination of witnesses. It does not require that the cross-examination be efficacious in the manner or to the extent sought by defense counsel [*People v. Augustin* (2003) 112 CA4th 444, 5 CR3d 171 (*Sixth Amendment* not abridged by two-day cross-examination of witness with cerebral palsy and speech impediment, claimed to be unintelligible)].

[e] Preservation of Issue on Appeal

Normally, if the trial court excludes evidence on cross-examination, no offer of proof is necessary to preserve the issue for consideration on appeal [*Evid Code* § 354(c)]. However, cross-examination is limited to the scope of the direct examination [*Evid Code* § 773]. If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue. In a prosecution for child molestation, defense counsel was not specific and made only the most speculative offer of proof in support of his request to inquire into whether an adult witness had a morbid fear of sexual matters and child molestation, which might have caused her to influence the report of the child victim. On appeal, defendant could not establish that the trial court's denial of his request was an abuse of discretion [*People v. Foss* (2007) 155 CA4th 113, 65 CR3d 790] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals General Overview Evidence Procedural Considerations Judicial Intervention in Trials Interrogation of Witnesses Evidence Testimony General Overview



42 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.40

16.40 Reexamination--Evid Code § 774

[1] Evid Code § 774 Text

■ *Evid Code § 774.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes the first and third sentences of former CCP § 2050. The nature of reexamination is to be determined in accordance with the definitions in *Evid Code* §§ 760-763 [Cal Law Rev Com Comment].

This section restates the first and third sentences of former CCP § 2050 [Cal Law Rev Com Comment].

[3] Case Notes

In a murder trial, counsel for codefendant raised the issue of defendant's prior inconsistent statements to the police. Defendant admitted he had lied to the police but claimed he was confused at that time, indicating he had requested an attorney during the interview. Even though defendant's own counsel did not re-examine defendant, defendant's responses raised new issues about defendant's credibility, so the trial judge did not abuse his discretion in permitting the prosecution to re-open cross-examination of defendant to explore these issues [*People v. Tafuya* (2007) 42 C4th 147, 175-176, 64 CR3d 163, 164 P3d 590 (citing *Evid Code* § 774)].

On redirect examination it is proper to permit a witness to state facts and circumstances that tend to correct any wrong impressions or inferences that may arise from a matter drawn out on cross-examination [*Myers v. Rose* (1938) 27 CA2d 87, 80 P2d 527 (motorman's statements as to rate of speed); *People v. Burke* (1912) 18 CA 72, 122 P 435 (character witness's reputation testimony); *People v. Corey* (1908) 8 CA 720, 97 P 907 (rebuttal of inference that rape

victim conducted herself in a lewd manner by being on the street)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of WitnessesCross-ExaminationCriminal Law &
ProcedureAppealsStandards of ReviewAbuse of DiscretionGeneral OverviewEvidenceTestimonyExaminationGeneral
Overview



43 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.41

16.41 Court Calling, Interrogation of Witnesses--Cross-Examination--Evid Code § 775

[1] Evid Code § 775 Text

■ *Evid Code § 775.*

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 witness 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.

LegH: 1965 ch. 299.

[2] Commission Comments

The power of the judge to call expert witnesses as well as other witnesses is recognized by statutory and case law [Cal Law Rev Com Comment].

The judge would be guilty of misconduct if he were to show partiality or bias in calling and interrogating witnesses [Cal Law Rev Com Comment].

[3] Case Notes

A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. The court may not, however, assume the role of either the prosecution or of the defense. The court's questioning must be temperate, nonargumentative, and scrupulously fair, and it must not convey to the jury the court's opinion of the witness's credibility [*People v. Cook* (2006) 39 C4th 566, 597, 47 CR3d 22, 139 P3d 492 (finding no error in murder prosecution where court's few questions to witnesses were neutrally phrased, and court also instructed jury to disregard court's questions and form own conclusions, using standardized instruction)].

In a juvenile dependency hearing, counsel's accusation of judicial bias lacked foundation. The judge was unable to sit

back to hear and observe the minor's testimony; instead, because of her developmental disability, he was required to get involved in the questioning, repeating her question and answer back to her, in order to ensure that he understood the minor's answers [*In re S.C. (2006)* 138 CA4th 396, 424, 41 CR3d 453] .

It is well within the province of the judge to ask a witness questions, particularly when the judge is the fact finder [*Evid Code* § 775]. The questions that were asked by the judge in this case can be put into five categories: (1) conducting voir dire regarding the minor's competency to testify; (2) specifying, for the record, the areas of the minor's body to which she pointed in response to questioning by a party's attorney, and the size of a room in her home about which the minor testified; (3) making sure the minor understood questions asked by a party's attorney; (4) requesting the minor to repeat or explain her testimony that the court obviously was having difficulty hearing; and (5) obtaining additional information from the minor in an apparent effort to determine where and how certain acts about which she testified took place. No reasonable attorney could interpret the judge's questions of the minor as a biased effort to help one side prove its case. Rather, they represent a conscientious effort by the judge to understand the testimony of the developmentally disabled minor. So it was also with the relatively few, short questions that the judge posed to the social worker with the obvious goal of understanding her testimony [*In re S.C. (2006)* (juvenile dependency petition)].

Evid Code § 775 expressly authorizes the court to call witnesses, preserving the right of the parties to object and cross-examine. The court may do so over the objection and against the will of the parties in the furtherance of justice, although the power to do so must be exercised impartially [*In re Scott (2003)* 29 C4th 783, 129 CR2d 605, 61 P3d 402 (referees should feel free to ask additional questions of witnesses); *People v. Hawkins (1995)* 10 C4th 920, 42 CR2d 636, 897 P2d 574 (trial court has a legitimate role of clarifying witness testimony); *People v. Cummings (1993)* 4 C4th 1233, 18 CR2d 796, 850 P2d 1] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Witnesses General Overview Evidence Procedural Considerations Judicial Intervention in Trials Comments by Judges General Overview Legal Ethics General Overview



44 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.42

16.42 Examining Adverse Witnesses--Evid Code § 776

[1] Evid Code § 776 Text

■ Evid Code § 776.

(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.

LegH: 1965 ch. 299; 1967 ch. 650.

[2] Commission Comments

This section restates and supersedes the substance of former *CCP* § 2055 as it has been interpreted by the courts. This section makes it clear that an adverse witness may be called at any time during the presentation of evidence by the party calling the witness, and there is no requirement that a party call his own witnesses before examining adverse witnesses [Cal Law Rev Com Comment].

Evid Code § 776(a) permits a party to call and examine as if under cross-examination an adverse party and certain adverse witnesses. The main advantage to this is that the examining party may use leading questions in his examination [Cal Law Rev Com Comment].

Evid Code § 776(b) provides that a witness examined under this section may be cross-examined by all other parties to the action in such order as the court directs. For example, a party whose interest in the action is identical with that of the party who called the witness for examination under this section has the right to cross-examine the witness fully because, he, too, has the right to call the witness for examination under this section. Similarly, a party whose interest in the action is adverse to the party who calls the witness for examination under this section has the right to cross-examine the witness fully, subject to the requirements of *Evid Code* § 776(b)(1) and (2) [Cal Law Rev Com Comment].

Evid Code § 776(b) also provides that examination by a party with whom the witness is identified, or by a party whose interest in the action is not adverse to the party with whom the witness is identified, is limited to examination as if under redirect examination (that is, leading questions cannot be asked of the witness by these parties) [Cal Law Rev Com Comment].

Evid Code § 776(d) lists the classes of persons who are "identified with a party" as provided in *Evid Code* § 776(a) and (b) [Cal Law Rev Com Comment].

Evid Code § 776(e) provides that when a party calling the witness is also closely identified with the adverse party, the adverse party should be entitled to the usual rights of a cross-examiner when he examines the witness (for example, employee sues employer and calls co-employee as witness). There is no reason to believe that witness will be adverse to employee-party and in sympathy with employer-party. Hence, under *Evid Code* § 776(e) if the reverse is the case, the employer can use leading questions in his cross-examination of an employee witness who is called to testify under *Evid Code* § 776 by a co-employee [Cal Law Rev Com Comment].



Strategic Point:

Note that if the party calling the witness can satisfy the court that the witness is in fact identified with the employer or for some other reason is amenable to suggestive questioning by the employer, the court may limit the employer's use of leading questions during his examination of the witness pursuant to *Evid Code* § 767 [Cal Law Rev Com Comment].

[3] Case Notes

Evid Code § 776 is remedial in character. It is to be construed liberally so that litigants may be afforded an opportunity to elicit facts from adverse parties that those parties have in their sole possession. The extent to which cross-examination of a witness may be carried rests largely within the court's discretion, and the same rule applies to a witness examined under this section. The testimony of adverse party, adduced under this section, is to be treated as though given on cross-examination. The person calling an adverse party as a witness is not bound by his testimony but may rebut it by other evidence [*Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 C2d 655, 313 P2d 557 (defendant railroad's agent was called as plaintiff's witness)].

When the plaintiff has addressed the testimony of an adverse witness under *Evid Code* § 776, portions of the testimony favorable to the plaintiff must be taken as true, and unfavorable portions must be disregarded [*Ashcraft v. King* (1991) 228 CA3d 604, 278 CR 900 (grant of defendant's motion for nonsuit as to plaintiff's cause of action for battery constituted prejudicial error)].

The court may attach more importance to expressions of a hostile witness that are favorable to the side he or she opposes than to the main portion of the witness's narrative [*Applegate v. Ota* (1983) 146 CA3d 702, 194 CR 331 (easement by prescription action)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Pretrial Judgments
Nonsuits
General

Overview
Evidence
Testimony
Examination
Cross-Examination
General Overview
Real Property Law
Limited Use
Rights
Easements
Creation
Easement by Prescription



45 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.43

16.43 Court Exclusion of Witnesses from Courtroom--Evid Code § 777

[1] Evid Code § 777 Text

■ *Evid Code § 777.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

Under this section, the only limitations on a court's power to exclude witnesses from the courtroom, are that (1) a party cannot be excluded and (2) a party other than a natural person is entitled to be present in the person of a designated officer or employee [Cal Law Rev Com Comment].

Evid Code § 777(b) permits the right of presence to be exercised by an employee as well as an officer. Also, because there is little practical distinction between corporations and other artificial entities and organizations, this section extends the right of presence to all artificial parties [Cal Law Rev Com Comment].



Strategic Point:

Since this section restates and supersedes former *CCP § 2043*, case law construing that section should be persuasive authority.

[3] Case Notes

It is within the discretionary power of the court to allow a bailiff who is also a witness to remain in the courtroom after a motion to exclude witnesses [*People v. Vernon* (1979) 89 CA3d 853, 152 CR 765] .

Under *Evid Code* § 777, the trial court retains discretion to decide whether prior to his testimony a witness should be precluded from hearing the testimony of another witness. Under *Pen Code* § 867, witness exclusion during the preliminary examination on motion of either party is a matter of right [*People v. Young* (1985) 175 CA3d 537, 221 CR 32] .

The exercise of power under *Evid Code* § 777 as to exclusion of witnesses is discretionary with the trial court [*People v. Valdez* (1986) 177 CA3d 680, 223 CR 149 (not error to compel defense to elect either to use expert's assistance in cross-examination or to exclude him for his subsequent testimony); *People v. Persky* (1959) 167 CA2d 134, 334 P2d 219 (not error to allow witnesses whose advice was necessary to attorneys to remain in courtroom)].

When a witness disobeys an order excluding all witnesses from courtroom, disobedience is punishable as contempt, but it does not constitute ground for exclusion of testimony of said witness [*People v. Willingham* (1969) 271 CA2d 562, 76 CR 760 (conduct may affect credibility)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewCriminal Law & ProcedureWitnessesSequestrationEvidenceTestimonySequestration



46 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.44

16.44 Excused Witnesses--Evid Code § 778

[1] Evid Code § 778 Text

■ *Evid Code § 778.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes the second and third sentences of former CCP § 2050 [Cal Law Rev Com Comment].

[3] Case Notes

The trial court has the discretion to deny a request to recall a witness where it determines that recall is inappropriate [*People v. Thomas* (1992) 2 C4th 489, 7 CR2d 199, 828 P2d 101] .

When the defendant has testified and been cross-examined, it is within the court's discretion to permit the defendant to be recalled for further cross-examination, even though he or she has already rested [*People v. Barboza* (1963) 213 CA2d 441, 28 CR 805 (defendant witness recalled for impeachment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsExamination of WitnessesCross-Examination



47 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.45

16.45 Basis of Credibility--Evid Code § 780

[1] Evid Code § 780 Text

■ *Evid Code § 780.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

Although *Evid Code* § 351 declares that "all relevant evidence is admissible," this section makes it clear that matters which may not be "evidence" in a technical sense can affect the credibility of a witness, and it provides for a convenient list of the most common factors that bear on the question of credibility [*Cal Law Rev Com Comment*; *Davis v. Judson* (1910) 159 C 121, 113 P 147 (uncontradicted testimony may contain inherent improbabilities)].

It is clear that the effect of this section, coupled with *Evid Code* § 351, is to change the somewhat inflexible rule of exclusion of evidence of a collateral nature offered to attack the credibility of a witness [Cal Law Rev Com Comment].

Now the trial court in its discretion may allow or exclude evidence of a collateral nature offered to attack the credibility of a witness. This changes existing law [Cal Law Rev Com Comment; *see Evid Code* § 352].



Warning:

In light of the many changes this section introduced into the law of evidence, prior case law construing the former statutory provisions is probably of little or no persuasive authority.

There is no limitation in the Evidence Code on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under *Evid Code* §§ 780 and 1100, such evidence is admissible. This represents a change in existing law [Cal Law Rev Com Comment].

Opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation [Cal Law Rev Com Comment].

[3] Case Notes

[a] Discretion of Court

Evid Code § 780 does not say that "all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under *Evid Code* § 352, the court has substantial discretion to exclude collateral evidence. The effect of *Evid Code* § 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge" [*People v. Thornton* (2007) 41 C4th 391, 428-429, 61 CR3d 461, 161 P3d 3, cert den 2007 US LEXIS 12579 (quoting Cal. Law Revision Commission comment)].

Trial courts retain wide latitude to impose reasonable limits on defense inquiry into potential bias of a prosecution witness [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145, 73 P3d 1137 (defense was not allowed to cross-examine prosecution witness on unrelated rape charge); *People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

The admission of collateral evidence is left to the discretion of the trial court [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1, 928 P2d 485] .

Evidence going to the credibility of a witness is relevant evidence [*People v. Lavergne* (1971) 4 C3d 735, 94 CR 405, 484 P2d 77; *see People v. Mickle* (1991) 54 C3d 140, 284 CR 511, 814 P2d 290 (evidence concerning whether psychiatric experts opposed death penalty admissible as bearing on credibility)].

[b] Attitude Toward Testifying--Fearful Witness

Generally, evidence that a witness is afraid to testify is admissible as relevant to the witness's credibility [*People v. Dickey* (2005) 35 C4th 884, 913, 28 CR3d 647, 111 P3d 921, cert denied, 546 US 1177 (no error in admitting witness's or detective's testimony about witness's fear of testifying; further, counsel was not ineffective in failing to object to witness's testimony that defendant was capable of carrying out his threats of retaliation, as testimony did not change outcome)].

In a criminal prosecution, evidence that a witness is afraid to testify or fears retaliation for testifying, and an explanation of the basis for the witness's fear, is relevant to the credibility of that witness and therefore admissible. There is no requirement that threats be corroborated or that the witness's fear of retaliation be directly linked to the defendant for the threat to be admissible. The existence of the threat, not necessarily its source, is relevant to the witness's credibility [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554, 73 P3d 433 (witness's testimony of threat by defendant and third party was properly admitted for nonhearsay purpose of showing why witness had not come forward earlier; absent defense request, court need not give limiting instruction that jury should consider evidence of threat only in assessing witness's credibility); *People v. Burgener* (2003) 29 C4th 833, 129 CR2d 747, 73 P3d 433 (evidence of threat to witness was properly offered to explain discrepancy in witness's statements)].

Evidence that a witness is afraid to testify is relevant to the witness's credibility. But when the witness admits to bias against a party, the reasons for the witness's fear are no longer relevant, and the witness cannot be rehabilitated by showing that his or her bias is justified [*People v. Morris* (1988) 46 C3d 1, 249 CR 119, 756 P2d 843] .

Evidence was admitted that members of the defendant's gang threatened witnesses [*People v. Sanchez* (1997) 58 CA4th 1435, 69 CR2d 16] .

A witness who testifies despite fear of recrimination is more credible because of his or her personal stake in the testimony [*People v. Olquin* (1994) 31 CA4th 1355, 37 CR2d 596] .

An accomplice's feelings of revenge were exceptionally relevant [*People v. Stewart* (1983) 145 CA3d 967, 193 CR 799] .

Evidence of threats to a witness is admissible because it is relevant on the issue of the witness's credibility [*People v. Lybrand* (1981) 115 CA3d 1, 171 CR 157; *People v. Gutierrez* (1994) 23 CA4th 1576, 28 CR2d 897 (evidence of threats to witness is relevant to witness's state of mind and demeanor, and evidence that witness is afraid of retaliation and afraid to testify is relevant to witness's credibility; it is not necessary to show that threats were made by defendant personally or that witness's fear of retaliation is directly linked to defendant)].

When the evidence explains not only the witness's state of mind but also his or her demeanor in court and prior actions, it is admissible [*People v. Feagin* (1995) 34 CA4th 1427, 40 CR2d 918 (defendant's attempt to kill witness on other occasion)].

[c] Bias, Interest, or Other Motive

It is proper for a party against whom a witness has given testimony to show, if he can, that such witness is biased or has an unusual interest in the outcome of the case [*People v. Carpenter* (1997) 15 C4th 312, 6 CR2d 1, 935 P2d 708 (witness's sexual relationship with defendant elicited during murder penalty phase); *People v. Mickle* (1991) 54 C3d 140, 284 CR 511, 814 P2d 290 (informant had written to judges in three separate criminal cases pending against him, offering to inform on various persons in exchange for leniency); *People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610 (defendant is entitled to explore the nature of any promises prosecution has made or inducements it has offered to its witnesses.); *People v. Burgener* (1986) 41 C3d 505, 224 CR 112, 714 P2d 1251 (evidence that two prosecution witnesses had been confederates in prior criminal activities is relevant to show bias, interest, or other motive); *People v. Balderas* (1985) 41 C3d 144, 222 CR 184, 711 P2d 480] .

The trial court, in its discretion, may decide the question of the admissibility of evidence offered for the purpose of showing a witness's bias [*Grudt v. City of Los Angeles* (1970) 2 C3d 575, 86 CR 465, 468 P2d 825] .

Evidence of past misconduct may tend to show that a police officer testifying as a witness has some motive, bias, or interest that might induce false testimony [*Coronado Police Officers Assn. v. Carroll* (2003) 106 CA4th 1001, 131 CR2d 553] .

A party may show that a witness has a motive to fabricate [*People v. Ruiz* (1998) 62 CA4th 234, 72 CR2d 572 (gang evidence admitted to show motive of declarant to lie to protect fellow gang member); *People v. Johnson* (1984) 159 CA3d 163, 205 CR 427 (evidence of motive to fabricate need not be admitted where theory is highly tenuous; motive of testifying to please police rejected)].

It is proper to cross-examine a witness to test whether that witness has a bias against the racial group to which the defendant, or other party, belongs [*In re Anthony P.* (1985) 167 CA3d 502, 213 CR 424] .

The existence of pending charges against a witness would tend to show that the witness seeks leniency through testifying [*People v. Claxton* (1982) 129 CA3d 638, 181 CR 281 ; *People v. Allen* (1978) 77 CA3d 924, 144 CR 6 (pending robbery charges against witness); *People v. Pierce* (1969) 269 CA2d 193, 75 CR 251

A specific instance of conduct is admissible if it is relevant to prove a witness's bias or improper motive, apart from any relevancy it has to prove a character trait [*People v. Knox* (1979) 95 CA3d 420, 157 CR 238] .

[d] Capacity to Perceive and Recollect

In a murder-kidnapping prosecution, the trial court did not abuse its discretion in excluding inquiry into the nature of the letter a witness had been composing the day she saw the crime, which would have been of marginal relevance, at best, to her capacity to perceive and remember [*People v. Thornton* (2007) 41 C4th 391, 428-429, 61 CR3d 461, 161 P3d 3 , cert den 2007 US LEXIS 12579] .

A conviction based on generic testimony does not violate a defendant's constitutional right to defend himself or to be convicted by a unanimous jury [*People v. Jones* (1990) 51 C3d 294, 270 CR 611, 792 P2d 643 (at issue was whether victim's inability to specify exact time, place, or circumstances denied defendant due process)].

Expert testimony concerning certain psychological factors that may impair the accuracy of eyewitness identifications is admissible under this section at the court's discretion [*People v. McDonald* (1984) 37 C3d 351, 208 CR 236, 690 P2d 709 ; see *Evid Code* § 801].

Although evidence of drug addiction or alcoholism may not be used to attack the character or veracity of a witness, such evidence may be relevant in determining the witness's ability to perceive the events in question [*People v. Smith* (1970) 4 CA3d 403, 84 CR 412] .

Court has discretion to allow prosecution to introduce expert evidence of mental retardation of victim with regard to the victim's ability to perceive and recollect [*People v. Herring* (1993) 20 CA4th 1066, 25 CR2d 213] .

[e] Character for Honesty or Veracity

A witness willfully false in one part of his testimony is not to be trusted in others [*People v. Laverne* (1971) 4 C3d 735, 94 CR 405, 484 P2d 77 ; *Edmonson v. State Bar of California* (1981) 29 C3d 339, 172 CR 899, 625 P2d 812 (false testimony may indicate concealment but doesn't warrant inference that truth is directly converse)].

An individual who has known a witness for a reasonable length of time or who knows the reputation of that witness for honesty and veracity in the community may qualify to testify as to the witness's character for honesty or veracity [*People v. Sergill* (1982) 138 CA3d 34, 187 CR 497] .

Prior false accusation of sexual molestation is relevant to molest victim's credibility, just as prior false accusation of rape is relevant to rape victim's credibility. The conduct being placed before the jury is the making of the false statement, not the sexual conduct that is the content of the statement. The sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility; rather, the jury is asked to draw an inference about the witness's credibility from the fact that she stated as true something that was false [*People v. Franklin* (1994) 25 CA4th 328, 30 CR2d 376] .

The admission of testimony of psychiatric expert to impeach a prosecution witness's credibility when the witness's mental or emotional condition may affect the witness's ability to tell the truth is within the trial court's discretion [*People v. Cooks* (1983) 141 CA3d 224, 190 CR 211] .

[f] Demeanor and Manner While Testifying

The trier of fact may evaluate the credibility of a witness, in part, by its subjective reaction to his demeanor, attitude, and manner of testifying. Such behavior is not communicated by the record [*Meiner v. Ford Motor Co.* (1971) 17 CA3d 127, 94 CR 702 (judge's disbelief due to witness's demeanor); *Cunningham v. Simpson* (1969) 1 C3d 301, 81 CR 855, 461 P2d 39 (possible negative jury reaction to arrogant witness)].

[g] Impeachment of Criminal Defendant as Witness

There are a number of situations in which a defendant's statements or other evidence may not be used as part of the prosecution's case-in-chief, but may be used for impeachment of a defendant who has given contrary testimony. Such situations include:

- Evidence obtained in violation of the *Fourth Amendment* [*Walder v. United States* (1954) 347 US 62, 74 S Ct 354, 98 L Ed 503 ; *People v. Johnson* (1989) 211 CA3d 392, 259 CR 388] .
- Evidence obtained in violation of defendant's Miranda rights [*Harris v. New York* (1971) 401 US 222, 91 S Ct 643, 28 L Ed2d 1 ; *People v. May* (1988) 44 C3d 309, 243 CR 369, 748 P2d 307] .
- Testimony of probationer at probation revocation hearing [*People v. Coleman* (1975) 13 C3d 867, 120 CR 384, 533 P2d 1024 (excluding probationer's testimony at probation revocation hearing from subsequent trial on criminal charges that formed basis of probation violation)].
- Testimony of defendant at suppression of evidence hearing [see *People v. Boyette* (2002) 29 C4th 381, 127 CR2d 544, 58 P3d 391 (defendant's statements at the suppression hearing were admissible to impeach him if his trial testimony proved inconsistent with his testimony at the suppression hearing); *People v. Drews* (1989) 208 CA3d 1317, 256 CR 846] .

[h] Credibility of Child as Witness

In a child sexual abuse case in which the central issue was the victim's credibility, the court held that California law does not require corroboration of a child victim's testimony and that here such testimony constituted sufficient evidence to convict the defendant [*People v. Harlan* (1990) 222 CA3d 439, 271 CR 653] .



Strategic Point:

A child's generic testimony (nonspecific testimony) regarding multiple sexual molestations over a period of time is sufficiently substantial from an evidentiary standpoint to support a conviction for child molestation, as long as the victim describes the type of acts committed, the frequency of the acts, and the general time period in which they occurred.

[i] Impeachment of Expert Witness

For the impeachment of expert witnesses, a distinction must be made between opinion and foundational fact. Rather than broadly construing what a foundational fact is, the term should be strictly construed by the court to prevent a party from offering a contrary opinion of his expert under the guise of impeachment [*Kennemur v. California* (1982) 133 CA3d 907, 184 CR 393] .

While a party may not call an expert witness merely to express an opinion contrary to another expert's, a party may impeach by showing that the matter on which the expert based his opinion is false [*Stark v. City of Los Angeles* (1985) 168 CA3d 276, 214 CR 216] .

[j] Prior Inconsistent Statements

The prior statement of a witness is not made inadmissible by the hearsay rule if his statement is inconsistent with his testimony at the hearing. However, testimony inconsistent with the prior statement rather than the mere failure to give favorable testimony is required before a witness can be impeached [*People v. Woodberry* (1970) 10 CA3d 695, 89 CR 330 (hearsay); *People v. Newton* (1970) 8 CA3d 359, 87 CR 394 (hostile testimony as prerequisite); *People v. Robinson* (1970) 6 CA3d 448, 86 CR 56 (prosecutor's misconduct); *People v. Jackson* (1970) 3 CA3d 921, 83 CR 829 (no recollection by witness)].

Evidence of confidential conversations obtained by eavesdropping or recording in violation of *Pen Code* § 632 may be used for impeachment [*Frio v. Superior Court* (1988) 203 CA3d 1480, 250 CR 819] .

Statements made by the defendant during plea negotiations, or evidence of statements made by the defendant revealed to the prosecution during plea negotiations may be used for impeachment [*People v. Crow* (1994) 28 CA4th 440, 33 CR2d 624 (notwithstanding *Evid Code* § 1153 and *Pen Code* § 1192.4, allowing impeachment by defendant's statements to defense psychologist, when report was furnished to prosecution during plea negotiations)].

There is a split of authority regarding statements made to an appointed psychiatrist for purposes of a *Pen Code* § 1368 (mental competence) hearing [*People v. Stanfill* (1986) 184 CA3d 577, 229 CR 215 ; *People v. Harris* (1987) 192 CA3d 943, 237 CR 747] .

[k] Nonexistence of Fact That Witness Asserted

A misdemeanor conviction for possession of a stolen handgun may be used on cross-examination of a witness who denied he ever possessed a gun. The reference to the prior crime is not asserted as a specific instance of conduct to prove guilt but is admitted to contradict the witness's statement on direct examination [*People v. Cooks* (1983) 141 CA3d 224, 190 CR 211] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Pretrial Motions & Procedures Suppression of Evidence Evidence Procedural

ConsiderationsJudicial Intervention in TrialsComments by JudgesCredibility of WitnessesLegal EthicsProsecutorial
Conduct



48 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.46

**16.46 Procedure to Determine Relevancy of Sexual Conduct Evidence Proposed to Attack Credibility of
Complaining Witness--Evid Code § 782**

[1] Evid Code § 782 Text

■ *Evid Code § 782.*

(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*.

LegH: 1974 ch. 569; 1981 ch. 726; 1987 ch. 177; 1989 ch. 1402; 1996 ch. 1075; 2004 ch. 61; 2006 ch. 225; 2007 ch. 130.

[2] Legislative Notes

[a] Short Title

This act may be known as the Robbins Rape Evidence Law [1974 Cal Stat, ch 569].

[b] 1989 Amendments

The Legislature finds and declares that because of the court's decision in *People v. Van Hoek 200 CA3d 811*, there is an immediate need for additional statutory protection for the most vulnerable among our children, those of tender years, some of whom are being subjected to continuing sexual abuse by those commonly referred to as "resident child molesters." These molesters reside with, or have recurring access to, a child and repeatedly molest the child over a prolonged period of time but the child, because of age or the frequency of the molestations, or both, often is unable to distinguish one incident from another in terms of time, place, or other particulars, and as a consequence prosecutors are unable to provide the specificity of charges necessary to overcome the constitutional due process problems raised in the Van Hoek case within the framework of existing statutory law. As a consequence, some of our most vulnerable children continue to be at risk and some of our worst offenders continue to go unpunished [1989 Cal Stat, ch 1402, § 1].

It is the intent of the Legislature in enacting this act to provide additional protection for children subjected to continuing sexual abuse and certain punishment for persons referred to as "resident child molesters" by establishing a new crime of

continuing sexual abuse of a child under circumstances where there have been repeated acts of molestation over a period of time, and the perpetrator either resides with or has recurring access to the child. It is the further intent of the Legislature that the penalty for this crime shall be greater than the maximum penalty under existing law for any single felony sex offense [1989 Cal Stat, ch 1402, § 1].

[3] Case Notes

The Victims' *Bill of Rights* [Cal Const, art I, § 8(d)] expressly states that it does not affect *Evid Code* § 782 [*People v. Culton* (1992) 11 CA4th 363, 14 CR2d 189 ; *People v. Shoemaker* (1982) 135 CA3d 442, 185 CR 370] .

Evid Code § 782 vests broad discretion in the trial court to weigh the defendant's proffered evidence prior to submission to the jury and to resolve the conflicting interests of the victim and the defendant [*People v. Casas* (1986) 181 CA3d 889, 226 CR 285] .

Sexual conduct, as used in *Evid Code* §§ 782 and 1103, encompasses any behavior that reflects the actor's or speaker's willingness to engage in sexual activity. The term should not be narrowly construed [*People v. Franklin* (1994) 25 CA4th 328, 30 CR2d 376] .

An exception to the rape shield laws, *Evid Code* § 1103, is when the credibility of the victim is more probative than prejudicial (most often when victim's prior sexual history involves prostitution); however, the rape shield statutes do not permit the trial judge to make a credibility determination at the in camera hearing, only *Evid Code* § 352 analysis [*People v. Chandler* (1997) 56 CA4th 703, 65 CR2d 687 (error to exclude two witnesses regarding victim's past history of trading sex for drugs because witnesses not believable, error harmless)].

In a prosecution for child molestation, a defendant is entitled to a hearing on whether the complaining witness had been subjected to prior similar acts by others. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. Thus, such evidence is relevant to the credibility of the complaining witness and should be admitted [*People v. Daggett* (1990) 225 CA3d 751, 275 CR 287] .



Strategic Point:

Where multiple defendants are charged with sex offenses in concert and one intends to challenge the complaining witness's credibility, this is a strong factor in considering severance of the actions.

Where a motion under *Evid Code* § 782 is procedurally defective, the court should not consider the merits of the motion but should insist upon strict compliance with the statutory requirements. A defendant may not allege prior prostitution of the complaining witness unless she testifies she denied consent, defendant produces evidence challenging such a denial and offers to prove that her prior sexual conduct is sufficient to attack her credibility as distinguished from her character [*People v. Rioz* (1984) 161 CA3d 905, 207 CR 903 (procedural defect: each defendant should have offered to prove that complaining witness agreed to have sex with him for money); see *Evid Code* § 1103].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals General Overview Evidence Procedural Considerations Objections & Offers of Proof Offers of Proof Family Law Family Protection & Welfare Children Abuse, Endangerment & Neglect



49 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.47

16.47 Sexual Harassment--Plaintiff's Sexual Conduct--Discovery Procedure--Evid Code § 783

[1] Evid Code § 783 Text

■ *Evid Code § 783.*

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 admissible 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.

LegH: 1985 ch. 1328.

[2] Legislative Notes

The Legislature finds and declares that it is the existing policy of the State of California to ensure that the causes of action for claims of sexual harassment, sexual assault, or sexual battery are given proper meaning. The discovery of

sexual aspects of complainants' lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial.

[3] Case Notes

The above statement of legislative policy has been determined to be equally applicable to juvenile dependency cases where sexual assault has been alleged [*In re Venus B.* (1990) 222 CA3d 931, 272 CR 115 (appeal of petition seeking to remove child from custody of parents)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionElementsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of Proof



50 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.48

16.48 Attacking or Supporting Credibility of Witness--Evid Code § 785

[1] Evid Code § 785 Text

■ *Evid Code § 785.*

The credibility of a witness may be attacked or supported by any party, including the party calling him.

LegH: 1965 ch. 299.

[2] Commission Comments

This section eliminates the former restriction that a party could not attack the credibility of one's own witness, unless he had been damaged or surprised by the witness's testimony [Cal Law Rev Com Comment].

Since a party has no control over a witness, he should not be "bound" by the testimony of a witness produced by him and he should be permitted to attack the credibility of the witness without anachronistic limitations [Cal Law Rev Com Comment].

This section is in keeping with the interest of providing a forum for full and free disclosure [Cal Law Rev Com Comment].

[3] Case Notes

The credibility of a witness may be attacked by any party, including the party calling the witness, by proof that the witness made an extrajudicial statement inconsistent with any part of the testimony at the time of trial [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145, 73 P3d 1137] .

Prosecutor may impeach his or her own witness [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1, 928 P2d 485 (witness under influence of PCP)].

One of the purposes of Evid Code § 785 of the Evidence Code is to allow a party to permit impeachment of a hostile

witness called by that party [*People v. Chacon* (1968) 69 C2d 765, 73 CR 10, 447 P2d 106] .

Defendant's prior convictions for robbery, grand theft, and receiving stolen property all involved moral turpitude. Therefore, evidence of those convictions was relevant to the issue of defendant's credibility, so the trial court properly admitted that evidence [*People v. Gray* (2007) 158 CA4th 635, 69 CR3d 876 (prosecution for burglary)].

A party's right to impeach own witness is not available where the witness has not testified against the impeaching party at all. There is nothing to counteract and the prior statement emerges as substantive evidence of the facts asserted in it [*People v. Newton* (1970) 8 CA3d 359, 87 CR 394] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureWitnessesImpeachmentCriminal Law &

ProcedureWitnessesUnavailabilityEvidenceProcedural ConsiderationsExclusion & Preservation by Prosecutor



51 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.49

16.49 Traits of Character--Evid Code § 786

[1] Evid Code § 786 Text

■ *Evid Code § 786.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Since other character traits are not sufficiently probative of a witness's honesty or veracity only those necessarily involved in a proper determination of credibility are sufficient to warrant consideration [Cal Law Rev Com Comment].

[3] Case Notes

The "Truth-in-Evidence" provision of Proposition 8 [*Cal Const, art I, § 28(d)*] abrogated *Evid Code § 786* [*People v. Harris* (1989) 47 C3d 1047, 255 CR 352, 767 P2d 619] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessGeneral
OverviewEvidenceTestimonyCredibilityRehabilitation



52 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.50

16.50 Specific Instances of Conduct--Evid Code § 787

[1] Evid Code § 787 Text

■ *Evid Code § 787.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

As under existing law, evidence of specific instances of a witness's conduct is inadmissible to prove a trait of his character for the purpose of attacking or supporting his credibility. *Evid Code § 787* is subject, however, to *Evid Code § 788*, which permits certain kinds of criminal convictions to be used for the purpose of attacking a witness's credibility [Cal Law Rev Com Comment].

[3] Case Notes

[a] Criminal Case--Rule of *People v. Wheeler*

Past criminal conduct amounting to a misdemeanor is admissible, subject to trial court discretion, as relevant evidence under the Truth in Evidence section of Proposition 8 [*Cal Const, art I, § 28(d)*] if the conduct has some logical bearing on the veracity of a witness in a criminal proceeding. However, evidence of the mere fact of a misdemeanor conviction, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility, since there is no equivalent to *Evid Code § 788* (felony convictions admissible) for misdemeanor convictions [*People v. Wheeler* (1992) 4 C4th 284, 14 CR2d 418, 841 P2d 938] (misdemeanor conduct, though not convictions, admissible for impeachment); *People v. Mickle* (1991) 54 C3d 140, 284 CR 511, 841 P2d 290 (jailhouse informant's threats against witnesses in his own case admissible in other case); *People v. Harris* (1989) 47 C3d 1047, 255 CR 352, 767 P2d 619; *People v. Cloyd* (1997) 54 CA4th 1402, 64 CR2d 104 (no error excluding evidence victim had two misdemeanor cases pending and had failed to appear on those cases)].



Strategic Point:

The Supreme Court has held that *Evid Code* § 787 as it applies to criminal proceedings was abrogated by the Truth in Evidence section of Proposition 8 [*Cal Const, art I, § 28(d)*], stating that the voters have expressly removed most statutory restrictions on the admission of relevant credibility evidence in criminal cases [*People v. Wheeler* (1992) 4 C4th 284, 14 CR2d 418, 841 P2d 938] . Proposition 8 expressly preserves the trial court's discretion under *Evid Code* § 352 to exclude evidence whose probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time [*People v. Chatman* (2006) 38 C4th 344, 376, 42 CR3d 621, 133 P3d 534 , *cert denied*, *Chatman v. California* (2007) 127 S Ct 938, 166 L Ed2d 718] .

Misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying conduct may be admissible subject to the court's exercise of discretion [*People v. Chatman* (2006) 38 C4th 344, 373, 42 CR3d 621, 133 P3d 534 , *cert denied*, *Chatman v. California* (2007) 127 S Ct 938, 166 L Ed2d 718 (court properly excluded evidence as more prejudicial than probative)].

Although evidence of past conduct is often offered for the purpose of impeachment, nothing in *Cal Const, art I, § 28(d)*, prevents the use of relevant testimony to prove a crime victim, or any other witness, is telling the truth [*People v. Stern* (2003) 111 CA4th 283, 3 CR3d 479 (evidence of uncharged stabbing supported witness's credibility regarding witness's recollection of defendant's threat to stab witness's mother)].

In assessing the moral turpitude of prior misconduct, "the label is not important--the conduct is" [*People v. Lepolo* (1997) 55 CA4th 85, 63 CR2d 735 (waving machete at police officer and threatening to harm him was act of moral turpitude, precise label by court not dispositive)].

Whether *Wheeler* has abrogated *People v. Jackson* (1986) 177 CA3d 216, 216 CR 21 , remains undecided. *Jackson* held that the Victim's Bill of Rights [*Cal Const, art I, § 28*] did not change the rule that juvenile adjudications may not be used for impeachment because juvenile adjudications are not criminal proceedings and do not result in criminal convictions, basing its ruling on *W&I Code* § 1772 regarding honorable discharges from the Youth Offender Parole Board. However, where there is no evidence of such an honorable discharge, *Jackson* is distinguishable. In such cases, the prosecution may introduce prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication, subject to *Evid Code* § 352 and other applicable limitations [*People v. Lee* (1994) 28 CA4th 1724, 34 CR2d 723 (case should not be construed as authority for impeachment by a witness's admissions of juvenile adjudications since, under *Wheeler*, evidence, whether documentary or testimonial, of fact of misdemeanor conviction, and arguably of juvenile adjudication not controlled by *W&I Code* § 1772, is inadmissible hearsay when offered to impeach witness's credibility)].

[b] Effect of Other Evidence Code Sections

Where the evidence of allegations of rape victim's alleged prior false accusations has relevancy beyond merely attacking the victim's credibility as a witness but is relevant on the substantive issue of the defendant's guilt, it is admissible under *Evid Code* § 1103 [*People v. Burrell-Hart* (1987) 192 CA3d 593, 237 CR 654 (trial court's error in refusing to admit evidence was harmless)].

Evidence of victim's character trait of vindictiveness, that is, that she would falsely accuse one other than the defendant of rape, is inadmissible to attack her credibility. Vindictiveness is not a character trait of dishonesty or untruthfulness [*People v. Jones* (1984) 155 CA3d 153, 202 CR 162 ; *but see* *People v. Wall* (1979) 95 CA3d 978, 157 CR 587 (such evidence is admissible under *Evid Code* § 1103(1)(a) because Law Revision Commission's comment to *Evid Code* §

1101 states that admissibility of such evidence is determined under *Evid Code* §§ 786-790)).

Where police personnel records sought to be discovered by a criminal defendant [see *Evid Code* § 1043] would be used only for impeachment purposes to attack the credibility of the arresting officers, such discovery is not permitted by *Evid Code* § 787, which does not allow the use of specific acts of misconduct to attack credibility [*Sacramento City Police Dept. v. Superior Court* (1984) 156 CA3d 1193, 203 CR 169 ("specific acts" would be possible instances of unprovoked violence while effecting arrests that might be found in their personnel records)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law &
Procedure Witnesses Impeachment Evidence Procedural Considerations Exclusion & Preservation by Prosecutor



53 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.51

16.51 Convictions of Felony--Evid Code § 788

[1] Evid Code § 788 Text

■ *Evid Code § 788.*

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).

LegH: 1965 ch. 299.

[2] Commission Comments

This section states an exception to the general rule provided under *Evid Code § 787* (that is, evidence of conviction of a felony may be used to attack the credibility of a witness). Although judgment of a conviction offered to prove that the person adjudged guilty committed the crime is hearsay, the hearsay objection to the evidence is overcome by the declaration in this section that such evidence may be shown for the purpose of attacking a witness's credibility [Cal Law Rev Com Comment].

Evid Code § 788(a) changes existing law by prohibiting the use of a conviction to attack the credibility of a witness if a pardon has been granted to the witness on the ground that he was innocent and was erroneously convicted [Cal Law Rev Com Comment].

Evid Code § 788(d) merely provides that a witness who has been relieved of the penalties and disabilities of a prior conviction under the laws of another jurisdiction will be subject to attack on his credibility under the same conditions that would be applicable if such relief had been granted him under the laws of California [Cal Law Rev Com Comment].

[3] The Victims' Bill of Rights

Two relevant provisions of the Victims' *Bill of Rights* [Cal Const, art I, § 28 (adopted June 8, 1982)] are:

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or *Evidence Code, Sections 352, 782 or 1103*. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.



Strategic Point:

The Supreme Court upheld the constitutionality as a whole of Proposition 8, the Victims' *Bill of Rights* [*Brosnahan v. Brown* (1982) 32 C3d 236, 186 CR 30, 651 P2d 274] .

[4] Case Notes

[a] Discretion of Court

Evid Code § 788 is limited by *Evid Code § 352*. On objection to the admission of a felony conviction for purposes of impeachment, whether in a civil case or a criminal case, a trial court must perform the balancing test prescribed by *Evid Code § 352*. Thus, the court has discretion to exclude a felony conviction if its probative value is substantially outweighed by a probability of undue prejudice or of the other factors listed in the section [*Robbins v. Wong* (1994) 27 CA4th 261, 32 CR2d 337 (application in civil cases); *People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111 (application in criminal cases); *People v. Beagle* (1972) 6 C3d 441, 99 CR 313, 492 P2d 1 (application in criminal cases)].

The Supreme Court affirmed the exclusion of evidence regarding a witness's involvement in prostitution, noting that such evidence was degrading and had an obvious potential for embarrassing or unfairly discrediting a witness [*People v. Phillips* (1985) 41 C3d 29, 222 CR 127, 711 P2d 423] .

[b] Civil Cases

In civil cases, unlike criminal cases, the "Use of Prior Convictions" section of Proposition 8 [*Cal Const, art I, § 28(f)*] is not applicable. Further, the California Supreme Court's decisions concerning impeachment with felony convictions in criminal cases--whether decided before or after the adoption of *Cal Const, art I, § 28(f)*--may not be construed as direct holdings on such impeachment in civil cases. The trial court in a civil case, however, may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under *Evid Code § 352* that it must perform. Earlier civil decisions that interpreted the former statute as requiring the mandatory admission of felony impeachment evidence without regard to its probative and prejudicial effect were superseded by the adoption of *Evid Code §§ 788 and 352* as part of the Evidence Code in 1967 [*Robbins v. Wong* (1994) 27 CA4th 261, 32 CR2d 337] .

[c] Criminal Cases Generally

Although a witness may be impeached with a felony conviction, statutory prohibitions on impeachment with conduct evidence other than felony convictions [*Evid Code §§ 787, 788*] no longer apply in criminal cases. The Supreme Court has held that with the enactment of the Truth in Evidence section of Proposition 8 [*Cal Const, art I, § 28(d)*] the voters have expressly removed most statutory restrictions on the admission of relevant credibility evidence in criminal cases, including the rule that felony convictions are the only form of conduct evidence admissible for impeachment. Hence, past criminal conduct amounting to a misdemeanor is admissible, subject to trial court discretion, as relevant evidence under "Truth-in-Evidence" if the conduct has some logical bearing on the veracity of a witness in a criminal proceeding. However, evidence of a misdemeanor conviction, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility, since there is no equivalent to *Evid Code § 788* (felony convictions admissible) for misdemeanor convictions [*People v. Wheeler* (1992) 4 C4th 284, 14 CR2d 418, 841 P2d 938] .

In criminal proceedings, the Victim's *Bill of Rights* [*Cal Const, art I, § 28*] supersedes all California restrictions on the admission of relevant evidence except those preserved or permitted by its express words. Statutory prohibitions on impeachment with conduct evidence no longer apply in criminal cases [*People v. Wheeler* (1992) 4 C4th 284, 14 CR2d 418, 841 P2d 938 (misdemeanor conduct, though not convictions, admissible for impeachment); *People v. Mickle* (1991) 54 C3d 140, 284 CR 511, 814 P2d 290 (jailhouse informant's threats against witnesses in his own case admissible to impeach him); *People v. Harris* (1989) 47 C3d 1047, 255 CR 352, 767 P2d 619 (prior reliability as police informant admissible to attack or support witness's credibility)].

[d] Definition of "Convicted"

"Conviction does not mean the judgment based upon the verdict, but it is the verdict itself. It is the ascertainment of guilt by the trial court. A person has been convicted even though the judgment should be suspended during appeal or while the convict is on probation. ... A judgment though not final may be proved for any purpose for which it is effectual" [*People v. Clapp* (1944) 67 CA2d 197, 200, 153 P2d 758 (internal citations omitted); *People v. Martinez* (1998) 62 CA4th 1454, 74 CR2d 121 (defendant impeached with prior conviction even though not yet sentenced on prior conviction that was a wobbler; includes analysis of the term "convicted"); *People v. Halsey* (1993) 21 CA4th 325, 26 CR2d 701 (conviction for impeachment means any conviction suffered before trial, even if conviction was after commission of offense at issue); see *People v. Braun* (1939) 14 C2d 1, 92 P2d 402 (witness impeached with prior conviction even though an appeal of conviction was pending)].

[e] Constitutionally Invalid Prior Conviction

The use of a constitutionally invalid prior conviction to impeach testimonial credibility is improper and to all such impeachment is error under California law [*Curl v. Superior Court* (1990) 51 C3d 1292, 276 CR 49, 801 P2d 292 (on a collateral challenge to the validity of a prior murder conviction via a motion to strike the special circumstance allegation, defendant has the burden of proving the constitutional invalidity of the prior); *People v. Coffey* (1967) 67 C2d 204, 60 CR 457, 430 P2d 15 (state has burden of proving constitutionality of convictions elsewhere)].

When the defendant has failed to raise the constitutionality of the judgments of prior conviction at the trial level, he or she may not for the first time collaterally attack them on appeal [*People v. Patterson* (1969) 270 CA2d 268, 75 CR 485] .

[f] Nonretroactivity of Victims' Bill of Rights

The Supreme Court has held that the Victims' *Bill of Rights* [Cal Const, art I, § 28] applies only to prosecutions for crimes committed on or after its effective date of June 9, 1982. The court noted that certain provisions of Proposition 8 "may affect rights of the defendant that are sufficiently 'substantial' to require ex post facto protection." Concerning the portion of *Evid Code* § 3 which declares that "relevant evidence shall not be excluded in any criminal proceeding," the court stated: "In any matter in which the clause is seen to have the effect of impairing a defense or 'permitting a person to be convicted with less evidence than was required when the act was done,' its application would appear to be barred by the ex post facto clause" [*People v. De Santis* (1992) 2 C4th 1198, 9 CR2d 628, 831 P2d 1210 (Proposition 8 postdates crime and is therefore inapplicable) (internal citation omitted); *People v. Smith* (1983) 34 C3d 251, 193 CR 692, 667 P2d 149 ; *People v. Weaver* (1985) 39 C3d 654, 217 CR 245, 703 P2d 1139 (the applicability of Proposition 8 in a revocation of probation hearing is determined by the date of the crime on which the revocation is based, not the date of the crime that led to the original grant of probation); *People v. McGriff* (1984) 158 CA3d 1151, 205 CR 232 (error in admission of prior does not require reversal because of other overwhelming circumstantial evidence of guilt); *People v. Broder* (1983) 147 CA3d 572, 195 CR 264 (where burglary was committed before effective date of Prop. 8, it was error to admit evidence of prior burglary)].

[g] Impact of Victims' Bill of Rights on *People v. Beagle*

In *People v. Beagle* (1972) 6 C3d 441, 99 CR 313, 492 P2d 1 , and seven successive cases, the Supreme Court fashioned a formula for weighing the probative value of the prior felony against the risk of prejudice to the defendant by admitting the prior felony for impeachment purposes. This black-letter formula to be followed by the trial judge in determining the admissibility of the prior felony involved four factors: (1) felonies involving dishonesty are more probative of credibility than others, such as those involving violence or assaultive conduct; (2) the nearer in time the prior conviction is to the present action the greater its probative value; (3) prior convictions for the same or similar crime as that with which the defendant is currently charged should be admitted sparingly. This is particularly true when other prior convictions of the defendant are available that involve dissimilar conduct to that for which the defendant currently is on trial; and (4) whether in this particular case it is more important that the jury hear the defendant's testimony about the case than to have the defendant remain silent out of fear of impeachment [*People v. Beagle* (1972) 6 C3d 441, 99 CR 313, 492 P2d 1 ; *People v. Antick* (1975) 15 C3d 79, 123 CR 475, 539 P2d 43 ; *People v. Rist* (1976) 16 C3d 211, 127 CR 457, 545 P2d 833 ; *People v. Rollo* (1977) 20 C3d 109, 141 CR 177, 569 P2d 771 ; *People v. Woodard* (1979) 23 C3d 329, 152 CR 536, 590 P2d 391 ; *People v. Fries* (1979) 24 C3d 222, 155 CR 194, 594 P2d 19 ; *People v. Spearman* (1979) 25 C3d 107, 157 CR 883, 599 P2d 74 ; *People v. Barrick* (1982) 33 C3d 115, 187 CR 716, 654 P2d 1243] .

In *People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111 , the Supreme Court interpreted the impact of Proposition 8 [Cal Const, art I, § 28] on the *Beagle* guidelines for the admission of prior felony convictions to impeach. The court held that the *Fourteenth Amendment* requires that a prior felony conviction can be used for impeachment if it shows "moral turpitude" or a "readiness to do evil" on the defendant's part. If it is determined that a proffered felony conviction does involve moral turpitude, then the felony conviction is prima facie admissible.

Presumably, if the connection is too tenuous between the moral defect in the defendant's character as shown by the prior conviction and dishonesty or veracity, then the prejudice to the defendant would outweigh the probative value under *Evid Code* § 352 [*People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111] .

The admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral

turpitude. Beyond this, the latitude that *Evid Code* § 352 allows for exclusion of impeachment evidence in individual cases is broad. When exercising its discretion under *Evid Code* § 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent, such as in *Beagle* and *Castro* [*People v. Wheeler* (1992) 4 C4th 284, 14 CR2d 418, 841 P2d 938 (misdemeanor conduct, though not convictions, admissible for impeachment); *People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111 ; *People v. Beagle* (1972) 6 C3d 441, 99 CR 313, 492 P2d 1 ; see *People v. Hinton* (2006)] .

Castro requires the trial court to make two determinations concerning the admissibility of a prior felony to impeach. Does the prior conviction involve moral turpitude? If so, then the court, under *Evid Code* § 352, must exercise its discretion in deciding whether to admit or exclude the prior [*People v. Hunt* (1985) 169 CA3d 668, 215 CR 429 ; *People v. Coad* (1986) 181 CA3d 1094, 226 CR 386 ; *People v. Valdez* (1986) 177 CA3d 680, 223 CR 149] .

Following *Castro*, it is clear that Proposition 8 did not abrogate a trial court's discretion to exclude evidence under *Evid Code* § 788. Rather, it broadened the category of felony convictions relevant to impeachment to include not only those that reflect directly on honesty and integrity but also those that involve moral turpitude [*People v. Partner* (1986) 180 CA3d 178, 225 CR 502] .

The *Beagle* factors remain relevant even after the adoption of Proposition 8. In the trial court's exercise of discretion under *Evid Code* § 352 to exclude evidence of prior felony convictions when their probative value on credibility is outweighed by the risk of undue prejudice, the court should consider the four factors outlined in *Beagle* [*People v. Muldrow* (1988) 202 CA3d 636, 248 CR 89 ; *People v. Dillingham* (1986) 186 CA3d 688, 231 CR 20] .

However, the rigid, black-letter rules of exclusion set forth in a line of cases beginning with *Antick* and including *Rist* and *Fries* no longer apply [*People v. Dillingham* (1986) 186 CA3d 688, 231 CR 20] .

[h] Moral Turpitude

All prior convictions that involve dishonesty under pre-*Castro* standards ipso facto involve moral turpitude under *Castro* [*People v. Parrish* (1985) 170 CA3d 336, 217 CR 700 ; *People v. Jackson* (1985) 174 CA3d 260, 220 CR 39 (robbery)].

Felonies that are crimes of violence that demonstrate "a general readiness to do evil" under *Castro* therefore involve moral turpitude [*People v. Jackson* (1985) 174 CA3d 260, 220 CR 39 (assault with deadly weapon); *People v. Williams* (1985) 169 CA3d 951, 215 CR 612] .

In determining whether crime is one of moral turpitude, court must look only to elements of offense to decide whether its least adjudicated elements necessarily involve moral turpitude. The least adjudicated test means that from the elements of the offense alone--without regard to the facts of the particular violation--one can reasonably infer the presence of moral turpitude. In other words, a court need not determine that a criminal statute could be violated only with evil intent in order to find that a conviction under that statute evinces moral turpitude. Only a substantial assurance that the credibility of a witness is adversely affected by his having suffered a conviction for a given offense is required [*People v. Feaster* (2002) 102 CA4th 1084, 125 CR2d 896 (negligent discharge of a firearm in violation of *Pen Code* § 246.3 involves moral turpitude); *People v. Campbell* (1994) 23 CA4th 1488, 28 CR2d 716 (felony vandalism involves moral turpitude, quoting *People v. Thomas* (1988) 206 CA3d 689, 254 CR 15 ; *People v. White* (1992) 4 CA4th 1299, 6 CR2d 259)] .

The following crimes "necessarily" involve moral turpitude:

- Arson [*People v. Miles* (1985) 172 CA3d 474, 218 CR 378] .

- Assault with a deadly weapon [*People v. Hinton* (2006) 37 C4th 839, 38 CR3d 149, 126 P3d 981 , 2006 C LEXIS 336, *97; *People v. Thomas* (1988) 206 CA3d 689, 254 CR 15 ; *People v. Cavazos* (1985) 172 CA3d 589, 218 CR 269] .
- Assault with intent to commit murder [*People v. Olmedo* (1985) 167 CA3d 1085, 213 CR 742] .
- Attempted murder [*People v. Hinton* (2006) 37 C4th 839, 38 CR3d 149, 126 P3d 981 , 2006 C LEXIS 336, *97].
- Auto theft [*People v. Lang* (1989) 49 C3d 991, 264 CR 386, 782 P2d 627] .
- Battery upon a police officer [*People v. Lindsay* (1989) 209 CA3d 849, 257 CR 529 ; *People v. Clarida* (1987) 197 CA3d 547, 243 CR 14] .
- Burglary [*People v. Phillips* (1985) 41 C3d 29, 222 CR 127, 711 P2d 423] .
- Child molestation [*People v. Massey* (1987) 192 CA3d 819, 237 CR 734] .
- Child punishment by inhuman corporal means [*People v. Brooks* (1992) 3 CA4th 669, 4 CR2d 570] .
- Discharging a firearm [*People v. Feaster* (2002) 102 CA4th 1084, 125 CR2d 896 (negligent discharge of firearm in violation of *Pen Code* § 246.3); *People v. White* (1992) 4 CA4th 1299, 6 CR2d 259 (discharging firearm into inhabited dwelling)].
- Driving with intent to evade pursuing officers in wanton disregard for safety of persons or property [*People v. Dewey* (1995) 42 CA4th 216, 49 CR2d 537] .
- Escape without force [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384 ; *People v. Waldecker* (1987) 195 CA3d 1152, 241 CR 650] .
- Failure to return to place of confinement [*People v. Lee* (1991) 229 CA3d 1504, 281 CR 9] .
- False imprisonment [*People v. Cornelio* (1989) 207 CA3d 1580, 255 CR 775] .
- Felony driving under influence with three or more DUI convictions within seven years [*People v. Forster* (1994) 29 CA4th 1746, 35 CR2d 705 (violation of *Veh Code* § 23175 is recidivist-type crime indicative of conscious indifference of consequences)].
- Felony hit-and-run [*People v. Bautista* (1990) 217 CA3d 1, 265 CR 661] .
- Felony indecent exposure [*People v. Ballard* (1993) 13 CA4th 687, 16 CR2d 624] .
- Felony vandalism [*People v. Campbell* (1994) 23 CA4th 1488, 28 CR2d 716] .
- Forgery [*People v. Flanagan* (1986) 185 CA3d 764 . 230 CR 64] .
- Keeping a drug house [*People v. Vera* (1999) 69 CA4th 1100, 82 CR2d 128] .
- Kidnapping [*People v. Zataray* (1985) 173 CA3d 390, 219 CR 33] .

- Murder [People v. Hinton (2006) 206 C LEXIS 336, *97].
- Pimping and pandering [People v. Jaimez (1986) 184 CA3d 146, 228 CR 852] .
- Possession of a deadly weapon with intent to commit assault [People v. Rivera (2003) 107 CA4th 1374, 133 CR2d 176 (juvenile conviction used to impeach adult)].
- Possession of drugs for sale [People v. Castro (1985) 38 C3d 301, 211 CR 719, 696 P2d 111] .
- Possession of unregistered firearms [People v. Garrett (1987) 195 CA3d 795, 241 CR 10] .
- Prostitution [People v. Chandler (1997) 56 CA4th 703, 65 CR2d 687] .
- Rape [People v. Bonilla (1985) 168 CA3d 201, 214 CR 191 ; People v. Mazza (1985) 175 CA3d 836, 221 CR 640] .
- Receiving stolen property [People v. Rodriguez (1986) 177 CA3d 174, 222 CR 809] .
- Resisting an executive officer (police officer) [People v. Williams (1999) 72 CA4th 1460, 86 CR2d 62] .
- Robbery [People v. Hughes (1995) 38 CA4th 481, 45 CR2d 168 ; People v. Burns (1987) 189 CA3d 734, 234 CR 547 ; People v. Brown (1985) 169 CA3d 800, 215 CR 494] .
- Sale of drugs [People v. Navarez (1985) 169 CA3d 936, 215 CR 519] .
- Statutory rape (without a good faith belief that the female was of the age of consent) [People v. Fulcher (1987) 194 CA3d 749, 236 CR 845 ; but see People v. Flanagan (1986) 185 CA3d 764, 230 CR 64] .
- Threats to commit a crime involving death or great bodily injury [People v. Thornton (1992) 3 CA4th 419, 4 CR2d 519] .
- Unlawful driving or taking of motor vehicle [People v. Lang (1989) 49 C3d 991, 264 CR 386, 782 P2d 627] .
- Voluntary manslaughter [People v. Coad (1986) 181 CA3d 1094, 226 CR 386 ; People v. Partner (1986) 180 CA3d 178, 225 CR 502] .

The following crimes do not necessarily involve moral turpitude:

- Assault (simple) [People v. Cavazos (1985) 172 CA3d 589, 218 CR 269] .
- Battery [People v. Thornton (1992) 3 CA4th 419, 4 CR2d 519 ; People v. Mansfield (1988) 200 CA3d 82, 245 CR 800] .
- Involuntary manslaughter [People v. Solis (1985) 172 CA3d 877, 218 CR 469] .

- Possession of drugs [*People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111 (heroin)].
- Statutory rape [*People v. Flanagan* (1986) 185 CA3d 764, 230 CR 64 ; but see *People v. Fulcher* (1987) 194 CA3d 749, 236 CR 845] .

[i] When Defendant Testifies

When the defendant takes the stand after the erroneous ruling that the trial court has no discretion to exclude evidence of prior convictions, the appellate court examines the record to see if a result more favorable to the defendant would have occurred in the absence of error [*People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111 ; *People v. Watson* (1956) 46 C2d 818, 299 P2d 243] .

[j] When Defendant Does Not Testify

California adopts the rule of *Luce v. United States* (1984) 469 US 38, 105 S Ct 460, 83 L Ed2d 443 , that when a trial court has denied a defendant's motion to exclude a prior conviction offered for impeachment purposes and the defendant has not testified, the trial court's ruling is not reviewable on appeal. This holding applies prospectively only [*People v. Collins* (1986) 42 C3d 378, 228 CR 899, 722 P2d 173] .

In pre-*Castro* but post-Proposition 8 cases where the court denied the motion to exclude prior convictions offered for impeachment purposes but did not exercise its discretion because it believed it was bound by *Cal Const, art I, § 28(f)*, to admit the convictions, and where the defendant did not take the stand, the appellate court should reverse and remand in all cases to allow the trial court to rule in open court whether it would have excluded the prior convictions in the exercise of its discretion [*People v. Collins* (1986) 42 C3d 378, 228 CR 899, 722 P2d 173] .

Although *Collins* was decided after the enactment of Proposition 8, its relevant holding is independent of that enactment and applies to both pre-Proposition 8 and post-Proposition 8 cases [*People v. Moten* (1989) 210 CA3d 765, 258 CR 390] .

[k] When Defendant Waives Jury Trial

In burglary prosecution, although the trial court erred in failing to exercise discretion to exclude prior felony convictions, defendant's jury trial waiver was not constitutionally flawed [*People v. Sandoval* (1987) 188 CA3d 1428, 234 CR 97] .

[l] Performing On-the-Record Balancing Test

The record must show affirmatively that the trial court weighed the prejudice against the probative value of the admission of defendants [*People v. Montiel* (1985) 39 C3d 910, 218 CR 572, 705 P2d 1248 (repeated rule of *Green* without modification or qualification); *People v. Navarez* (1985) 169 CA3d 936, 215 CR 519 (applying rule of *Green* in *Castro* setting); *People v. Johnson* (1987) 193 CA3d 1570, 239 CR 190 (*Green* does not compel an express statement where the context of the court's ruling indicates that the judge "could have done nothing else"); *People v. Clarida* (1987) 197 CA3d 547, 243 CR 14 (context of ruling demonstrates judge engaged in weighing process; better practice is to make a clear record)].

Failure to make an on-the-record determination of probative value versus prejudicial effect is harmless error where, in the reasonable exercise of discretion, the court could not have justified excluding the evidence for impeachment purposes [*People v. Hoze* (1987) 195 CA3d 949, 241 CR 14 ; *People v. Garrett* (1987) 195 CA3d 795, 241 CR 10 (where the issue of probative value versus prejudicial effect was before the court and formed the basis for its ruling, failure to recite the formula was harmless error)].

The appellate courts are split on whether the *Collins* case requires reversal and remand in post-*Castro* cases where the trial court has not exercised its discretion on the record when balancing the probative value of the prior conviction against its prejudicial impact [*People v. Flanagan* (1986) 185 CA3d 764, 230 CR 64 (post-*Castro* case; reversed and remanded for on-the-record exercise of discretion); *People v. Lewis* (1987) 191 CA3d 1288, 237 CR 64 (held that the on-the-record requirement of *Collins* applies only to cases tried after Proposition 8 and before *Castro*, not applicable to post-*Castro* cases)].

[m] Same or Similar Conduct

Although convictions for the same crime should be used sparingly, the fact that prior convictions were for the same offense as that presently charged no longer compels their exclusion [*People v. Dillingham* (1986) 186 CA3d 688, 231 CR 20 (in prosecution for burglary, court had discretion to admit three prior burglary convictions to impeach defendant, although court erred in failing to exercise its discretion)].

[n] More Than One Prior Conviction

Under the *Beagle* analysis, more than one prior felony conviction may be admitted to impeach. However, the court must exercise its discretion and balance the risk of undue prejudice against the probative value of the evidence [*People v. Holt* (1984) 37 C3d 436, 208 CR 547, 690 P2d 1207] .

There is no automatic limitation on the number of priors admissible for impeachment. Moreover, a series of crimes relevant to credibility is more probative than is a single such offense. Thus, whether or not more than one prior felony should be admitted is simply one of the factors that must be weighed against the danger of prejudice [*People v. Dillingham* (1986) 186 CA3d 688, 231 CR 20] .

[o] Remoteness

Remoteness is a factor to be considered by the trial court when exercising its discretion. The court may consider the length of a time elapsed since the prior conviction, the length of the sentence served, the nature of the conviction (a 20-year-old conviction for battery is a stronger candidate for exclusion than one for a crime involving dishonesty), the age of the defendant when the prior was committed, and the defendant's conduct subsequent to the prior [*People v. Carpenter* (1999) 21 C4th 1016, 90 CR2d 607, 988 P2d 531 (convictions 17 years before trial were not too remote because the defendant had been incarcerated all but two of the years between the conviction and the trial); *People v. Nunley* (1985) 168 CA3d 225, 214 CR 82 (eight-year-old burglary conviction not too remote); *People v. DeCosse* (1986) 183 CA3d 404, 228 CR 114 (12-year-old burglary conviction not too remote for impeachment purposes)].

It is error to exclude remote conviction relating to dishonesty to impeach declarant where it is vital for defendant's defense [*People v. Stevenson* (1978) 79 CA3d 976, 145 CR 301] .

[p] Witness Other Than Criminal Defendant

The balancing process required by *Evid Code* § 352, that the trial judge must utilize when considering introduction of evidence of a prior felony conviction for the purpose of impeaching a witness's testimony, applies both to the witness who is a criminal defendant and to the witness who is not the accused in a criminal case. Although *Beagle* and subsequent cases involve witnesses who were criminal defendants, neither *Evid Code* § 352 nor *Evid Code* § 788 limits its application to criminal defendant witnesses. The class of witness to be impeached is irrelevant. Since a party may be prejudiced by admission of a non-party witness's prior felony conviction, the trial court must exercise discretion whenever a party moves for exclusion of a witness's prior felony conviction [*People v. Castro* (1985) 38 C3d 301, 211 CR 719, 696 P2d 111 ; *People v. Holt* (1984) 37 C3d 436, 208 CR 547, 690 P2d 1207 (murder convictions are not probative on issue of disposition to falsify); *People v. Woodard* (1979) 23 C3d 329, 152 CR 536, 590 P2d 391] .

The failure of a non-party witness to testify cannot be deemed prejudicial error where the court's ruling did not deprive the defendant of valuable corroborative testimony [*People v. Smith* (1984) 151 CA3d 89, 198 CR 623] .

[q] Other Issues

Evidence of a defendant's other violent criminal conduct, including all of the pertinent circumstances, is admissible whether or not the defendant has also been convicted of the crimes [*People v. Kelly* (1992) 1 C4th 495, 3 CR2d 677, 822 P2d 385 ; *People v. Fierro* (1991) 1 C4th 173, 3 CR2d 426, 821 P2d 1302 ; *People v. Ashmus* (1991) 54 C3d 932, 2 CR2d 112, 820 P2d 214] .

Evidence of "custody" on misdemeanor charges is generally not admissible to impeach a witness's credibility but may be admitted to show a witness's bias or motive to lie [*People v. Balderas* (1985) 41 C3d 144, 222 CR 184, 711 P2d 480 (police custody for misdemeanor may form the basis of a deal on charges pending against witness that may motivate him to lie)].

Where the prosecution introduced a prior conviction without revealing the identity of the offense, the defendant waived the claim of error by failing to object or to bring out the nature of the conviction on redirect [*People v. Duran* (1983) 140 CA3d 485, 189 CR 595 (failure to object was trial tactic, not ineffective assistance of counsel)].

The scope of inquiry, when a criminal defendant is impeached with evidence of a prior felony conviction, does not extend to the facts of the underlying offense. This rule does not apply, however, where the defendant first seeks to mislead a jury or minimize the facts of the earlier conviction [*People v. Heckathorne* (1988) 202 CA3d 458, 248 CR 399] .

Similarly, when a witness is impeached with a prior felony conviction, the conduct underlying the conviction is inadmissible, because it is irrelevant. A witness's testimonial admission of a prior felony conviction constitutes conclusive proof that the witness committed all acts necessary to constitute the offense. Even if the fact of conviction were still a disputed fact, evidence of how the witness committed the felony has no tendency in reason to disprove the disputed fact that he had been so convicted [*People v. Rhinehart* (1995) 33 CA4th 1, 39 CR2d 91 (defense witness tried to minimize perjury conviction)].

In seeking to impeach a witness by a prior conviction, simple questions designed to identify the particular felony involved in the conviction are allowable; thus, the name or nature of the crime may be asked as well as the date and place of conviction [*People v. Hall* (1970) 5 CA3d 116, 85 CR 188 (prior armed robbery conviction); *People v. Long* (1970) 6 CA3d 741, 86 CR 227 (simple description permitted)].

Although a defendant may, if he testifies, be impeached by proof of a prior felony conviction, the defendant has a constitutional privilege not to testify at all. If the defendant chooses not to testify, prosecution comment or jury instruction reflecting adversely upon this silence violates the federal constitutional privilege against self-incrimination [*People v. Cabrellis* (1967) 251 CA2d 681, 59 CR 795] .

That the prior convictions are identical with the charged crime no longer compels their exclusion for impeachment purposes [*People v. Stewart* (1985) 171 CA3d 59, 215 CR 716 (discretion is abused only if the court exceeds the bounds of reason)].

Evidence that a defendant has been convicted of a crime or has committed other crimes cannot be used to prove his criminal disposition or continual criminality [*People v. Laursen* (1968) 264 CA2d 932, 71 CR 71] .

A defendant, as a witness, may be impeached by proof of a prior conviction even where the defendant has admitted the prior conviction before trial [*People v. Knighton* (1967) 250 CA2d 221, 58 CR 700] .

While *Beagle* guidelines are not precisely applicable impeachment of a nondefendant witness by use of prior convictions, they should be considered [*People v. Kane (1984) 150 CA3d 523, 198 CR 73* (prior Mann Act conviction not relating to honesty of minor witness properly excluded)].

[r] Foreign Conviction

A foreign conviction may not be admitted for impeachment purposes unless it is shown to be a felony under the law of the jurisdiction in which it is sustained [*Truman v. Thomas (1980) 27 C3d 285, 165 CR 308, 611 P2d 902* (felony in Utah becomes misdemeanor where sentence is stayed and defendant is placed on probation and does not violate probation)].

[s] Sanitizing the Prior

In a prosecution for theft and unlawful driving or taking of a vehicle, the court erred in ruling that the defendant could be impeached by reference to his prior conviction of automobile theft as a conviction of a "felony involving theft." Sanitizing the prior conviction may lead to jury speculation that the offense was similar [*People v. Barrick (1982) 33 C3d 115, 187 CR 716, 654 P2d 1243* (analysis under *Beagle*)].

[t] Prior Arrest

Although a witness may be impeached by proof of conviction of a felony, he or she may not be impeached by evidence of mere arrest [*People v. Chandler (1957) 152 CA2d Supp 916, 313 P2d 223* (defendant may not be impeached by evidence of misdemeanor conviction); *People v. Gutierrez (1957) 152 CA2d 115, 312 P2d 29* (improper to ask if defendant had been in trouble with the police before); *People v. Kennedy (1962) 200 CA2d 814, 19 CR 683* (former arrests)].

[u] Juvenile Adjudication and Commitment to Youth Authority

A juvenile adjudication is a civil proceeding and not a "criminal proceeding" (as required under Proposition 8); therefore, it is error to admit a prior juvenile adjudication for impeachment. Since it is not a "felony conviction," use of *Beagle* analysis is also precluded [*People v. Sanchez (1985) 170 CA3d 216, 216 CR 21* (juvenile burglary)].

Under *Pen Code § 17(c)*, on discharge of a defendant from the Youth Authority, a criminal conviction shall be deemed a misdemeanor and therefore use of the conviction to impeach is barred by *Evid Code § 788*. However, where the defendant is on parole, the court found that he is not "discharged" under *Pen Code § 2117(c)* and therefore there was no error in using a felony conviction to impeach the defendant [*People v. Seaton (1983) 146 CA3d 67, 194 CR 32* (audit forgery conviction)].

[v] Bifurcation

In Division Three of the Court of Appeals, the court adopted the rule of practice of permitting bifurcation of the proceedings when the defendant pleads not guilty to the prior conviction. The jury is not informed of the prior conviction until the defendant is found guilty [*People v. Bracamonte (1981) 119 CA3d 644, 174 CR 191*]. Since this practice does not affect the use of the prior but only the procedure to be used for determining whether or not there is a useable prior, there is no conflict between the bifurcated trial procedure and Proposition 8 [*People v. Tipton (1984) 160 CA3d 853, 206 CR 821*]. The standard of prejudice to be used in evaluating the erroneous failure to bifurcate is the Watson standard [*People v. Golston (1986) 188 CA3d 346, 232 CR 788*].

[w] Trier of Fact's Knowledge of Prior Convictions

The intent of the Victims' *Bill of Rights* is that a prior felony conviction be made known to the trier of fact when such a prior is an element of the offense [*People v. Callegri* (1984) 154 CA3d 856, 202 CR 109 (trial court correct in denying defendant's motion to stipulate to a prior)].

[x] Expunged Conviction

An expunged felony conviction of a witness is not admissible for impeachment. The expungement limitation provided by *Evid Code* § 788(c) and (d) was not abrogated by *Cal Const, art I, § 28* [*People v. Field* (1995) 31 CA4th 1778, 37 CR2d 803 (expunged Oklahoma conviction not admissible for impeachment)].

The expungement procedure of another jurisdiction is substantially equivalent to California's, notwithstanding procedural differences, where both statutes were enacted to eradicate the record of conviction for certain purposes when a probationer has successfully completed probation [*People v. Field* (1995) 31 CA4th 1778, 37 CR2d 803 (expunged Oklahoma conviction not admissible for impeachment)].

[y] Plea Bargain or Immunity Agreements

Although technically not under a specific evidence code section, a witness's plea bargain or grant of immunity raises issues of the witness's credibility. Moreover, a coercive grant of immunity or plea agreement may violate due process [*People v. Medina* (1974) 41 CA3d 438, 116 CR 133 ("a defendant is denied a fair trial if the prosecution's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion"); *People v. Fields* (1983) 35 C3d 329, 197 CR 803, 673 P2d 680 (due process requirements of *Medina* are met if agreement permits witness to testify freely at trial and to respond to claim of breached agreement by showing testimony was full and truthful account); *People v. Garrison* (1989) 47 C3d 746, 254 CR 257, 765 P2d 419 (the grant of immunity or plea bargain cannot be "expressly contingent" on the witness sticking to a particular version); *People v. Badgett* (1995) 10 C4th 330, 41 CR2d 635, 895 P2d 877 (immunity agreement not conditioned on testimony consistent with earlier statements to police); *People v. Garcia* (1997) 56 CA4th 1349, 66 CR2d 350 (valid agreement where witness was not accomplice on whose testimony prosecution substantially based its case, and no requirement to conform testimony)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals General Overview Evidence Privileges Government Privileges Official Information Privilege Informer Privilege Torts Transportation Torts General Overview



54 of 85 DOCUMENTS

California Courtroom Evidence

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Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.52

16.52 Religious Belief or Lack--Evid Code § 789

[1] Evid Code § 789 Text

■ *Evid Code § 789.*

Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.

LegH: 1965 ch. 299.

[2] Commission Comments

This section codifies existing law [Cal Law Rev Com Comment; see *People v. Copsey* (1887) 71 C 548, 12 P 721] .

[3] Case Notes

A binder containing Muslim educational material was relevant on the issue of motive to murder and to join a conspiracy to commit murder but could not be admitted for the purpose of attacking the witness's credibility because of his religious views [*People v. Cooks* (1983) 141 CA3d 224, 190 CR 211 (binder was used in meetings of conspirators)].

Cross-examination based on bias from witness's status as fellow Jehovah's Witness with plaintiff was proper. While one cannot be precluded from testifying because he or she lacks religious belief, relevant inquiry whether a witness's membership in a particular religious sect or a tenet of his faith might tend to bias him is not prohibited [*Drake v. Dean* (1993) 15 CA4th 915, 19 CR2d 325] .

Legal Topics:

For related research and practice materials, see the following legal topics:
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OverviewEvidenceTestimonyCredibilityImpeachmentBias, Motive &
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55 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.53

16.53 Good Character of Witness--Evid Code § 790

[1] Evid Code § 790 Text

■ *Evid Code § 790.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section (along with *Evid Code § 1101*) restates and supersedes former CCP § 2053, as well as previous case law [Cal Law Rev Com Comment].

Unless the credibility of a witness is put in issue by an attack impugning his character for honesty or veracity, evidence of the witness's good character admitted merely to support his credibility introduces collateral material that is unnecessary to a proper determination of any legitimate issue in the action [Cal Law Rev Com Comment].

[3] Case Notes

Because Proposition 8 effected a pro tanto repeal of *Evid Code § 790*, there is no basis on which to distinguish *Evid Code §§ 786 and 787* [*People v. Harris* (1989) 47 C3d 1047, 255 CR 352, 767 P2d 619] .

Application of *Evid Code § 790* in criminal proceedings is barred by the enactment of the "Truth-in-Evidence" provision of Proposition 8 [Cal Const, art I, § 28(d)] which prohibits the exclusion of "relevant evidence in any criminal proceedings" [*People v. Taylor* (1986) 180 CA3d 622, 225 CR 733 (evidence of defendant's reputation for truth and veracity should have been admitted as it was critical, not collateral, in this case)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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56 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.54

16.54 Previous Statements--Evid Code § 791

[1] Evid Code § 791 Text

■ *Evid Code § 791.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section sets forth the conditions for admitting a witness's prior consistent statements for the purpose of supporting his credibility as a witness [Cal Law Rev Com Comment].

Evid Code § 791(a) permits the introduction of a witness's prior consistent statement if evidence of an inconsistent statement of the witness has been admitted for the purpose of attacking his credibility and if the inconsistent statement was made before the alleged inconsistent statement. This is an extension of the rule that evidence of a prior consistent statement is admissible to rehabilitate a witness following an express or implied charge of recent fabrication. Cases have held that the offering of a prior inconsistent statement is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made and justifies the admission of a consistent statement made prior to the alleged inconsistent statement [Cal Law Rev Com Comment].

Evid Code § 791(b) codifies existing law; a prior consistent statement is inadmissible if it was made after the time the improper motive is alleged to have arisen [Cal Law Rev Com Comment].

See *Evid Code* § 1236 to the effect that statements in compliance with *Evid Code* § 791 and consistent with testimony at the hearing are admissible as an exception to the hearsay rule and may be offered for the truth of the matter asserted [Cal Law Rev Com Comment].

[3] Case Notes

[a] Use of Prior Consistent Statement

In a murder prosecution, the victims' neighbor testified that he had seen last seen the victims on Thursday. He was impeached by his prior inconsistent statement, to a police sergeant, that he might have seen them on Friday. The witness said he had made a mistake when he said Friday. On rebuttal, the court admitted a different police officer's testimony that the witness had told him he last saw the victims either Thursday or Friday. The trial court upheld that police officer's testimony on several grounds, including its being a prior consistent statement that was used to rehabilitate the witness. The exception to *Evid Code* § 791(a) applied here, as the witness's statement to the sergeant ("I may have seen them Friday") was indeed inconsistent with the witness's trial testimony ("I didn't see them Friday"), while the witness's earlier statement to the other police officer ("I last saw them Thursday or Friday") was entirely consistent with his trial testimony ("I last saw them Thursday") [*People v. Cook* (2007) 40 C4th 1334, 1357, 58 CR3d 340, 157 P3d 950, cert den 128 SCt 443].

Admission of accomplice's prior consistent statement did not deny defendant his due process rights [*People v. DeSantis* (1992) 2 C4th 1198, 9 CR2d 628, 831 P2d 1210] .

Prior consistent statements that suggest mistake on the witness's part is inadmissible [*People v. Breaux* (1991) 1 C4th 281, 3 CR2d 81, 821 P2d 585] .

The reason for this limitation is that when there is a contradiction between the testimony of two witnesses, it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously [*People v. Gentry* (1969) 270 CA2d 462, 76 CR 336] .

The witness must testify at the present hearing to invoke this section [*People v. Hitchings* (1997) 59 CA4th 915, 69 CR2d 484 (evidence excluded because defendant did not testify at second trial)].

Prior consistent statement is admissible over hearsay objection if offered after evidence of inconsistent statement or express or implied charge of recent fabrication, bias, or improper motive [*People v. Randle* (1992) 8 CA4th 1023, 10 CR2d 804] .

[b] Bias or Motive to Fabricate

A prior consistent statement logically bolsters a witness's credibility whenever it predates any motive to lie, not just when it predates all possible motives, and accordingly under *Evid Code* § 791, a prior consistent statement is admissible as long as it was made before the existence of any one of the motives that the opposing party expressly or impliedly suggests may have influenced the witness's testimony [*People v. Hillhouse* (2002) 27 C4th 469, 117 CR2d 45, 40 P3d 754] .

There was no improper motive when a witness made statements shortly after a murder and before the witness was charged with the crime [*People v. Bolin* (1998) 18 C4th 297, 75 CR2d 412, 956 P2d 374 (cross-examination implied witness's attorney encouraged witness to fabricate accusations against defendant); *People v. Flores* (1982) 128 CA3d

512, 180 CR 368 (proffered statement not made before improper motive was alleged to have arisen)).

The party attempting to use prior consistent statements has the burden of proving that no improper motive existed at the time the statements were made [*People v. Frank* (1990) 51 C3d 718, 274 CR 372, 798 P2d 1215 (evidence that witness was motivated by promises of leniency); *People v. Coleman* (1969) 71 C2d 1159, 80 CR 920, 459 P2d 248] .

There is an exception to the requirement that the prior consistent statement must have been made before an improper motive is alleged to have existed: this involves the situation where the charge of recent fabrication is made by negative evidence that the witness did not speak of the matter before when it would have been natural to speak, and the witness's silence is alleged to be inconsistent with trial testimony. In this scenario, the evidence of the consistent statement becomes proper because the supposed fact of not speaking formerly, from which there would be an inference of recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story [*People v. Williams* (2002) 102 CA4th 995, 125 CR2d 884] .

Legal Topics:

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57 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
F. Witnesses (Evid Code §§ 700-795)

Chapter 16 Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis Evidence
Code §§ 700-795

1-16 California Courtroom Evidence 16.55

16.55 Previous Hypnosis of Witness--Admissibility of Evidence--Evid Code § 795

[1] Evid Code § 795 Text

■ *Evid Code § 795.*

(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.

LegH: 1984 ch. 479; 1987 ch. 285; 1996 ch. 67; 2002 ch. 1013.

[2] Case Notes

Evid Code § 795 was enacted in response to *People v. Shirley* (1982) 31 C3d 18, 181 CR 243, 723 P2d 1354, which held "that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward." Events in issue were characterized as those that were "the subject of the hypnotic session" [*People v. Aguilar* (1990) 218 CA3d 1556, 267 CR 879].

The reason for the *Shirley* rule is that the use of hypnosis to improve the memory of a potential witness is not accepted as reliable by a consensus of the relevant scientific community, and hence the witness's post-hypnotic testimony is inadmissible under the *Kelly-Frye* test [*People v. Miller* (1990) 50 C3d 954, 269 CR 492, 790 P2d 1289 ; see generally *People v. Kelly* (1976) 17 C3d 24, 130 CR 144, 549 P2d 1240 ; *Frye v. United States* (DC Cir 1923) 293 F 1013].

This standard governs the admissibility in California of all prehypnotic evidence predating January 1, 1985--the effective date of *Evid Code § 795*--regardless of when such evidence was, or may in the future be, offered at trial [*People v. Hayes* (1989) 49 C3d 1260, 265 CR 132, 783 P2d 719 (victim's testimony, including lineups and in-court identifications of defendant were inadmissible as victim had no occasion to identify the defendant until after undergoing hypnosis; on retrial, prehypnotic testimony may be permitted)].

Strategic Point:



Evid Code § 795 attempted to reconcile *Shirley* with Proposition 8, which in June 1982, amended the California Constitution to provide that, with certain specified exceptions, all relevant evidence is admissible [*Cal Const, art I, § 28*]. *Evid Code § 795* was enacted to provide a middle ground and permit a witness to testify after having been hypnotized only if strict guidelines had been followed that would insure an adequate record upon which to judge whether hypnosis improperly contaminates the witness. The enactment of *Evid Code § 795* did not, however, abrogate the exception recognized in *Shirley* for the testimony of a defendant. When a defendant himself submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. Thus, the admissibility of post-hypnosis testimony of a defendant is governed by *Shirley* and is not affected by *Evid Code § 795* [*People v. Aguilar* (1990) 218 CA3d 1556, 267 CR 879].

Distinguish:

Under the standard for admitting "prehypnotic evidence" generally adopted by a unanimous body of sister-state decisions that have addressed the question, a witness is permitted to testify to events that the trial court finds the witness both recalled and related to others before undergoing hypnosis or that were not discussed during the hypnotic session. The probable reliability and potential importance of the evidence justifies its admission where it is free of the taint of suggestive pretrial identification procedures. The opposing party is permitted to introduce evidence of the fact and method of the hypnosis, and its potential effects on the witness's recollection.

Error in admitting the testimony of a previously hypnotized witness is not reversible error per se but is subject to the prejudicial-error standard adopted in *People v. Watson* (1956) 46 C2d 818, 299 P2d 243 [*People v. Shirley* (1982) 31 C3d 18, 181 CR 243, 723 P2d 1354] .

The *Shirley* rule applies retroactively to all cases not yet final as of the date *Shirley* was decided [*People v. Guerra* (1984) 37 C3d 385, 208 CR 162, 690 P2d 635] .

Use of sodium amytal to refresh repressed memories lacks scientific acceptance to pass *Kelly* experimental evidence test [*Ramona v. Superior Court (Ramona)* (1997) 57 CA4th 107, 66 CR2d 766] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Witnesses General Overview Evidence Testimony Credibility Impeachment Mental Incapacity Healthcare Law Business Administration & Organization General Overview



58 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.syn

§ 17.syn Synopsis to Chapter 17: Nonexpert and Expert Opinion Evidence Code §§ 800-897

17.01 Non-Experts' Opinions--Evid Code § 800

[1] Evid Code § 800 Text

[2] Commission Comments

[3] Case Notes

[a] Construction of Statute

[b] Admissible Lay Opinions

[c] Inadmissible Lay Opinions

17.02 Limits of Experts' Opinions--Evid Code § 801

[1] Evid Code § 801 Text

[2] Commission Comments

[3] Case Notes

[a] Discretion of Court

[b] Basis for Opinion Must Be Perceived, Personally Known, or Made Known

[c] Opinion on Unreliability of Eyewitness Identification

[d] Opinion on Cause and Time of Death

[e] Opinion on Causation

[f] Opinion on Standard of Care

- [g] Opinion on Damages
- [h] Opinion on Subject Not Within Common Experience
- [i] Opinion on Street Gangs
- [j] Matter Relied Upon by Expert
- [k] Psychological Profile Evidence
- [l] Opinion Based on Hearsay
- [m] Hypothetical Questions
- [n] Effect of Expert Testimony on Credibility
- [o] Witness Not Qualifying as Expert
- [p] Matter Not Subject to Expert's Opinion
- [q] Unacceptable Basis for Expert's Opinion
- [r] Inadmissible Opinion on Subject Within Common Experience

17.03 Basis and Reason for Opinions--Evid Code § 802

- [1] Evid Code § 802 Text
- [2] Commission Comments
- [3] Case Notes

17.04 Opinions Based on Improper Matter--Exclusion--Evid Code § 803

- [1] Evid Code § 803 Text
- [2] Commission Comments
- [3] Case Notes

17.05 Opinion of Expert Based on Opinion of Other--Evid Code § 804

- [1] Evid Code § 804 Text
- [2] Commission Comments
- [3] Case Notes

17.06 Opinion Embracing Ultimate Issue--Evid Code § 805

- [1] Evid Code § 805 Text
- [2] Commission Comments
- [3] Case Notes

[a] Construction of Statute

[b] Defendant's Mental State

[c] Guilt or Innocence

17.07 Limits of Applicability--Evid Code § 810

[1] Evid Code § 810 Text

17.08 Value of Property--Evid Code § 811

[1] Evid Code § 811 Text

[2] Case Notes

17.09 Just Compensation Interpretation in Substantive Law Unchanged--Evid Code § 812

[1] Evid Code § 812 Text

[2] Case Notes

17.10 Opinion Testimony--Property Valuation--Witness Qualifications--Evid Code § 813

[1] Evid Code § 813 Text

[2] Explanation of Section

[3] Case Notes

[a] Purpose of Rule

[b] Eminent Domain Case

[c] Unlawful Detainer Case

[d] Who May Testify as to Value

[e] Limited Effect of Non-Opinion Evidence

17.11 Opinion Testimony--Property Valuation--Limits of Opinion--Evid Code § 814

[1] Evid Code § 814 Text

[2] Case Notes

[a] Market Value as Basic Measure

[b] Appraisal Trinity

17.12 Repealed--Evid Code § 814.5

17.13 Valuation Basis for Opinion--Sale Price--Terms of Sale--Evid Code § 815

[1] Evid Code § 815 Text

[2] Case Notes

17.14 Valuation of Property Based on Comparable Property--Evid Code § 816

[1] Evid Code § 816 Text

[2] Explanation of Section

[3] Case Notes

[a] Opinion of Expert Witness

[b] Requirement of Comparability

[c] Function of Judge and Jury

[d] Condemnation Proceeding

17.15 Valuation Based on Rental or Lease Terms--Evid Code § 817

[1] Evid Code § 817 Text

[2] Case Notes

17.16 Valuation Based on Rental Value of Comparable Property--Evid Code § 818

[1] Evid Code § 818 Text

[2] Case Notes

17.17 Valuation Based on Capitalized Reasonable Net Rental Value--Evid Code § 819

[1] Evid Code § 819 Text

[2] Case Notes

17.18 Valuation-Improvements--Evid Code § 820

[1] Evid Code § 820 Text

[2] Case Notes

17.19 Valuation--Area Improvements--Evid Code § 821

[1] Evid Code § 821 Text

17.20 Valuation Limitations--Matters Inadmissible as Evidence--Evid Code § 822

[1] Evid Code § 822 Text

[2] Commission Comments

[a] 2000 Amendments

[3] Case Notes

[a] Acquisition for Public Use--Property that Could Have Been Taken by Eminent Domain

[b] Offered or Listing Price of Other Property

[c] Opinion as to Value of Other Property

[d] Noncompensable Items of Value, Damage, or Injury

[e] Market Value of Property

17.21 Valuation Method Optional--Evid Code § 823

[1] Evid Code § 823 Text

[2] Senate Judiciary Committee Comment

17.22 Valuation--Nonprofit, Special Use Property--Evid Code § 824

[1] Evid Code § 824 Text

17.23 Basis for Sanity Opinion--Evid Code § 870

[1] Evid Code § 870 Text

[2] Commission Comments

[3] Case Notes

[a] Intimate Acquaintance

[b] Subscribing Witness

17.24 Repealed--Evid Code §§ 890-895

17.25 Repealed--Evid Code § 895.5

17.26 Repealed--Evid Code §§ 896, 897



59 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 800 through 897* on opinion evidence of experts and nonexperts.



Cross Reference:

Discussion of opinion evidence and appropriate forms, see *California Trial Guide, Unit 60, Opinion Testimony, § 60.01 et seq.* (Matthew Bender); *California Forms of Pleading and Practice, Ch. 551, Trial, § 551.70* (Matthew Bender); Imwinkelried et al., *California Evidentiary Foundations*, Ch. 8, *Opinion Evidence* (Matthew Bender); *Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, *Questioning Witnesses and Objections* (Matthew Bender).



60 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.01

17.01 Non-Experts' Opinions--Evid Code § 800

[1] Evid Code § 800 Text

■ *Evid Code § 800.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

"Opinion" includes all opinions, inferences, conclusions, and other subjective statements made by a witness [Cal Law Rev Com Comment].

Evid Code § 800 does not make inadmissible an opinion that is admissible under existing law, even if the requirements of the section are not satisfied (for example, the opinion as to the value of one's property or services) [Cal Law Rev Com Comment].

Distinguish: *Evid Code § 800(b)* rejects the traditional rule that lay witnesses can only testify as to the facts and the traditional exception to that rule, that lay opinion is admissible only where necessary. The "helpfulness" standard of *Evid Code § 800(b)* does, however, have its roots in case law [see *Nolan v. Nolan* (1909) 155 C 476, 101 P 520]. The witness must base his or her opinion on facts of which he personally has knowledge and to which the witness has testified.

[3] Case Notes

[a] Construction of Statute

The lay opinion rule merely requires that witnesses express themselves at the lowest possible level of abstraction. Conclusions should be left to the trier of fact whenever feasible, but when the details observed, even though recalled, are too complex or too subtle for concrete description by the witness, he or she may state a general impression [*People v. Hurlic* (1971) 14 CA3d 122, 92 CR 55 (police officer's opinion that defendant waived *Miranda* rights); *Angelus Chevrolet v. State of California* (1981) 115 CA3d 995, 171 CR 801 ; *Chatman v. Alameda County Flood Control and Water Conservation District* (1986) 183 CA3d 424, 228 CR 257 (maintenance engineer's testimony on condition of gutter); *People v. Torres* (1995) 33 CA4th 37, 39 CR2d 103 (improper for police officer to testify as to meaning of terms "robbery" and "extortion," and to express opinion that the crimes committed in the case were robberies)].

[b] Admissible Lay Opinions

Lay opinion testimony of the identity of a person in a video tape of a robbery was permitted, although the witnesses did not personally perceive the robbery but did have personal knowledge as to defendant's appearance at the time the robbery was committed. The court analogized to the identification of handwriting by lay opinion evidence provided for in *Evid Code* §§ 1416 and 1417. The two predicates for admissibility are (1) that the witness testify from personal knowledge of defendant's appearance at or before the time the photograph was taken, and (2) that the testimony aid the trier of fact in determining the crucial identity issue [*People v. Mixon* (1982) 129 CA3d 118, 180 CR 772 (probative value of officer's identification of surveillance photograph outweighed prejudice); *People v. Perry* (1976) 60 CA3d 608, 131 CR 629 (identification by defendant's parole officer); *People v. Ingle* (1986) 178 CA3d 505, 223 CR 723 (witness's adequate opportunity to view defendant's physical features during the robbery and to relate her observations to the video picture satisfies dual standard of *Evid Code* § 800)].

A lay witness may testify as to relevant personal knowledge of the events, as well as reasons why the witness's recollection is credible. A witness may also be asked if the witness knows of a reason that another witness may be lying or mistaken, provided that the witness is not asked to conjecture [*People v. Chatman* (2006) 38 CA4th 344, 382, 42 CR3d 621, 133 P3d 534 , *cert denied*, 127 S Ct 938] .

In an action against a cosmetics company for misrepresentation of the state of its business when it raised money by selling notes to investment funds, one plaintiff's managing director and its vice-president for investment analyst were properly permitted to give a lay opinion of the value of their property, i.e., that the notes became worthless after they were purchased [*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 CA4th 835, 68 CR3d 828] .

Lay witnesses were permitted to express opinions of the following kinds:

- A witness's opinion that he had trouble remembering things "because of his brain cells" [*People v. DeSantis* (1992) 2 CA4th 1198, 9 CR2d 628, 831 P2d 1210] .
- A police officer's opinion that the defendant's shoe soles and footprints at the crime scene were comparable [*People v. Maglaya* (2003) 112 CA4th 1604, 6 CR3d 155 ; *People v. Lucero* (1998) 64 CA4th 1107, 75 CR2d 806] .
- A witness's opinion on the state of another's intoxication based on commonly recognized signs such as odor of alcohol, slurred speech, and unsteadiness [*People v. Williams* (1992) 3 CA4th 1326, 5 CR2d 130 ; *People v. Garcia* (1972) 27 CA3d 639, 104 CR 69 (opinion that person was drunk)].
- The opinion that people engaged in a discussion were "angry" [*People v. Deacon* (1953) 117 CA2d 206, 255 P2d 98] .

● The opinion that someone appeared to be "trying to break up a fight" [*People v. Harris* (1969) 270 CA2d 863, 76 CR 130] .

[c] Inadmissible Lay Opinions

In a kidnapping prosecution, the trial court did not abuse its discretion in ruling that a question, asking the witness whether she thought the two vehicle occupants were acting as if they knew each other, called for a speculative answer. The court was implicitly ruling that the question called for a conjectural lay opinion. Such evidence would not be helpful to a clear understanding of the witness's testimony [*Evid Code* § 800(b)]. The court's ruling did not fall outside the bounds of reason [*People v. Thornton* (2007) 41 C4th 391, 429, 61 CR3d 461, 161 P3d 3 , cert den 2007 US LEXIS 12579] .

A lay witness may not be asked to speculate whether another witness is lying [*People v. Chatman* (2006) 38 C4th 344, 382, 42 CR3d 621, 133 P3d 534 , cert denied, *Chatman v. California* (2007) 127 S Ct 938, 166 L Ed2d 718] .

Matters beyond common experience are not proper subjects of lay opinion testimony [*People v. Williams* (1992) 3 CA4th 1326, 5 CR2d 130] .

A lay witness, including a party, may not render a medical opinion as to whether a person has a medical condition and whether that medical condition requires particular advice be given as to risks of a surgery [*Jambazian v. Borden* (1994) 25 CA4th 836, 30 CR2d 768 (in medical malpractice informed consent case, on motion for summary judgment, plaintiff's declaration that he had diabetes, which made surgery risky, was inadmissible over objection)].

Opinions of claims adjusters as to insurance coverage were inadmissible speculation by nonexperts (that is, the legal opinion of a lay witness) [*Pond v. Insurance Co. of North America* (1984) 151 CA3d 280, 198 CR 517] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Summary Judgment Supporting Materials Affidavits Criminal Law & Procedure Appeals Standards of Review Abuse of Discretion General Overview Evidence Demonstrative Evidence Visual Formats



61 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.02

17.02 Limits of Experts' Opinions--Evid Code § 801

[1] Evid Code § 801 Text

- *Evid Code § 801.*

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.

LegH: 1965 ch. 299.

As to expert opinion testimony regarding experimental (Kelly-Frye), scientific, and psychological evidence, see Chapter 25.

[2] Commission Comments

"Matter" encompasses every conceivable basis for an opinion, including facts, data, a witness knowledge, experience, and other intangibles upon which an opinion may be based [Cal Law Rev Com Comment].

Under *Evid Code § 801(b)*, the matter upon which an expert's opinion is based must meet each of three separate but related tests:

- The matter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed.
- Without regard to the means by which an expert familiarizes himself with the matter upon which his

opinion is based, the matter relied upon by the expert in forming his opinion must be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates, whether or not such subject matter is admissible.

■ Thus, the opinion of an expert must not only be on a proper subject, but must be founded on relevant, reliable (as contrasted with irrelevant and speculative) subject matter.

In large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinions [Cal Law Rev Com Comment].

If the fact sought to be proved is one within the general knowledge of laymen, expert testimony is not required. Expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education [Cal Law Rev Com Comment].

In regard to some matters of expert opinion, an expert must, if he is going to give an opinion that will be helpful to the jury, rely on reports, statements, and other information that might not be admissible evidence [Cal Law Rev Com Comment].

An expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this state to be an improper basis for an opinion [Cal Law Rev Com Comment].

In some fields of expert knowledge (for example, medicine), an expert may rely on hearsay, that is, statements made by and information received from other persons considered for the truth of the matter asserted therein (for example, physicians may rely on statements from patients and other physicians); in some other fields of expert knowledge, an expert may not do so (for example, an investigator of automobile accidents) [Cal Law Rev Com Comment].

[3] Case Notes

[a] Discretion of Court

The admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission. It will be excluded only when it would add nothing at all to the jury's common fund of information [*People v. McAlpin* (1991) 53 C3d 1289, 283 CR 382, 812 P2d 563 (expert opinion on child molestation and commonly held misconceptions)].

[b] Basis for Opinion Must Be Perceived, Personally Known, or Made Known

This requirement assures the expert's acquaintance with the facts of a particular case either by his personal perception or observation or by means of assuming facts not personally known to the witness [*People v. Ramos* (1997) 15 C4th 1133, 64 CR2d 892, 938 P2d 950 (expert opinion properly excluded where expert lacked personal knowledge of prison conditions on which he was testifying)].

[c] Opinion on Unreliability of Eyewitness Identification

Expert testimony that informs the jury of psychological factors that may impair the accuracy of eyewitness identification is admissible. Where the expert testifies, not concerning his opinion but concerning facts within his special knowledge, *Evid Code* § 801 is inapplicable. Such testimony is not directed toward the truth-telling abilities of a particular witness, but is a review of the professional literature of certain eyewitness identification problems. It is not necessary that jurors be totally ignorant of the subject matter of the opinion; such testimony is admissible where it "assists" the trier of fact. Such testimony does not usurp the function of the jury because the jury still has the task of judging credibility [*People v. McDonald* (1984) 37 C3d 351, 208 CR 236, 690 P2d 709 (not to allow such testimony

concerning cross-racial identification errors was prejudicial abuse of discretion)].

When the prosecution case was not premised solely on eyewitness identification testimony but substantially corroborated by other evidence, exclusion of expert testimony on psychological factors that impair eyewitness identification was not error [*People v. Plasencia* (1985) 168 CA3d 546, 214 CR 316 (eyewitness identification was substantially corroborated by other evidence of independent reliability)].

Also, expert opinion on eyewitness identification may be excluded when the offered opinion does not require utilization of any expertise beyond that possessed by the jurors [*People v. Sandoval* (1994) 30 CA4th 1288, 36 CR2d 646 (exclusion of expert's opinion that defendant's particular lineups were unfair was not error, because the offered opinion did not require utilization of any expertise beyond that possessed by the jurors, and because the eyewitness identification was substantially corroborated by other evidence)].

[d] Opinion on Cause and Time of Death

A forensic pathologist who has performed an autopsy is generally permitted to offer an expert opinion not only as to the cause and time of death but also as to circumstances under which the fatal injury could or could not have been inflicted [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1, 928 P2d 485 (in determining how fatal gunshot occurred, expert opinion may eliminate certain body positions from the realm of possibility)].

[e] Opinion on Causation

In an action for breach of contract arising from the rescission of an insurance policy, the trial court did not abuse its discretion in excluding the declaration of plaintiff's expert. It might be possible to submit evidence, even expert evidence, as to whether an insurer reasonably relied on certain representations or that representations were not material (for example, evidence of industry practice might conceivably be relevant). However, plaintiff's expert expressly stated her opinion that the representations at issue were not material to the underwriting of this policy, and alternately that the representations could not have been reasonably relied upon and should have been investigated further. These conclusions were based on speculation about what defendant's underwriter knew, considered, or concluded. The trial court had discretion to conclude that the expert's opinions were not based on reliable matter under *Evid Code* § 801(b). Even if materiality could be a question of fact, testimony as to what someone else considered material is the type of speculation that a trial court may, in its discretion, exclude as not being appropriate opinion evidence. Moreover, without abusing its discretion, the trial court could have determined that much of the expert's discussion of what the underwriter should have done constituted inadmissible conclusions [*Mitchell v. United National Ins. Co.* (2005) 127 CA4th 457, 477-478, 25 CR3d 627 (affirming judgment for defendant)].

An expert witness does not possess a carte blanche to express any opinion within the area of expertise. An expert opinion that there is some theoretical possibility the negligent act could have been a cause-in-fact of a particular injury is insufficient to establish causation. Instead, the 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 that the negligent act was a cause-in-fact of the plaintiff's injury [*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 CA4th 1108, 8 CR3d 363 (in medical malpractice action, expert's inadequate opinion was inadmissible)].

When medical opinion testimony is introduced to establish causation of an injury, medical opinion of the probability that an event caused an injury can support a finding of proximate cause [*Robison v. Leigh* (1957) 153 CA2d 730, 732, 315 P2d 42 ; *Francis v. Sauve* (1963) 222 CA2d 102, 118, 34 CR 754 (medical testimony tending to prove only a possibility that an event was the proximate cause of an injury is insufficient to sustain a recovery)].

[f] Opinion on Standard of Care

Expert testimony is admissible to establish the standard of care applicable to a lawyer's performance of an engagement and whether he has performed to that standard [*Wright v. Williams* (1975) 47 CA3d 802, 121 CR 194 (expert testimony is required where the attorney is a specialist)].

[g] Opinion on Damages

Expert testimony alone is a sufficient basis for an award of lost profits in the new business context if the expert's opinion is supported by tangible evidence with a substantial and sufficient factual basis, rather than by mere speculation and hypothetical situations [Kids' Universe v. In2Labs (2002) 95 CA4th 870, 116 CR2d 158 (summary judgment was proper in a breach of contract action to recover lost profits; because of the speculative nature of the evidence, plaintiffs failed to raise a triable issue of material fact as to their ability to prove lost profits)].

To support recovery for prospective medical damages, opinion testimony regarding future consequences must establish that future results are reasonably certain to occur [*Bauman v. San Francisco* (1940) 42 CA2d 144, 163, 108 P2d 989] .

[h] Opinion on Subject Not Within Common Experience

Notwithstanding the ability of jurors to review the evidence before them and draw commonsense inferences, it may aid them to learn from an expert in crime scene analysis, who has examined not only the evidence in the particular case but has in mind his or her experience in analyzing hundreds of other cases, to determine whether certain features that appear in all the charged crimes are comparatively rare and therefore suggest that the crimes were committed by the same person. In the present murder case, the crime reconstruction expert testified that in his extensive experience the tightly clustered wound pattern was "a distinct common denominator" that was "rare" in other cases. The trial court did not err in admitting this evidence as helpful to the jury [*People v. Prince* (2007) 40 C4th 1179, 1223-1226, 57 CR3d 543, 156 P3d 1015 , cert den 2008 US LEXIS 301] .

In an action for damages arising out of cancellation of a music tour, an entertainment attorney's testimony related primarily to the customs and practices of the entertainment industry, specifically, the music concert business. Because these customs and practices were sufficiently beyond common experience, the expert opinion was admissible to assist the trier of fact. Even if some of the opinions about the existence of a valid contract expressed by the plaintiff's expert invaded the province of the jury, the error did not require reversal since those opinions were directly contradicted by defendants' several experts [*PM Group, Inc. v. Stewart* (2007) 154 CA4th 55, 64 CR3d 227] .

In an action for breach of fiduciary duty arising out of a corporate merger, the trial court did not err in limiting plaintiff's expert's testimony. The trial court properly prohibited any opinions relating to the fraud causes of action since the expert had testified at his deposition that he had formed no opinions on those causes of action. The only remaining cause of action to which the expert could properly have testified was the cause of action for breach of fiduciary duty. To the extent that the excluded testimony would have described the fiduciary relationship, it was properly excluded as pertaining to a question of law. As to the factual element of breach, the expert was allowed to give his opinion as to how defendants breached their duty to plaintiff. A discussion of the customs and practices in the securities industry would not have added any substance to plaintiff's fiduciary duty claim [*Amtower v. Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 71 CR3d 361] .

The plaintiff in a medical malpractice action based on a rare complication of back surgery required expert testimony to establish a deviation from the standard of care [*Curtis v. Santa Clara Valley Medical Center* (2003) 110 CA4th 796, 2 CR3d 73] .

The feasibility of routine anti-HBC testing and the relationship between a hospital and blood banks required expert testimony [*Osborn v. Irwin Memorial Blood Bank* (1992) 5 CA4th 234, 7 CR2d 101] .

A fair rate of return on a mobile home park is a proper matter for expert opinion [*Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180 CA3d 152, 225 CR 364] .

A consumer's expectation on mammary implants was outside the realm of common experience [*Rosburg v. Minnesota Mining and Manufacturing Co.* (1986) 181 CA3d 726, 226 CR 229] .

What tax benefits could be expected in a given situation is outside common experience [*People v. Fahy* (1970) 13 CA3d 808, 92 CR 451] .

[i] Opinion on Street Gangs

Criminal street gang activity may be a proper subject of expert opinion testimony [*People v. Gonzalez* (2006) 38 C4th 932, 944, 44 CR3d 237, 135 P3d 649 ; *People v. Ward* (2005) 36 C4th 186, 209, 30 CR3d 464, 114 P3d 717 ; *People v. Williams* (1997) 16 C4th 153, 66 CR2d 123, 940 P2d 710]. If a witness has spent a number of years investigating and associating with juvenile gangs, the trial court could reasonably conclude that he is sufficiently familiar with gang terminology to accurately interpret the words used by defendants accused of such activity [*People v. Champion* (1995) 9 C4th 879, 39 CR2d 547, 891 P2d 93] .

Exception: An expert's opinion on gangs was properly excluded when he was unwilling to disclose the identities of the gang members with whom he conversed to get the information, because that impaired the prosecution's ability to cross-examine [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

Gang culture, habits, and psychology proper subject for expert testimony [*People v. Valdez* (1997) 58 CA4th 494, 68 CR2d 195] .

Police officer's testimony as to primary activities of criminal street gang was based on his background and training, personal knowledge and experience with gang, information from contacts and conversations with gang members, and information from police investigative files [*People v. Loeun* (1994) 33 CA4th 1509, 40 CR2d 160] .

Police officer's opinion had sufficient foundation. Evidence was probative on intent and motive. The court properly exercised discretion under *Evid Code* § 352 [*People v. Olguin* (1994) 31 CA4th 1355, 37 CR2d 596] .

Officers did not simply recite information told to them by gang members, but provided foundational testimony for their opinions and were sufficiently corroborated [*People v. Gamez* (1991) 235 CA3d 957, 286 CR 894] .

[j] Matter Relied Upon by Expert

An expert's opinion must be supported by sufficient facts to validate it in the eyes of the law. Speculative and self-serving expert testimony is an insufficient basis for plaintiffs' claims [*Eddins v. Redstone* (2005) 134 CA4th 290, 317, 35 CR3d 863 (alleged economic conspiracy not supported by expert testimony)].

Experts are not absolutely barred from relying on information from lay persons when reaching their conclusions; rather, the trial court must consider the propriety of relying on such information on a case-by-case basis [*Board of Trustees v. Porini* (1968) 263 CA2d 784, 70 CR 73] .

Evid Code § 801 codifies prior law, but expands the area of what an expert may base for his opinion. Although the basis for his opinion may not in itself be admissible, it must be of a type that "reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. ..." [*Lockheed Litigation Cases* (2004)

115 CA4th 558, 115 CA4th 621, 10 CR3d 34 (trial court properly excluded expert opinion on causation of death, where opinion had no reasonable basis); *Ramona v. Superior Court* (1997) 57 CA4th 107, 66 CR2d 766 (expert testimony need not be based on a certainty, but may be based on a probability; lack of absolute scientific certainty does not deprive opinion of evidentiary value); *City of San Diego v. Sobke* (1998) 65 CA4th 379, 76 CR2d 9 (improper valuation of goodwill in condemnation proceeding excluded as not used by expert in the field); *Nortica v. State Compensation Ins. Fund* (1999) 70 CA4th 911, 83 CR2d 89 (expert may rely on industry trade paper interview made by defendant's corporate president)].

The information upon which the opinion is based need not be in evidence [*People v. Chapman* (1968) 261 CA2d 149, 67 CR 601 (written admission)].

Such evidence should be allowed to serve as the basis of expert opinion, however, only to the extent that it is reasonably reliable [*Board of Trustees v. Porini* (1968) 263 CA2d 784, 70 CR 73 (mental condition); *People v. Beach* (1968) 263 CA2d 476, 69 CR 394 (insanity)].

In an eminent domain action, a condemned business's expert conceded the business had no goodwill under the excess profit test. However, the trial court did not err in admitting expert testimony valuing the goodwill of a business by the "cost to create" approach, which no previous case had recognized as an acceptable method of valuing goodwill. In this case, a previously profitable auto lube business had experienced several unprofitable years while a large redevelopment project was being built nearby. The expert testified that the owner had reasonably spent over \$200,000 to position its business, pending completion of the nearby commercial development. However, the business was condemned, and the redevelopment agency offered it \$35,000 for goodwill. The business had not yet experienced excess profits but clearly had great potential for increased patronage and profit, including a desirable location. The expert estimated that the business could have been sold for over \$400,000, of which over half was due to goodwill. The business clearly had goodwill within the meaning of the statute and would experience a total loss of goodwill due to condemnation of the property [*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 CA4th 1095, 64 CR3d 519 (affirming amount of jury verdict for goodwill, and affirming final judgment of condemnation)].

Expert's testimony in a child molestation case was not based on objective evidence, but on one interview with defendant. It was held to be admissible character evidence because "lack of sexual deviance is a character trait subject to proof by opinion testimony." The absence of standardized testing goes to weight, not relevance [*People v. McAlpin* (1991) 53 C3d 1289, 283 CR 382, 812 P2d 563].

Statements made while under hypnosis may not be relied upon by a psychologist in forming an opinion about a patient's past mental state, such as whether a defendant was suffering from post-traumatic stress disorder, because a proper foundation was not made that hypnosis may reasonably be relied on by an expert forming an opinion [*People v. Parnell* (1993) 16 CA4th 862, 20 CR2d 302] .

Expert testimony about the unreliability or lack of credibility of the testimony of prison inmates was not admissible because it was irrelevant and not the subject of legitimate scientific evidence from expert witnesses [*People v. Johnson* (1993) 19 CA4th 778, 23 CR2d 703] .

When there is little or no direct evidence on which the expert can base an opinion, the expert may have to turn to forms of circumstantial evidence on which he might not otherwise rely [*Buckwalter v. Airline Training Center* (1982) 134 CA3d 547, 184 CR 659 (suit for wrongful death following unwitnessed air collision)].

[k] Psychological Profile Evidence

In the absence of any evidence that the scientific community has developed any standard "profile" of a population group that would enter into a medical diagnosis of an individual, testimony concerning whether an individual's psychological

characteristics matched that of the group is inadmissible [*People v. Ruiz* (1990) 222 CA3d 1241, 272 CR 368 (expert testimony that defendant did not share certain characteristics commonly shared by pedophiles properly excluded)].

Profile evidence is generally inadmissible to prove guilt [*People v. Robbie* (2002) 92 CA4th 1075, 112 CR2d 479 (reversible error in admission of profile evidence demonstrating that defendant's behavior during sexual encounter was consistent with behavior pattern common to rapists; expert testimony prejudicially bolstered victim's credibility)].

It is now settled that psychological opinions based upon personal examination and an analysis of accepted psychological tests, such as the MMPI and MCMI, may be admitted as character evidence tending to show that an individual was or was not likely to have committed a particular act, and that the admissibility of such evidence need not be tested under the *Kelly-Frye* standard [*People v. Stoll* (1989) 49 C3d 1136, 265 CR 111, 783 P2d 698] .

Expert testimony is proper to dispel misconceptions regarding behavior of sexual abuse victims [*People v. Houseley* (1992) 6 CA4th 947, 8 CR2d 431 ; *People v. Gilbert* (1992) 5 CA4th 1372, 7 CR2d 660 (child sexual abuse)].

[I] Opinion Based on Hearsay

An expert may generally base his or her opinion on any matter known to him or her, including hearsay not otherwise admissible, which may be reasonably relied on for that purpose [*People v. Montiel* (1993) 5 C4th 877, 21 CR2d 705, 855 P2d 1277 (defendant's drug use)].

If an expert is using hearsay to support his opinion, it should be considered improper unless there are elements of necessity and indications of reliability [*People v. Carpenter* (1997) 15 C4th 312, 63 CR2d 1, 935 P2d 708 (exclusion of expert's prejudicial hearsay applies to both prosecution and defense); *People v. Gardeley* (1996) 14 C4th 605, 59 CR2d 356, 927 P2d 713 (court given considerable discretion to prevent jury from learning of incompetent hearsay)].

Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of fact on direct examination [*Whitfield v. Roth* (1974) 10 C3d 874, 112 CR 540, 519 P2d 588] .

An expert may rely on hearsay and state it as the basis of opinion [*Nortica v. State Compensation Ins. Fund* (1999) 70 CA4th 911, 83 CR2d 89 (industry trade paper); *People v. Campos* (1995) 32 CA4th 304, 38 CR2d 113 (psychiatrist's opinion on mental state); *Klein v. Oakland Raiders, Ltd.* (1989) 211 CA3d 67, 259 CR 149 (in action for malicious prosecution, objective tenability of prior action); *Board of Trustees v. Porini* (1968) 263 CA2d 784, 70 CR 73 (mental condition)].

Although the courts reject expert opinions based on unreliable hearsay, hearsay information of a type reasonably relied on by professionals in the field in forming an opinion on the subject may be used to support an expert opinion, even though it is not admissible in court [*People ex rel. DOT v. Clauser/Wells Partnership* (2002) 95 CA4th 1066, 116 CR2d 240 (in an eminent domain action, the trial court erred by excluding expert testimony as to the fair market value of condemned business inventory; the expert's valuation opinion was based on a proper legal standard and supported by a sufficient evidentiary foundation to be heard by the jury)].

However, this rule does not preclude the cross-examination of an expert witness on the content of out-of-court statements of another [*People v. Campos* (1995) 32 CA4th 304, 38 CR2d 113 (mentally-disordered-offender proceeding: witness may not testify on direct examination that prior medical evaluations agreed with witness's own evaluation)].

However, hearsay statements of forensic expert obtained during an investigation are admissible at a preliminary hearing [*Hosek v. Superior Court* (1992) 10 CA4th 605, 12 CR2d 650] .

A probation report, albeit hearsay, may reasonably be relied on by an expert [*People v. Campos* (1995) 32 CA4th 304, 38 CR2d 113 (error in admitting probation report and reports of prior evaluations into evidence in mentally-disordered-offender proceeding); *People v. Miller* (1994) 25 CA4th 913, 31 CR2d 423 (psychologist properly relied on probation report on defendant's underlying offense in giving his opinion that defendant was mentally disordered offender)].

Additionally, as long as expert testimony assists the trier of fact, it is proper, even though it provides evidence of elements of allegations charged [*People v. Gamez* (1991) 235 CA3d 957, 286 CR 894] .

[m] Hypothetical Questions

It is well established that examining counsel may ask an expert witness a question of a hypothetical nature. This question may be 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 not deemed material [*People v. Sims* (1993) 5 C4th 405, 20 CR2d 537, 853 P2d 992 (cause of death)].

The trial court acted within its discretion in preventing the defense's expert witness from expressing an opinion on whether defendant's conduct immediately before, during, and after the charged crimes was consistent with the binge pattern of crack cocaine use. The trial court could properly require the defense to proceed by the use of hypothetical questions. Through the posed hypothetical question, the trial court allowed the defense to put before the jury the theory that defendant killed the victims while he was in a certain stage of a crack cocaine binge [*People v. Pollock* (2004) 32 C4th 1153, 13 CR3d 34, 89 P3d 353] .

It is improper to ask an expert witness a hypothetical question that assumes facts not in evidence or assumes facts inconsistent with those in evidence [*People v. Gardeley* (1996) 14 C4th 605, 59 CR2d 356, 927 P2d 713 (hypothetical question must be rooted in facts shown by the evidence)].

When the minimum safety of a product is within common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect [*Soule v. General Motors Corp.* (1994) 8 C4th 548, 34 CR2d 607, 882 P2d 298 (issue of design defect)].

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. Where there is no foundational evidence upon which to base a hypothetical question to elicit the proffered testimony, an expert's opinion would amount to pure speculation or conjecture [*Bushling v. Fremont Medical Center* (2004) 117 CA4th 493, 11 CR3d 653 (experts' conclusion is no more than speculation if there is no factual basis for events)].

Granting a motion to exclude the testimony is proper where the probative value of the evidence is substantially outweighed by the probability that its admission will create prejudice, confuse the issues, or mislead the jury [*Hyatt v. Sierra Boat Co.* (1978) 79 CA3d 325, 145 CR 47] .

Hypothetical questions using names of defendant and victims were not prejudicial where jury knew expert witness had never met or examined defendant [*People v. Phillips* (1981) 122 CA3d 69, 175 CR 703] .

Hypothetical question to drug enforcement agent regarding pharmacist's possession of drugs for illegal street sales was not prejudicial because the question precluded any reference to pharmacist's refusal to account for disappearing drugs [*People v. Doss* (1992) 4 CA4th 1585, 6 CR2d 590] .

A hypothetical question was improper because it assumed the following facts not in evidence or inconsistent with the

evidence:

- An experiment as to a product defect, without proper facts [*Andrews v. Barker Brothers Corp.* (1968) 267 CA2d 530, 73 CR 284] .
- A person's willingness to lend money [*Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 CA2d 526, 63 CR 518] .

[n] Effect of Expert Testimony on Credibility

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, jury may reject these opinions. Where there is conflicting expert evidence, the determination by the trier of fact as to its weight and value and the resolution of such conflict are not subject to review on appeal [*People v. Samuels* (1981) 29 C3d 489, 174 CR 684, 629 P2d 485 (to require jury to accept unanimous opinion of experts would substitute trial by experts for trial by jury); *People v. Coogler* (1969) 71 C2d 153, 77 CR 790, 454 P2d 686 (mental condition)].

A jury cannot reasonably reject "persuasive and virtually uncontradicted" evidence showing a defendant's lack of competency to stand trial [*People v. Samuels* (1981) 29 C3d 489, 174 CR 684, 629 P2d 485 (set aside jury's finding of competence)].

Psychiatric examination and testimony may not be offered for the sole purpose of determining whether a witness is telling the truth on a particular occasion [*People v. Ainsworth* (1988) 45 C3d 984, 248 CR 568, 755 P2d 1017] .

Expert testimony about the tendency of domestic violence victims to later deny or minimize the assailant's conduct was admissible under *Evid Code* § 801 because it would assist the trier of fact in evaluating the credibility of the victim's trial testimony and earlier statements to the police. There is no rule requiring a preliminary finding that the charged act of abuse occurred before the jury can consider the evidence relating to credibility [*People v. Brown* (2004) 33 C4th 892, 16 CR3d 447, 94 P3d 574] .

A party must object and state the reasons for objection to expert testimony or it is waived. The party must also object and give counsel an opportunity to correct an improper hypothetical question [*Waller v. Southern Pacific Co.* (1967) 66 C2d 201, 57 CR 353, 424 P2d 937 (complex hypothetical question)].

When an expert psychiatrist is asked to speculate about the accused's state of mind at the time of the commission of offense charged, the trial court is free to reject that testimony, because "a psychiatrist is not an expert at all when it comes to determining if the accused is legally responsible under California law" [*In re Thomas* (1986) 183 CA3d 786, 228 CR 430 (opinion of psychiatrist on the existence of malice aforethought at time of killing)].

Evidence of the defendant's insanity was of such weight and character that it could not be reasonably rejected by the jury [*People v. Duckett* (1984) 162 CA3d 1115, 209 CR 96] .

A doctor may not give expert testimony on whether the defendant was telling the truth. It is the province of the jury to determine whether a person's equivocations about the cause of injury indicate that it was intentionally inflicted [*People v. Joseph* (1982) 128 CA3d 189, 180 CR 119 (improper testimony that inconsistent statements regarding child's injury were sign of battered child syndrome and hence child was battered)].

[o] Witness Not Qualifying as Expert

Although culture and habits of criminal street gangs are proper subject for expert testimony, police officer's testimony

as expert on gangs as to defendant's subjective knowledge and intent to possess handgun was inadmissible where it was only evidence offered by prosecution to establish elements of crime, and, as such, was type of opinion that did nothing more than inform jury how officer believed case should be decided [*People v. Killebrew* (2002) 103 CA4th 644, 126 CR2d 876] .

A police officer who had only 10 hours of classroom time and one eight-hour laboratory regarding nystagmus was not sufficiently qualified as an expert. His opinion that appellant was under the influence of alcohol, to the extent it was based on the test, rested on premises well beyond his knowledge and experience [*People v. Williams* (1992) 3 CA4th 1326, 5 CR2d 130] .

[p] Matter Not Subject to Expert's Opinion

The way in which the law should apply to certain facts is a question of law and is not subject to expert opinion [*People v. Torres* (1995) 33 CA4th 37, 39 CR2d 103 (improper for police officer to testify as to meaning of terms "robbery" and "extortion"; and to express opinion that crimes committed in the case were robberies); *Williams v. Coombs* (1986) 179 CA3d 626, 224 CR 865 (improper to admit expert opinion on the legal question of probable cause); *Communications Satellite Corp. v. Franchise Tax Board* (1984) 156 CA3d 726, 203 CR 779 (improper to allow expert interpretation of taxation statute); *Downer v. Bramet* (1984) 152 CA3d 837, 199 CR 830 (expert legal testimony on whether a property transfer was a gift was inadmissible)].

The role of expert testimony is limited in the context of assumption of risk. It is for the court to decide whether an activity is an active sport, the inherent risks of that sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport. A court in its discretion could receive expert factual opinion to inform its decision on these issues, particularly on the nature of an unknown or esoteric activity, but in no event may it receive expert evidence on the ultimate legal issues of inherent risk and duty [*Towns v. Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568 (in action arising out of skiers' collision, trial court correctly excluded plaintiff's expert's declaration on summary judgment)].

An expert may not attempt to define a statutory term when its definition is a matter of law on which the court should instruct [*People v. Hardy* (1969) 271 CA2d 322, 76 CR 557 (definition of "till tapping")].

[q] Unacceptable Basis for Expert's Opinion

Expert testimony based on speculative evidence may properly be excluded [*People v. Coffman and Marlow* (2004) 34 CA4th 1, 17 CR3d 710, 96 P3d 30 (no abuse of discretion in murder prosecution in cutting short defense counsel asking defense psychologist whether strangling as a form of murder differs psychologically from any other form)].

[r] Inadmissible Opinion on Subject Within Common Experience

When the evidence is of such common knowledge that people of ordinary training and experience could reach a conclusion as easily as expert, admission of the expert testimony may constitute reversible error; for instance:

- It was error to admit expert testimony explaining a method for calculating loss of enjoyment of life since that subject is not sufficiently beyond the common experience of the jury [*Loth v. Truck-A-Way Corp.* (1998) 60 CA4th 757, 70 CR2d 571] .
- It was error to admit testimony by a police officer as an expert as to the significance of equivocal conduct by the defendant prior to his arrest [*People v. Hernandez* (1977) 70 CA3d 271, 138 CR 675] .

No expert was needed to decide whether the size or irregular shape of a sidewalk crack rendered it dangerous, in light of

photographs submitted by both sides [*Caloroso v. Hathaway* (2004) 122 CA4th 922, 19 CR3d 254] .

In a wrongful termination suit, an expert improperly gave the opinion that the employer's conduct indicated retaliation [*Kotla v. Regents of University of California* (2004) 115 CA4th 283, 8 CR3d 898] .

The Legislature has determined that judges and jurors are capable of deciding whether a defendant's mental illness resulted in an inability to form the mental state required to sustain the charge. Such testimony is not "sufficiently beyond common experience" so that the opinion of an expert would assist the trier of fact [*People v. McCowan* (1986) 182 CA3d 1, 227 CR 23] .

No authority supports the position that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require expert testimony [*People v. Sergill* (1982) 138 CA3d 34, 187 CR 497] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals General Overview Insurance Law Industry Regulation Rates Supporting Documentation Real Property Law Mobilehomes & Mobilehome Parks General Overview



62 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.03

17.03 Basis and Reason for Opinions--Evid Code § 802

[1] Evid Code § 802 Text

■ *Evid Code § 802.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 802 applies to all witnesses who give opinion testimony. Although *Evid Code § 802* provides that a witness may state the basis for his opinion on direct examination, it is clear that, in some cases, a witness is required to do so in order to show that his opinion is applicable to the action before the court. The court may require a witness to state the facts observed before stating his opinion [Cal Law Rev Com Comment].

A witness testifying from his personal observation of the facts upon which his opinion is based need not be examined concerning such facts before testifying in the form of opinion; his personal observation is a sufficient basis upon which to found his opinion [Cal Law Rev Com Comment].

Evid Code § 802 is based essentially on the requirement, under *Evid Code §§ 350* and *403*, that all evidence must be shown to be applicable or relevant to the action [Cal Law Rev Com Comment].

Strategic Point:



Evid Code § 802 does not significantly change prior law, so earlier cases should be persuasive.

[3] Case Notes

The court is given considerable discretion to control the form in which an expert is questioned to prevent the jury from learning of incompetent hearsay [*People v. Bell* (2007) 40 C4th 582, 54 CR3d 453, 151 P3d 292 ; *People v. Gardeley* (1996) 14 C4th 605, 59 CR2d 356, 927 P2d 713].

In a prosecution for murder and robbery, the trial court did not err in excluding the defense psychiatrist's testimony about what defendant had told him about the crimes. Although an expert can properly testify about the otherwise inadmissible basis for his opinion [*Evid Code* § 802], this is subject to the court's discretion under *Evid Code* § 352. In this instance it would have been too difficult for the jury to separate the proper and improper use of the statements, and a limiting instruction would not have been sufficient. In addition, because the defendant did not testify, it would be similar to admitting defendant's testimony without cross-examination. In any case, the statements excluded were cumulative. The jury heard a great deal of evidence of defendant's statements about the crime to the police and the psychological experts, forming the basis for the experts' opinions [*People v. Bell* (2007) 40 C4th 582, 608-609, 54 CR3d 453, 151 P3d 292 , cert den 2007 US LEXIS 9157] .

The matters on which an expert relied in forming an opinion may be stated on direct, but testimony concerning the details of otherwise inadmissible matters is not permitted. On cross, the trial court must use discretion and where necessary exclude highly prejudicial inadmissible hearsay [*People v. Coleman* (1985) 38 C3d 69, 211 CR 102, 695 P2d 189 (admission of line of questioning concerning accusatory statements in letters of murdered wife was prejudicial abuse of discretion); *People v. Bell* (2007) 40 C4th 582, 54 CR3d 453, 151 P3d 292 (no abuse of discretion in excluding hearsay matter underlying expert's opinion)].

An expert witness may be cross-examined, because probing into the reasons of an expert for his or her opinions is usually the only recourse of the adverse party. It may be as important to learn what facts the witness deemed unimportant as to ascertain what facts he believed and relied on in the formation of the opinion [*People v. Bandhauer* (1970) 1 C3d 609, 83 CR 184, 463 P2d 408 (mental condition)].

Under *Evid Code* §§ 720(a) and 802, the foundation for the expert's testimony (that is, establishing his expertise and the basis of his opinion) need not be established in the absence of a specific objection or unless the court, in its discretion, requires it [*People v. Rodriguez* (1969) 274 CA2d 770, 79 CR 240 (narcotics agent's testimony that balloons are used to conceal heroin)].

The trial court correctly allowed an expert medical witness on direct examination to describe statements made to him by defendant as matters considered by the witness in forming his expert opinion of defendant's mental state [*People v. Boyer* (2006) 38 C4th 412, 462, 42 CR3d 677, 133 P3d 581 (affirming murder conviction)].

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 diagnosis and treatment [*People v. Piper* (1980) 103 CA3d 102, 162 CR 833 (proper to ask criminologist if he consulted another criminologist before rendering opinion; content of second opinion is inadmissible hearsay, however)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals Standards of Review Abuse of Discretion General Overview Evidence Procedural Considerations Exclusion & Preservation by Prosecutor Evidence Testimony Examination Direct Examination



63 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.04

17.04 Opinions Based on Improper Matter--Exclusion--Evid Code § 803

[1] Evid Code § 803 Text

■ *Evid Code § 803.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The trial court has the discretion to determine whether or not an opinion should be held inadmissible or stricken. The exercise of this discretion will depend in a given case on the extent to which the improper considerations have influenced the opinion [Cal Law Rev Com Comment].

If a witness's opinion is stricken because of reliance upon improper considerations, the second sentence of *Evid Code § 803* assures the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper [Cal Law Rev Com Comment].

[3] Case Notes

In an eminent domain action, the trial court erred in permitting an expert to testify to a goodwill value determined by creating a future income stream not tied to the condemned's actual business operations. The restaurant industry sales used to determine the future income streams to be discounted were based not on expected growth in the facility's historic earnings, but represented anticipated profits from an imagined better use of the existing facility, which was not a proper basis for the expert's opinion [*Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 CA4th 1111, 65 CR3d 372] .

The expert testimony of a chemist, based in part on hearsay, is admissible where it was also based on the expert's own

observations of the chemicals and equipment in question [*People v. Alywin* (1973) 31 CA3d 826, 107 CR 824 (proper basis for the opinion existed independent of improper basis)].

In a wrongful death action, experts' opinions concerning a head injury were based in part on pretrial statements of witnesses, but even if the statements had not been available, the experts' opinions would have been the same. The data on which they relied were medical records pertaining to the fatal injury, including the coroner's autopsy report and a videotape recording of the accident [*Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 CA3d 53, 169 CR 66] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral

OverviewEvidenceTestimonyGeneral OverviewTortsWrongful Death & Survival ActionsJoinder Requirements



64 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.05

17.05 Opinion of Expert Based on Opinion of Other--Evid Code § 804

[1] Evid Code § 804 Text

■ *Evid Code § 804.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 804 is designed to provide protection to a party who is confronted with an expert witness who relies on the opinion or statement of some other person. In such a situation, a party may find that cross-examination of the witness will not reveal the weakness in his opinion, for the crucial parts are based on the observations or opinions of someone else [Cal Law Rev Com Comment].

Evid Code § 804 permits 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 [Cal Law Rev Com

Comment].

[3] Case Notes

The correct test for the use of statements or extrajudicial material in forming a partial basis for an opinion by an expert is that of reasonably reliable information [*Board of Trustees v. Porini* (1968) 263 CA2d 784, 70 CR 73 (opinion of doctor based upon extrajudicial facts from lay third parties); *Korsak v. Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 3 CR2d 833 (testimony of mechanical engineer of his communications with area hotels about their plumbing and maintenance practices inadmissible in action by injured hotel guest)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsAdmissibility



65 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.06

17.06 Opinion Embracing Ultimate Issue--Evid Code § 805

[1] Evid Code § 805 Text

- *Evid Code § 805.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section now makes it clear that an expert may give an opinion on the very ultimate issue in question [Cal Law Rev Com Comment].

[3] Case Notes

[a] Construction of Statute

In a murder trial, the expert witness did not testify that defendant was guilty, nor tell the jury whom to believe, nor direct the jury toward a specific conclusion on any element of the charged crimes. His testimony did not mention defendant at all. The expert's conclusion, based on special training and experience in evaluating the records of hundreds of crime scenes, was only that he believed all the crimes were committed by the same person, based on certain rare similarities in method. This did not bind the jury nor essentially direct a verdict. The trial court properly instructed the jury that they were the exclusive judges of credibility and that they were not bound by an expert's opinion, being free to accord the opinion the weight it deserves after considering the basis for the opinion [*People v. Prince* (2007) 40 C4th 1179, 1227, 57 CR3d 543, 156 P3d 1015 , cert den 2008 US LEXIS 301 (finding no error)].

In an action for payment of a guaranteed loan, both parties submitted declarations from experts who offered conflicting opinions on the undisputed facts as to whether the loan was a "shared appreciation loan." While *Evid Code § 805* permits expert testimony on the ultimate issue to be decided by the fact finder, this rule does not authorize an expert to testify to legal conclusions in the guise of expert opinion. The manner in which the law should apply to particular facts

is a legal question and is not subject to expert opinion. Such legal conclusions do not constitute substantial evidence. Even lawyers may not testify as to legal conclusions or state interpretations of the law [*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 CA4th 525, 65 CR3d 205 (reversing summary judgment)].

Notwithstanding *Evid Code* § 805, an expert opinion is inadmissible if it invades the province of the jury to decide a case. The determination whether an expert witness's opinion bears upon or decides an ultimate issue in the case is sometimes a difficult decision, and a large element of judicial discretion is involved. Therefore, in a prosecution for grand theft arising out of an endless chain scheme, the trial court properly permitted expert witnesses to testify regarding the aspects of an endless chain scheme, but not whether the scheme in question was, in fact, an endless chain scheme. Thus, one expert testified that based upon his expertise and knowledge, endless chain schemes are not secret organizations, they do not sell products, and they compensate a participant for bringing in a new participant. He also stated that he had no knowledge of an endless chain scheme that received \$9 million from its participants, yet returned 60 to 85 percent of the funds. The trial court also properly restricted expert witnesses from instructing on the law of endless chain schemes [*People v. Frederick* (2006) 142 CA4th 400, 412, 48 CR3d 585] .

It is neither unusual nor impermissible for experts to testify in the form of opinion to the ultimate issue [*People v. Valdez* (1997) 58 CA4th 494, 68 CR2d 195 (whether defendant acted for benefit of gang was ultimate issue on which expert could render an opinion); *People v. Olguin* (1994) 31 CA4th 1355, 37 CR2d 596 (expert testimony as to gangs); *People v. Doss* (1992) 4 CA4th 1585, 6 CR2d 590] .

The cited rule does not authorize an expert to testify to legal conclusions in the guise of expert opinion [*Carlton v. Department of Motor Vehicles* (1988) 203 CA3d 1428, 250 CR 809 (opinion regarding who was "most responsible" for an automobile accident was a legal conclusion and not a proper subject for expert opinion)].

There are limits to the opinion that an expert may make that embraces the ultimate issue [*Summers v. A.L. Gilbert Co.* (1999) 69 CA4th 1155, 82 CR2d 162 (expert must not usurp the function of the jury; and *Evid Code* § 805 does not bestow on expert carte blanche to express any opinion he or she wishes)].

[b] Defendant's Mental State

Because it is more specific, *Pen Code* § 29, which disallows an expert to testify to the ultimate fact of a defendant's mental state, prevails over *Evid Code* § 805 [*People v. Whitler* (1985) 171 CA3d 337, 214 CR 610 (expert testimony on diminished capacity properly excluded)].

[c] Guilt or Innocence

There is a long established rule that a witness cannot express an opinion on the guilt or innocence of a criminal defendant [*People v. Hardy* (1969) 271 CA2d 322, 76 CR 557 (definition of "till tapping")].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
 Juries & Jurors
 General Overview
 Evidence
 Testimony
 Experts
 Criminal Trials
 Evidence
 Testimony
 Experts
 Ultimate Issue



66 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.07

17.07 Limits of Applicability--Evid Code § 810

[1] Evid Code § 810 Text

■ *Evid Code § 810.*

(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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1978 ch. 294; 1980 ch. 381.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsRule Application & Interpretation



67 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.08

17.08 Value of Property--Evid Code § 811

[1] Evid Code § 811 Text

■ *Evid Code § 811.*

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.**

LegH: 1965 ch. 1151; 1975 ch. 1240; 1976 ch. 294; 1980 ch. 381.

[2] Case Notes

The general rules of evidence may be applied only where an action for loss of personal property is brought separately from an action for real property damage. Where personal property was evaluated separately from land and fixtures but plaintiffs filed a single suit to recover for both species of property loss, the court found no reason to treat the two types of property differently [*Aetna Life and Cas. Co. v. City of Los Angeles* (1985) 170 CA3d 865, 216 CR 831] .



68 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.09

17.09 Just Compensation Interpretation in Substantive Law Unchanged--Evid Code § 812

[1] Evid Code § 812 Text

■ *Evid Code § 812.*

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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1975 ch. 1240, oper. Jan. 1, 1976; 1978 ch. 294.

[2] Case Notes

Existing case law on the proper method of establishing the fair market value of an easement is not affected by the Evidence Code valuation provisions [*County Sanitation Dist. v. Watson Land Co.* (1993) 17 CA4th 1268, 22 CR2d 117] .



69 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.10

17.10 Opinion Testimony--Property Valuation--Witness Qualifications--Evid Code § 813

[1] Evid Code § 813 Text

■ *Evid Code § 813.*

(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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1978 ch. 294; 1980 ch. 381.

[2] Explanation of Section

The only relevant evidence of the value of property is the resulting increase, if any, in the fair market value of the property affected. And, it is this value which may be established only through the opinions of witnesses qualified to express such opinions.

Evid Code § 813(b) contains no limitation on the number of witnesses, nor does it bar any other admissible evidence for the limited purpose of enabling the court, jury, or referee to understand and weigh the opinions of the valuation witnesses. Such admissible evidence, except evidence of the character of the improvement proposed to be constructed by the condemnor in an eminent domain proceeding, is subject to impeachment and rebuttal.

[3] Case Notes

[a] Purpose of Rule

Evid Code § 813 was not intended to be an exclusionary section, but rather, the limitations set forth in the section are intended to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony [*State ex rel. State Public Works Board v. Wherity* (1969) 275 CA2d 241, 75 CR 591 (value of condemned property)].

[b] Eminent Domain Case

In an eminent domain action, the owner argued that if the court allowed the condemning agency to introduce evidence of the 1998 purchase price and the owner's failure to develop the property to its highest and best use, the owner should be allowed to counter with evidence of the 1998 design plans for a local trolley project and the effect of later design changes to the trolley project on the owner's development schedule for the property. The trial court did not abuse its discretion in admitting the owner's "value engineering" evidence for this stated purpose. *Evid Code § 813* does not prohibit admission of evidence of project changes, it merely provides that evidence of the character of the project is not subject to impeachment or rebuttal. The condemner did not explain how the project change or value engineering evidence in question impeached or rebutted any evidence of the ultimate design or character of the trolley project [*San Diego Metropolitan Transit Development Bd. v. RV Communities* (2007) 158 CA4th 313, 69 CR3d 705] .

Evid Code § 813(a) provides that property value may be shown only by the opinions of experts and owners. In an eminent domain case involving manufactured homes, the expert witness was subject to cross-examination on his appraisal methodology, including the language on the Fannie Mae form and whether its definition of fair market value differed from the statutory definition. The court, sitting as trier of fact, could decide what weight to give to his appraisal in light of the language on the form. *Evid Code § 813* does not bar admission of other evidence for the limited purpose of enabling the trier of fact to weigh the opinions of valuation witnesses. The trier of fact is not required to accept the opinion testimony of any witness as to value; may accept that part of such testimony it concludes worthy of belief and reject that part which is unworthy of belief; and, in determining the amount of just compensation in an eminent domain action, is not required to coincide a determination with the specific amount fixed by the valuation testimony of any expert witness [*Escondido Union School Dist. v. Casas Suenos De Oro, Inc.* (2005) 129 CA4th 944, 982, 29 CR3d 89] .

In an eminent domain action, the court is not an appraiser and does not make a determination of market value, but must base its determination of the value of condemned property upon the opinions of designated valuation experts [*South Bay Irrigation District v. California American Water Company* (1976) 61 CA3d 944, 133 CR 166] .

In an eminent domain action, the court may consider a previous sale of the property in reaching a decision on a new trial motion. This is not inconsistent with *Evid Code § 813(a)* because in assessing the opinions of the valuation witnesses,

the trier of fact is not required to accept the total testimony of one witness but may instead decide upon a value which falls within the range of opinion testimony of the various witnesses. In ruling on a motion for a new trial, the court has the same powers as a trier of fact to weigh the evidence and resolve issues of credibility [*People ex rel. Department of Public Works v. Peninsula Enterprises, Inc.* (1979) 91 CA3d 332, 153 CR 895] .

In an eminent domain action, property owner's evidence of "developer's approach" methodology for property valuation is improper opinion as to value [*Contra Costa Water District v. Bar-C Properties* (1992) 5 CA4th 652, 7 CR2d 91] .

Evid Code § 813(a) provides no more than that the value of property in an eminent domain proceeding may be shown by the opinions of qualified witnesses and by the owner of the property being valued [*State ex rel. State Public Works Board v. Wherity* (1969) 275 CA2d 241, 75 CR 591 (value of condemned property)].

[c] Unlawful Detainer Case

In an unlawful detainer action based on a claim of waste of the premises, a neighbor who observed the damages to the wall by looking through the window, and who was a contractor experienced in laying floors, was competent to testify about what he and the landlord saw [*Freeze v. Brinson* (1991) 3 CA4th Supp 1, 5 CR2d 227] .

[d] Who May Testify as to Value

When an owner of stolen personal property testifies as to its value at a restitution hearing, his or her testimony constitutes prima facie evidence. The burden then shifts to the defendant to demonstrate that the proffered value is erroneous. In this case, the owners of property testified as to the loss of hundreds of thousands of dollars in jewelry. Their testimony constituted substantial evidence of value, even though it was unsupported by receipts or appraisals, and even though a detailed description of each piece of jewelry was not given. It was up to defendant to obtain more particular descriptions through cross-examination, to seek whatever documentation she thought would be necessary to challenge the proffered values, and to object when the court ordered restitution without assigning a particular value to each individual piece of jewelry stolen. Having failed to do so, she did not meet her burden [*People v. Prosser* (2007) 157 CA4th 682, 684-685, 68 CR3d 808] .

In an action brought by a consignor against a retailer for conversion of goods, evidence supported the trial court's finding that plaintiff would not price goods so high that they would not sell. According to the declaration of one of the consignor's partners, plaintiff had been in business for more than 44 years, and declarant had conducted business with the retailer for over 20 years. It was reasonable to infer that plaintiff and declarant knew how to value consigned merchandise so that the goods would sell in the market. A trier of fact could reasonably conclude that declarant was knowledgeable about the subject of consigned goods under *Evid Code § 813(a)(3)* [*Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 CA4th 692, 701, 28 CR3d 815] .

Evid Code § 813(a)(2) is to be limited in its applicability to actual owners of the property in question [*City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (value of condemned property)].

In stating an opinion as to the value of his or her property, an owner is bound by the same rules of admissibility as any other witness. Thus, *Evid Code § 803* may bar that testimony if it is based entirely on improper matter [*Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 CA3d 58, 91 CR 375 (severance damages)].

The rule that the owner of the property or property interest being valued may testify as to his opinion of the value was predicated on the theory that the owner who resided on and owned property for a period of years would be presumed to acquire sufficient knowledge of the property and of the value of the land in that neighborhood to be able to give an intelligent estimate as to the value of his or her own property [*City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (value of condemned property)].

The opinions of experts and the data upon which those opinions are based are entitled to greater deference in special use property litigation because of the lack of any other objective standard (such as the price possibly obtainable were a buyer readily ascertainable) [*City of Commerce v. National Starch and Chemical* (1981) 118 CA3d 1, 173 CR 176] .

A property owner has a limited right under *Evid Code* § 813 to give an opinion of the value of the property. On the issue of the effect of code violations and structural defects on the market value of property, testimony must be based on observations that an expert may reasonably rely on [*Fragale v. Faulkner* (2003) 110 CA4th 229, 1 CR3d 616 (offer of proof provided no foundation for an opinion from owner)].

[e] Limited Effect of Non-Opinion Evidence

When value is in issue, the criteria used by the expert witness to support his opinion (such as highest and best land use, comparable sales, market data, "after" condition vis-a-vis "before" condition evidence) have no independent probative value and go only to the weight to be accorded to the opinion by the trier of fact [*Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 CA3d 58, 91 CR 375 (severance damages); *Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co.* (1968) 268 CA2d 199, 91 CR 375 (value of special benefits)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Real Property Law Eminent Domain Proceedings Valuation Real Property Law Title Quality Adverse Claim Actions Unlawful Detainer



70 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.11

17.11 Opinion Testimony--Property Valuation--Limits of Opinion--Evid Code § 814

[1] Evid Code § 814 Text

■ *Evid Code § 814.*

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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1975 ch. 1240, oper. July 1, 1976; 1980 ch. 381.

[2] Case Notes

[a] Market Value as Basic Measure

The rule is of universal acceptance that the measure of damage is the market value, that is to say, the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable [*Sacramento Southern R. Co. v. Heilbron* (1909) 156 C 408, 104 P 979 (value of condemned property)].

[b] Appraisal Trinity

Real estate appraisers use what is referred to as the "appraisal trinity." These three means of arriving at a market value are usually combined. All three methods have been judicially approved [*State ex rel. State Public Works Board v. Stevenson* (1970) 5 CA3d 60, 84 CR 742 ; *State ex rel. State Public Works Board v. Wherity* (1969) 275 CA2d 241, 75 CR 591 ; *State ex rel. State Public Works Board v. Covich* (1968) 260 CA2d 663, 67 CR 280] :

- The current cost of reproducing the property less depreciation from all sources.

- The "market data" approach or value indicated by recent sales of comparable properties in the market.
- The "income approach" or value which the property's net earning power will support based upon the capitalization of net income.

The appraisal trinity is substantially codified by *Evid Code* §§ 815-820 [*State ex rel. State Public Works Board v. Stevenson* (1970) 5 CA3d 60, 84 CR 742 (value of condemned property)].

Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. *Evid Code* §§ 815-820 set forth various methodologies sanctioned for use by valuation experts. When property acquired by eminent domain is part of a larger parcel, in addition to compensation for the property actually taken, the property owner must be compensated for the injury or damage, if any, to the land that he retains, reduced by the amount of benefit to the remainder. Such "severance damages" are typically measured by comparing the fair market value of the remainder before and after the taking. In other words, the value of the remaining property taken as a part of the whole, described as the "before condition," must be compared with the value that portion has as a result of the taking and the construction of the improvement in the manner proposed, described as the "after condition." Damages are computed simply by subtracting the market value of the remainder in its after condition from the market value of the remainder in its before condition [*City of San Diego v. D.R. Horton San Diego Holding Co, Inc.* (2005) 126 CA4th 668, 680-681, 24 CR3d 334] .

A witness qualified to express an opinion about market value is not necessarily qualified to express an opinion about other matters relating to the property [*Los Angeles County Flood Control Dist. v. Mindlin* (1980) 106 CA3d 698, 165 CR 233] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Eminent Domain Proceedings Experts Real Property Law Eminent Domain Proceedings Valuation Real Property Law Property Valuation



71 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.12

17.12 Repealed--Evid Code § 814.5

LegH: Enacted 1971. Repealed 1971 ch. 1574, oper. July 1, 1972.



72 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.13

17.13 Valuation Basis for Opinion--Sale Price--Terms of Sale--Evid Code § 815

[1] Evid Code § 815 Text

■ *Evid Code § 815.*

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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1978 ch. 294.

[2] Case Notes

In determining the relevance and helpfulness of evidence of prior transactions, the trial judge must necessarily exercise a wide discretion [*City of Santa Cruz v. Wood* (1967) 252 CA2d 52, 60 CR 26] .

The trial judge, in an eminent domain action, may consider a recent sale of the property in question, when deciding on a motion for new trial based on excessive damages [*People ex rel. Department of Public Works v. Peninsula Enterprises, Inc.* (1979) 91 CA3d 332, 153 CR 895] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDiscretionReal Property LawEminent Domain ProceedingsValuationReal Property LawPriorities & RecordingLis Pendens



73 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.14

17.14 Valuation of Property Based on Comparable Property--Evid Code § 816

[1] Evid Code § 816 Text

■ Evid Code § 816.

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 fairly be considered as shedding light on the value of the property being valued.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967.

[2] Explanation of Section

Evid Code § 816 does not establish criteria of "substantial" or "insubstantial" comparability but instead requires the trial court to measure whether or not the property sold is "sufficiently like" the property to be valued by determining whether the price realized for the property sold may be fairly considered as shedding light on the value of the property being valued.

[3] Case Notes

[a] Opinion of Expert Witness

Where an expert appraisal witness can fairly estimate the amount of each of the enhanced sales prices that is attributable to project enhancement, the trier of fact can subtract the amount of value that he finds to be due to project enhancement, and can then test the witness's valuation of the condemned land against this adjusted sales price [*County of San Luis Obispo v. Bailey* (1971) 4 C3d 518, 93 CR 859, 483 P2d 27 (sales of property 30 to 50 miles away shed light on value of condemned lands); *Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C3d 478, 93 CR 833, 483 P2d 1 (sales reflecting

substantial project enhancement admitted to show effect of inflation, growth, and freeways)].

Commonly, a comparable sales price will vary in some respect from an appraiser's opinion of the condemned land's value. When this happens, the appraiser will often want to explain on direct examination the distinguishing features between the property sold and the property to be valued, which he has taken into account in inferring the value of the land under consideration from the comparable sale. Moreover, even if the appraiser does not so testify on direct examination, he will frequently be questioned on cross-examination as to the relevant differences between the assertedly comparable parcel and the subject land. In response, he will be compelled to disclose how he took these relevant differences into account in deriving his valuation figure. This adjustment process is an integral element of the comparable sales approach [*Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C3d 478, 93 CR 833, 483 P2d 1] .

Where an expert used comparable sales from homes unaffected by jet noise as basis for his estimate of value of home condemned, estimate was proper despite the fact that homes there were generally higher priced [*Parker v. Los Angeles* (1974) 44 CA3d 556, 118 CR 687] .

[b] Requirement of Comparability

It is well established that evidence of sales to fortify the opinion of the expert appraiser may not be received in evidence until comparability of the property sold to the property under condemnation is shown, to make it clear that the price realized for the other land may fairly be considered as shedding light on the value of the land in question [*County of Los Angeles v. Faus* (1957) 48 C2d 672, 312 P2d 680 (market value is what a willing buyer would pay); *City of Rosemead v. Anderson* (1969) 270 CA2d 260, 75 CR 575 (particular assemblage of property not a comparable sale)].

Testimony is allowed on the decline in market value occasioned by precondemnation announcements [*Klopping v. City of Whittier* (1972) 8 C3d 39, 104 CR 1, 500 P2d 1345] .

The trend in sales prices of noncomparable neighboring properties may be admitted even though the absolute sales prices of noncomparable property is inadmissible under *Evid Code* § 816. The trial court has the discretion to admit evidence of sales prices that include "project enhanced value" if the evidence sheds light on the value of the property to be condemned. The trial court has considerable discretion to determine the relevance of price trend testimony [*City of Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 C3d 473, 128 CR 436, 546 P2d 1380] .

Evid Code § 816 embodies the "market approach" to land valuation [*State ex rel. State Public Works Board v. Wherity* (1969) 275 CA2d 241, 75 CR 591] .

A sale in a bankruptcy proceeding may be considered as a comparable sale shedding light on the value of the property [*San Diego Gas & Electric Co. v. 3250 Corp.* (1988) 205 CA3d 1075, 252 CR 853] .

[c] Function of Judge and Jury

The trial judge retains his traditional authority of prohibiting the cross examiner from ranging too far afield or from requiring the witness to delve into the realm of speculation [see *Evid Code* § 352]. The mere possibility that such examination may be abused, however, cannot justify an inflexible rule that precludes a party from exposing relevant distinctions between the offered comparable sale and the condemned land [*County of San Luis Obispo v. Bailey* (1971) 4 C3d 518, 93 CR 859, 483 P2d 27 (sales of property 30 to 50 miles away shed light on value of condemned lands); *People ex rel. Department of Public Works v. Reardon* (1971) 4 C3d 507, 93 CR 852, 483 P2d 20 (a "comparable sale" does not have to be precisely equivalent)].

Manifestly, in applying the comparability standard with its inherent vagueness, the trial judge must be granted wide discretion [*Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C3d 478, 93 CR 833, 483 P2d 1 ; *County of Los Angeles v.*

Faus (1957) 48 C2d 672, 312 P2d 680 (determination is dependent on equities of each case); *City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (condemnation of church lands)].

The discretion of the trial court will not be interfered with unless abused [*Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C3d 478, 93 CR 833, 483 P2d 1] .

[d] Condemnation Proceeding

In an eminent domain case, the expert witness obtained the information for the comparable sales he used in his appraisal from a computer reporting service. According to his deposition testimony, he did not confirm any of the comparable sales data contained in his appraisal with the parties to the transaction. Of five comparable sales used, he contacted the seller's agent in only one instance. There was no error in admitting the comparable sales despite his failure to obtain first-hand verification. *Evid Code § 816* does not require verification of comparable sales. Also, the fact that the comparable sales data was not verified does not render the evidence inadmissible as opinion evidence of another property under *Evid Code § 822(a)(4)* [*Escondido Union School Dist. v. Casas Suenos De Oro, Inc.* (2005) 129 CA4th 944, 982, 29 CR3d 89] .

To be admissible, a sale must only shed light on the value of the property being valued. The trial court improperly excluded a valuation expert's testimony on the ground he used comparable sales outside the area in his "cash flow multiplier" valuation method. Although the defendant's witness testified he did not use local area sales because none were reported on the databases he used, the plaintiff's own expert testified those databases were reliable for business valuation appraisers to understand goodwill comparables, and business sales (when used to select a multiplier to value goodwill) vary little with geographical area. Plaintiff's counsel cross-examined defendant's expert at length regarding the comparable sales, and any related issue went to the weight of his testimony rather than its admissibility [*Redevelopment Agency of San Diego v. Attisha* (2005) 128 CA4th 357, 373, 27 CR3d 126 (trial court erred in striking expert's testimony on various grounds; matter reversed and remanded on issue of valuation of goodwill)].

In ruling on the admissibility of a proffered sale under *Evid Code § 816*, the trial court bears the initial responsibility of determining whether or not the property sold is sufficiently similar to the condemned property to permit the sale to be received into evidence. The court's decision to allow the introduction of the sale, however, is by no means a determination that the sale property is precisely equivalent to the condemned land or that the comparable sale price represents the value of the land to be valued; the admission, instead, only reflects a judgment that the comparable sale price may be fairly considered as shedding light on the value of the land being valued. Once a sale is admitted into evidence, it is the universal rule that the degree of comparability is a question of fact for the jury. Unless the court permits opposing counsel to inquire into the circumstances surrounding such a sale, the jury will face an impossible task in determining the weight to be given to evidence of it. Counsel must be given an opportunity to inquire into relevant differences that exist between the condemned land and the property, which was the subject of the comparable sale, or he is effectively precluded from demonstrating why a given sale may not be a reliable indicant of the value of the condemned land. In a condemnation proceeding concerning a church where the church's appraisers used the reproduction cost method of valuation and the state's appraisers used the replacement cost method, a jury instruction stating that one method of estimating fair market value was the "replacement and reproduction cost method" instead of "replacement or reproduction cost method" was de minimis error where the jury had heard extensive testimony defining the terms as they were used by the appraisers [*Redevelopment Agency v. First Christian Church of Long Beach* (1983) 140 CA3d 690, 189 CR 749] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law Practice & Proceedings Appeals Standards of Review Abuse of Discretion Real Property Law Eminent Domain Proceedings Valuation Real Property Law Purchase & Sale Contracts of Sale General Overview



74 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

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Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.15

17.15 Valuation Based on Rental or Lease Terms--Evid Code § 817

[1] Evid Code § 817 Text

■ *Evid Code § 817.*

(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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1978 ch. 294.

[2] Case Notes

In a condemnation case, a tenant should be allowed to recover business losses beyond the expiration of the lease term if the evidence shows more probably than not that the lease would have been extended for a longer term but for the expropriation. It is the jury's province to determine whether there was a reasonable probability of a lease renewal [*Redevelopment Agency of San Diego v. Attisha* (2005) 128 CA4th 357, 373, 27 CR3d 126 (trial court erred in striking expert's testimony)].

In determining fair market value, rent reserved and other terms of a lease would, of course, be weighed by any willing purchaser and are thus merely factors to be considered by the expert witness, and ultimately by the jury, in determining the fair market value of a tenancy [*San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 CA2d 263, 71 CR 204 (condemnation action); *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 CA2d 889, 63 CR 640 (condemnation action)].

In determining value of condemned hotel property, use by condemnor's appraisers of gross receipts from rent of rooms and stores in hotel as basis for determining what operator would be willing to pay owner as rent for hotel does not violate *Evid Code* § 819 permitting use of the capitalized value of the reasonable net rental value attributable to the land, in determining the value of taken property [*Redevelopment Agency v. Del-Camp Investments, Inc.* (1974) 38 CA3d 836, 113 CR 762] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawEminent Domain
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75 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.16

17.16 Valuation Based on Rental Value of Comparable Property--Evid Code § 818

[1] Evid Code § 818 Text

■ Evid Code § 818.

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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967.

[2] Case Notes

In an eminent domain action, where the capitalization method of valuation is not employed, a methodology is adapted whereby owner's witnesses examine ground leases on noncomparable properties in the general area of the subject property to determine the prevailing rate relationship between the value of underlying vacant land and the rent it will bring from a tenant developing the property. Then, testimony regarding the result of this inquiry is admissible to show what owners of property in the general area can expect as a general return on their investments. This testimony sheds some light on the appropriate amount of precondemnation damages. It was not used to establish any absolute rental values for noncomparable properties [*People ex rel. Department of Public Works v. Peninsula Enterprises, Inc.* (1979) 91 CA3d 332, 153 CR 895] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewCriminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewReal Property LawEminent Domain ProceedingsValuation



76 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.17

17.17 Valuation Based on Capitalized Reasonable Net Rental Value--Evid Code § 819

[1] Evid Code § 819 Text

■ *Evid Code § 819.*

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).

LegH: 1965 ch. 1151, oper. Jan. 1, 1967.

[2] Case Notes

The phrase "value of property" means amount of "just compensation" to be awarded in eminent domain action [*South Bay Irrigation District v. California American Water Company* (1976) 61 CA3d 944, 133 CR 166] .

Evidence of fair market value based on capitalization of income derived from a nonexistent improvement is not permitted under this section [*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 CA4th 918, 62 CR2d 121 (eminent domain proceeding)].

A tenant seeking to prove that a landlord had avoidable loss of rents may use the following analysis if the building is sold. Assuming that the property is sold at its fair market value, the sale price is "the capitalized value of the reasonable net rental value attributable to the land and existing improvements" [Evid Code § 819]. With an assumed capitalization rate based on the sales of comparable leased properties, and the known sale price for the subject building, the equivalent rental stream may be determined and compared with the rental loss resulting from the tenant's abandonment. By this means, the tenant may establish whether the landlord has recovered his lost rental, in whole or in part, by a favorable sale. While this evidence would necessarily require expert opinion testimony, it is the type of evidence often offered in other contexts where property valuations are in issue [*Millikan v. American Spectrum* (2004) 117 CA4th 1094, 12 CR3d 459] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawEminent Domain ProceedingsConstitutional Limits & RightsJust CompensationReal Property
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Recovery



77 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.18

17.18 Valuation-Improvements--Evid Code § 820

[1] Evid Code § 820 Text

■ *Evid Code § 820.*

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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967.

[2] Case Notes

Depreciation and obsolescence should not be used as a back door method of nullifying the reproduction and replacement approach to valuation of a special use building [*Redevelopment Agency of City of Long Beach v. First Christian Church of Long Beach* (1983) 140 CA3d 690, 189 CR 749] .



78 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.19

17.19 Valuation--Area Improvements--Evid Code § 821

[1] Evid Code § 821 Text

■ *Evid Code § 821.*

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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967.



79 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.20

17.20 Valuation Limitations--Matters Inadmissible as Evidence--Evid Code § 822

[1] Evid Code § 822 Text

■ *Evid Code § 822.*

(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.

LegH: 1965 ch. 1151, oper. Jan. 1, 1967; 1978 ch. 294; 1980 ch. 381; 1986 ch. 1238; 1987 ch. 1278; 2000 ch. 948.

[2] Commission Comments

[a] 2000 Amendments

Evid Code § 822(a)(1) is amended to delete the special exception relating to property appropriated to public use, in reliance on general evidentiary principles [see, e.g., *Evid Code* § 823 ("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."); see also *CCP* § 1263.320(b) (fair market value)]. Thus, evidence of an acquisition that is otherwise inadmissible under *Evid Code* § 822(a)(1) may, in an appropriate case, be admissible under *Evid Code* § 823 if a private market is lacking, e.g., the acquisition involves a special purpose property such as a school, church, cemetery, park, utility corridor, or similar property. The new exception is intended to apply in an eminent domain or inverse condemnation proceeding that relates to a public agency's acquisition or taking of all or any part of a water system owned by a water company [Cal Law Rev Com Comment].

Evid Code § 822(c) is deleted as obsolete [Cal Law Rev Com Comment].

[3] Case Notes

[a] Acquisition for Public Use--Property that Could Have Been Taken by Eminent Domain

The language of *Evid Code* § 822(a)(1) embodies the former court-made rule that "it is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands, however similar they may be to that in controversy, because the price paid under such circumstances 'is not a reasonable or fair test of market value.'" *Evid Code* § 822(a)(1) does not confer a discretionary power on the trial court. It categorically excludes evidence of a specified character, subject to a stated exception [*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 CA4th 1083, 125 CR2d 12 (rejecting any suggestion that statute was intended only, or primarily, for the protection of property owners, and thus should have little or no effect where, as here, condemnee offers evidence of other acquisitions for public use)].

[b] Offered or Listing Price of Other Property

In an eminent domain case, the fact that the expert witness did not verify first hand the comparable sales data he got from a computer reporting service did not render the evidence inadmissible as opinion evidence of another property under *Evid Code* § 822(a)(4) [*Escondido Union School Dist. v. Casas Suenos De Oro, Inc.* (2005) 129 CA4th 944, 982, 29 CR3d 89] .

In an eminent domain proceeding involving a church, sales of churches in other areas were found to be sales of noncomparable property and were therefore irrelevant and not admissible [*Redevelopment Agency v. First Christian Church of Long Beach* (1983) 140 CA3d 690, 189 CR 749] .

[c] Opinion as to Value of Other Property

Evid Code § 822(a)(4) does not preclude an appraiser, when referring to comparable sales, from explaining any adjustments (for enhancement value) that must be made in the comparable sale price in utilizing that sale as an indicant of the value of the property to be taken [*Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C3d 478, 93 CR 833, 483 P2d 1] .

Distinguish:

The limit of the intent evinced by *Evid Code* § 822(a)(4) was to preclude a party, who produces an expert appraiser, from using his opinion of the value of property "X" as a whole as a prop in proving the value of the subject property. Therefore, the witness may render an opinion relating to value where such opinion was derived from a number of factors, only one of which involved the valuation of another property interest. Where evidence of a prior inconsistent value opinion is offered to impeach the credibility of the expert valuation witness, such evidence has generally been held admissible. Where the nonsubject property opinion evidence has been offered for valuation purposes, ipso facto, it has been held inadmissible.

To construe and apply *Evid Code* § 822(a)(4) to the contrary would effectually deny to the condemnees the right to impeach the condemner's appraisal witness [*City of Los Angeles v. Waller* (1979) 90 CA3d 766, 154 CR 12 (unrelated appraisal can be used to impeach the credibility of a valuation witness); *State ex rel. State Public Works Board v. Stevenson* (1970) 5 CA3d 60, 84 CR 742] .

[d] Noncompensable Items of Value, Damage, or Injury

It is not inconsistent with the prohibition of this section to allow an expert appraiser to base his opinion on the location of the property in combination with the effect of a zoning ordinance [*People ex rel. Department of Public Works v. Investors Diversified Services, Inc.* (1968) 262 CA2d 367, 68 CR 663] .

It is not improper for appraiser to establish a low end of the fair market value of an item by looking at what it would have cost on the used market [*San Diego County v. Cabrillo Lanes, Inc.* (1992) 10 CA4th 576, 12 CR2d 613 (condemnation action by city against property on which tenant operated a bowling alley)].

In offering an opinion on market value, an expert cannot be permitted to rely upon the influence of any noncompensable items of value, damage, or injury [*City of Carlsbad v. Rudvalis* (2003) 109 CA4th 667, 135 CR2d 194 (reduction in nursery property market value caused by improvements of adjacent streets that increased traffic and accelerated urbanization was noncompensable); *Akins v. Sacramento Municipal Utility District* (1992) 6 CA4th 1605, 8 CR2d 785] .

[e] Market Value of Property

Evid Code § 822(a)(6) of the *Evidence Code* is a protection for property owners, not condemning entities. The purpose of section 822 is to prevent introduction into evidence of particular acquisitions of similar properties by the condemner itself. The parties are to focus instead on the market value of the property at the time of condemnation. As long as an expert does not rely on a particular and identifiable acquisition, the statute is not offended. Any other result transforms the statute into an a priori bar to the use of the net income method, which was not intended by the Legislature [*Hurwitz v. City of Orange* (2004) 122 CA4th 835, 19 CR3d 213 (trial court properly allowed owner's expert to testify about capitalization rate based on expert's own general experience)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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80 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.21

17.21 Valuation Method Optional--Evid Code § 823

[1] Evid Code § 823 Text

■ *Evid Code § 823.*

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.

LegH: 1980 ch. 381; 1992 ch. 7.

[2] Senate Judiciary Committee Comment

Evid Code § 823 is included because there may be no relevant market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties [Sen Jud Com Comment].



81 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.22

17.22 Valuation--Nonprofit, Special Use Property--Evid Code § 824

[1] Evid Code § 824 Text

■ *Evid Code § 824.*

(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 other 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.

LegH: 1992 ch. 7.

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law Oil, Gas & Mineral Interests Personality & Realty Interests Energy & Utilities Law Transportation & Pipelines Easements & Rights of Way



82 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.23

17.23 Basis for Sanity Opinion--Evid Code § 870

[1] Evid Code § 870 Text

- *Evid Code § 870.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 870 does not affect the rule that permits a witness to testify to a person's rational or irrational appearance or conduct, even though the witness is not qualified under *Evid Code § 870* to express an opinion on the person's sanity [Cal Law Rev Com Comment].



Strategic Point:

Evid Code § 870 codifies prior law and cases thereon would appear persuasive.

[3] Case Notes

[a] Intimate Acquaintance

The insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice, especially

considering the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. Medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. Since there can be reasonable debate about what the cognate legal and medical tests should be, due process imposes no single formulation of legal insanity [*Clark v. Arizona* (2006), 548 US 735, 126 S Ct 2709, 2722, 165 L Ed2d 842 (also distinguishing between expert's observation evidence and expert's opinion evidence)].

There is no definite rule as to what is required to constitute one as an "intimate acquaintance" of another [*Atkins Corp. v. Tourny* (1936) 6 C2d 206, 57 P2d 480 (within discretion of court)].

The trial judge is to determine, in the exercise of a sound discretion, whether the opinion of a former intimate acquaintance is based upon too remote an acquaintanceship [*People v. Aranda* (1938) 12 C2d 307, 83 P2d 928 (several months' absence)].

An intimate acquaintance is not to be cross-examined with questions that are more properly addressed to expert witnesses [*People v. Marshall* (1930) 209 C 540, 289 P 629 (psychiatric questions); *Estate of Martin* (1915) 170 C 657, 151 P 138 (hypothetical questions); *Estate of Dolbeer* (1906) 149 C 227, 86 P 695 (hypothetical questions)].

An intimate acquaintance may testify as to his or her opinion of an acquaintance's sanity, but not being an expert, cannot testify as to an opinion of his acquaintance's competency to perform specific legal acts [*Estate of Perkins* (1925) 195 C 699, 235 P 45 (capacity to make a will)].

Familiarity with the mental temperament of the person whose sanity is in question is a requisite element of "intimate acquaintance," but this familiarity is not to be measured exclusively by acquaintanceship for any particular length of time [*Estate of Budan* (1909) 156 C 230, 104 P 442 (opinion of trained nurse)].

[b] Subscribing Witness

Because the law presumes that a subscribing witness had his or her attention directed to and noted the mental capacity of the signer, such an opinion is entitled to more weight than that of a passive witness [*Estate of McDonough* (1926) 200 C 57, 251 P 916 ; *Estate of Holloway* (1925) 195 C 711, 235 P 1012 (jury question)].

It was error to permit an opinion as to testamentary capacity [*Estate of Goulart* (1963) 222 CA2d 808, 35 CR 465] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Examination of Witnesses Cross-Examination Estate, Gift & Trust Law Will Contests Testamentary Capacity General Overview Evidence Testimony General Overview



83 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.24

17.24 Repealed--Evid Code §§ 890-895

LegH: Enacted 1965. Repealed 1992 ch.162.



84 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.25

17.25 Repealed--Evid Code § 895.5

LegH: Enacted 1986. Repealed 1993 ch. 219.



85 of 85 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

G. Chapter Opinion (Evid Code §§ 800-897)

Chapter 17 Nonexpert and Expert Opinion Evidence Code §§ 800-897

1-17 California Courtroom Evidence 17.26

17.26 Repealed--Evid Code §§ 896, 897

LegH: Enacted 1965. Repealed 1992 ch. 162.



1 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.syn

§ 18.syn Synopsis to Chapter 18: Privileges Evidence Code §§ 900-1070

Introduction

[1] Types of Privileges

[2] Holder of Privilege

[3] Waiver

[4] Prohibition Against Commenting on Exercise of Privilege

18.01 Definitions Govern--Evid Code § 900

[1] Evid Code § 900 Text

[2] Commission Comments

18.02 Proceeding--Evid Code § 901

[1] Evid Code § 901 Text

[2] Commission Comment

18.03 Civil Proceeding--Evid Code § 902

[1] Evid Code § 902 Text

[2] Commission Comments

18.04 Criminal Proceeding--Evid Code § 903

[1] Evid Code § 903 Text

[2] Commission Comment

18.05 Presiding Officer--Evid Code § 905

[1] Evid Code § 905 Text

[2] Commission Comment

18.06 Applicability of Provisions--Evid Code § 910

[1] Evid Code § 910 Text

[2] Legislative Committee Comments

[3] Case Notes

18.07 Preliminary Provisions--Evid Code § 911

[1] Evid Code § 911 Text

[2] Commission Comments

[3] Case Notes

[a] Constitutional Considerations

[b] New Privileges Not Permitted

[c] Burden of Proof

18.08 Waiver by Disclosure--Joint Holders of Privilege--Evid Code § 912

[1] Evid Code § 912 Text

[2] Official Comments

[3] Case Notes

[a] Waiver

[b] Exception: "Joint Defense" or "Common Interest" Doctrine

[c] Relationships Not Covered

18.09 Prohibition From Comment on Exercise of Privilege--No Presumption or Inference--Evid Code § 913

[1] Evid Code § 913 Text

[2] Case Notes

[a] Purpose of Evid Code § 913

[b] Attorney-Client or Work Product Privileges

18.10 Basis of Determination of Claim of Privilege--Contempt for Failure to Disclose--Evid Code § 914

[1] Evid Code § 914 Text

[2] Statutory References

[3] Committee Comments

[4] Case Notes

18.11 Disclosure of Information to Determine Claim--Official Information--Identity of Informer--Trade Secrets--Evid Code § 915

[1] Evid Code § 915 Text

[2] Commission Comments

[3] Committee Comments

[4] Case Notes

[a] Disclosure to Establish Privilege

[b] In Camera Review

18.12 Basis of Exclusion of Information--Exceptions--Evid Code § 916

[1] Evid Code § 916 Text

18.13 Presumption of Confidential Nature of Communication; Electronic Communication Retains Privileged Character--Evid Code § 917

[1] Evid Code § 917 Text

[2] Legislative Note--2002

[3] Commission Comments

[4] Committee Comments

[5] Case Notes

18.14 Error on Claim Disallowance--Evid Code § 918

[1] Evid Code § 918 Text

18.15 Basis of Admissibility of Privileged Information--Evid Code § 919

[1] Evid Code § 919 Text

[2] Commission Comment

18.16 Privilege Statutes Immune to Repeal by Implication--Evid Code § 920

[1] Evid Code § 920 Text

[2] Statutory References

[3] Commission Comments

[4] Case Notes

18.17 Privilege of Defendant--Evid Code § 930

[1] Evid Code § 930 Text

[2] Commission Comment

[3] Statutory References

[4] Case Notes

[a] Constitutional Considerations

[b] Applicable Only in Criminal Cases

[c] Waiver

[d] Compulsion

18.18 Self-Incrimination Privilege--Evid Code § 940

[1] Evid Code § 940 Text

[2] Commission Comments

[3] Statutory References

[4] Application of Proposition 8--The Victims' Bill of Rights

[5] Application of Proposition 115--Reciprocal Discovery

[6] Case Notes

[a] Evidence of Crime

[b] Applicable in Certain Types of Actions

[c] Scope of the Privilege--Witnesses

[d] Corporations

[e] Waiver

[f] Proposition 115--Reciprocal Discovery

[g] Involuntary Confession

[h] Custody

[i] Sufficiency of Advisement and Waiver

[j] Impeachment--By Defendant's Silence

[k] Impeachment--By Defendant's Statements

[1] Proposition 8--Victims' Bill of Rights

18.19 Lawyer Defined--Evid Code § 950

[1] Evid Code § 950 Text

[2] Statutory Reference

[3] Commission Comments

[4] Case Notes

18.20 Client Defined--Evid Code § 951

[1] Evid Code § 951 Text

[2] Commission Comments

[3] Case Notes

18.21 "Confidential Communication Between Client and Lawyer"--Evid Code § 952

[1] Evid Code § 952 Text

[2] Statutory Reference

[3] Commission Comments

[4] Case Notes

[a] Scope of Privilege

[b] Third-Party Disclosures

[c] Privilege Not Applied

18.22 Holder of the Privileged Defined--Evid Code § 953

[1] Evid Code § 953 Text

[2] Commission Comments

[3] Case Notes

18.23 Privilege Claimants--Evid Code § 954

[1] Evid Code § 954 Text

[2] Comments

[3] Commission Comments

[4] Case Notes

[a] Scope of Privilege

[b] Trustee As Client

[c] Waiver

18.24 Lawyer's Obligation to Claim Privilege--Evid Code § 955

[1] Evid Code § 955 Text

[2] Commission Comment

[3] Case Notes

18.25 Lawyer Obtained to Aid in Planning, Committing Crime--Evid Code § 956

[1] Evid Code § 956 Text

[2] Commission Comment

[3] Case Notes

18.26 No Privilege if Disclosure Will Prevent Criminal Act--Evid Code § 956.5

[1] Evid Code § 956.5 Text

[2] Case Notes

18.27 Communication Between Parties Claiming Under Deceased Client--Evid Code § 957

[1] Evid Code § 957 Text

[2] Commission Comments

[3] Case Notes

18.28 Communication in Issue of Breach of Duty Arising of Lawyer-Client Relations--Evid Code § 958

[1] Evid Code § 958 Text

[2] Commission Comments

[3] Case Notes

18.29 Communication of Intention or Competence of Client Executing Attested Document--Evid Code § 959

[1] Evid Code § 959 Text

[2] Commission Comments

[3] Case Notes

18.30 Communication of Intention of Deceased Client with Respect to Writing Affecting Property Interest--Evid Code § 960

[1] Evid Code § 960 Text

[2] Commission Comments

18.31 Validity of Writing by Deceased Client Affecting Interest in Property--Evid Code § 961

[1] Evid Code § 961 Text

[2] Commission Comments

18.32 Communication Made If Two or More Clients Retain Same Lawyer in Matter of Common Interest--Evid Code § 962

[1] Evid Code § 962 Text

[2] Case Notes

18.33 General Provisions--Evid Code § 970

[1] Evid Code § 970 Text

[2] Statutory Reference

[3] Commission Comments

[4] Case Notes

18.34 Exemption of Spouse of Party Called as Witness--Evid Code § 971

[1] Evid Code § 971 Text

[2] Commission Comments

[3] Statutory Reference

[4] Case Notes

18.35 Privilege Exception--Evid Code § 972

[1] Evid Code § 972 Text

[2] Commission Comments

[3] Case Notes

[a] Spousal Privilege

[b] Cohabitants

[c] Crime Against Third Person

18.36 Privilege Waiver--Proceeding for Benefit of Self or Spouse--Evid Code § 973

[1] Evid Code § 973 Text

[2] Commission Comments

[3] Legislative Committee Comments

[4] Case Notes

18.37 General Provision--Evid Code § 980

[1] Evid Code § 980 Text

[2] Statutory Reference

[3] Commission Comments

[4] Case Notes

18.38 Communication Made to Enable Commission of Crime or Fraud--Evid Code § 981

[1] Evid Code § 981 Text

[2] Commission Comments

[3] Case Notes

18.39 Proceedings to Commit Spouse Due to Alleged Condition--Evid Code § 982

[1] Evid Code § 982 Text

[2] Commission Comments

18.40 Proceedings to Establish Spouse's Competence--Evid Code § 983

[1] Evid Code § 983 Text

[2] Commission Comment

18.41 Proceedings Brought by One Spouse Against Other--Against Person Claiming Through Deceased Spouse--Evid Code § 984

[1] Evid Code § 984 Text

[2] Commission Comment

18.42 Criminal Proceedings--Evid Code § 985

[1] Evid Code § 985 Text

[2] Commission Comment

[3] Case Notes

18.43 Juvenile Court Proceedings--Evid Code § 986

[1] Evid Code § 986 Text

[2] Commission Comment

18.44 Communication by Spouse, Defendant in Criminal Action--Evid Code § 987

[1] Evid Code § 987 Text

[2] Commission Comments

18.45 "Physician" Defined--Evid Code § 990

[1] Evid Code § 990 Text

[2] Commission Comments

[3] Case Notes

18.46 "Patient" Defined--Evid Code § 991

[1] Evid Code § 991 Text

[2] Legislative Committee Comments

[3] Case Notes

18.47 Confidential Communication Between Patient and Physician Defined--Evid Code § 992

[1] Evid Code § 992 Text

[2] Legislative Committee Comments

[3] Case Notes

18.48 Holder of the Privilege--Evid Code § 993

[1] Evid Code § 993 Text

[2] Comment

[3] Commission Comments

[4] Case Notes

18.49 Patient's Right of Privilege--Evid Code § 994

[1] Evid Code § 994 Text

[2] Commission Comments

[3] Statutory References

[4] Case Notes

18.50 Physician's Obligation to Claim Privilege--Evid Code § 995

[1] Evid Code § 995 Text

[2] Statutory References

[3] Commission Comment

[4] Case Notes

18.51 Condition of Patient--Evid Code § 996

[1] Evid Code § 996 Text

[2] Commission Comment

[3] Case Notes

18.52 When Services of Physician Sought to Aid in Commission of or to Escape Crime or Tort--Evid Code § 997

[1] Evid Code § 997 Text

[2] Commission Comments

18.53 Criminal Proceedings--Evid Code § 998

[1] Evid Code § 998 Text

[2] Commission Comment

[3] Case Notes

18.54 Proceeding for Damages Due to Criminal Conduct of Patient--Evid Code § 999

[1] Evid Code § 999 Text

[2] Case Notes

18.55 Communication Between Parties Claiming Through Deceased Patient--Evid Code § 1000

[1] Evid Code § 1000 Text

18.56 Communication in Issue of Breach of Duty Arising out of Physician-Patient Relationship--Evid Code § 1001

[1] Evid Code § 1001 Text

[2] Case Notes

18.57 Communication Concerning Intention of Deceased Patient with Respect to Writing Affecting Property Interest--Evid Code § 1002

[1] Evid Code § 1002 Text

18.58 Communication Concerning Validity of Deed Executed by Deceased Patient--Evid Code § 1003

[1] Evid Code § 1003 Text

18.59 No Privilege in Proceedings to Commit Patient Due to Alleged Condition--Evid Code § 1004

[1] Evid Code § 1004 Text

[2] Commission Comments

18.60 Proceedings to Establish Patient's Competence--Evid Code § 1005

[1] Evid Code § 1005 Text

[2] Commission Comments

18.61 Information to Public Office by Physician or Patient--Evid Code § 1006

[1] Evid Code § 1006 Text

[2] Commission Comment

18.62 Proceeding by Public Entity to Determine Condition of Right, Authority, Privilege--Evid Code § 1007

[1] Evid Code § 1007 Text

[2] Legislative Committee Comments

18.63 Psychotherapist Defined--Evid Code § 1010

[1] Evid Code § 1010 Text

[2] Legislative Note

[3] Case Notes

18.64 Privilege-Educational Psychologist-Patient--Evid Code § 1010.5

[1] Evid Code § 1010.5 Text

18.65 Patient Defined--Evid Code § 1011

[1] Evid Code § 1011 Text

[2] Legislative Committee Comment

18.66 Confidential Communication Between Patient and Psychotherapist--Evid Code § 1012

[1] Evid Code § 1012 Text

[2] Commission Comment

[3] Case Notes

18.67 Holder of Privilege--Evid Code § 1013

[1] Evid Code § 1013 Text

[2] Case Notes

18.68 Who May Claim Privilege--Evid Code § 1014

[1] Evid Code § 1014 Text

[2] Legislative Committee Comments

[3] Case Notes

[a] Scope of Privilege

[b] Constitutional Issues

[c] Holder of Privilege

18.69 Repealed--Evid Code § 1014.5

18.70 Psychotherapist's Obligation to Claim Privilege--Evid Code § 1015

[1] Evid Code § 1015 Text

[2] Statutory References

[3] Case Notes

18.71 Condition of Patient--Evid Code § 1016

[1] Evid Code § 1016 Text

[2] Case Notes

18.72 Psychotherapist Appointed by Court--Application--Evid Code § 1017

[1] Evid Code § 1017 Text

[2] Commission Comments

[3] Case Notes

18.73 No Privilege if Psychotherapist's Services Were Obtained to Aid in Crime or Tort--Evid Code § 1018

[1] Evid Code § 1018 Text

18.74 Communication Between Parties Claiming Through Deceased Patient--Evid Code § 1019

[1] Evid Code § 1019 Text

18.75 Communication in Issue of Breach of Duty Arising out of Psychotherapist-Patient Relation--Evid Code § 1020

[1] Evid Code § 1020 Text

18.76 Communication Concerning Intention of Deceased Patient in Writing Affecting Interest--Evid Code § 1021

[1] Evid Code § 1021 Text

18.77 Communication Concerning Validity of Deed Executed by Deceased Patient--Evid Code § 1022

[1] Evid Code § 1022 Text

18.78 Proceeding in Criminal Action to Determine Sanity of Defendant--Evid Code § 1023

[1] Evid Code § 1023 Text

[2] Commission Comments

18.79 Patient Adjudged Dangerous--Evid Code § 1024

[1] Evid Code § 1024 Text

[2] Commission Comments

[3] Case Notes

[a] Therapist's Duty

[b] Child Abuse Reporting Act

18.80 Proceeding to Establish Patient's Competence--Evid Code § 1025

[1] Evid Code § 1025 Text

18.81 Information to Public Office Required of Psychotherapist or Patient if Open to Public--Evid Code § 1026

[1] Evid Code § 1026 Text

18.82 Additional Circumstances for No Privilege--Evid Code § 1027

[1] Evid Code § 1027 Text

[2] Commission Comments

[3] Case Notes

18.83 Repealed--Evid Code § 1028

18.84 "Member of the Clergy" Defined--Evid Code § 1030

[1] Evid Code § 1030 Text

18.85 "Penitent" Defined--Evid Code § 1031

[1] Evid Code § 1031 Text

[2] Case Notes

18.86 "Penitential Communication" Defined--Evid Code § 1032

[1] Evid Code § 1032 Text

[2] Commission Comment

[3] Case Notes

18.87 Penitent's Privilege--Evid Code § 1033

[1] Evid Code § 1033 Text

[2] Commission Comment

[3] Case Notes

18.88 Member of the Clergy's Privilege--Evid Code § 1034

[1] Evid Code § 1034 Text

[2] Commission Comments

[3] Case Notes

18.89 Victim Defined--Evid Code § 1035

[1] Evid Code § 1035 Text

18.90 Sexual Assault Victim Counselor-Requirements--Evid Code § 1035.2

[1] Evid Code § 1035.2 Text

18.91 Confidential Communication Between Victim and Counselor--Evid Code § 1035.4

[1] Evid Code § 1035.4 Text

[2] Case Notes

18.92 Holder of Privilege-Victim or Victim's Relation--Evid Code § 1035.6

[1] Evid Code § 1035.6 Text

18.93 Exercise of Privilege--Evid Code § 1035.8

[1] Evid Code § 1035.8 Text

[2] Case Notes

18.94 Counselor's Privilege--Evid Code § 1036

[1] Evid Code § 1036 Text

18.95 Sexual Assault Defined--Evid Code § 1036.2

[1] Evid Code § 1036.2 Text

18.96 Victim Defined--Evid Code § 1037

[1] Evid Code § 1037 Text

18.97 Domestic Violence Counselor-Requirements--Evid Code § 1037.1

[1] Evid Code § 1037.1 Text

18.98 Confidential Communication Between Victim and Counselor--Evid Code § 1037.2

[1] Evid Code § 1037.2 Text

18.99 Construction--Evid Code § 1037.3

[1] Evid Code § 1037.3 Text

18.100 Holder of Privilege--Evid Code § 1037.4

[1] Evid Code § 1037.4 Text

18.101 Exercise of Privilege--Evid Code § 1037.5

[1] Evid Code § 1037.5 Text

18.102 Counselor's Privilege--Evid Code § 1037.6

[1] Evid Code § 1037.6 Text

18.103 Domestic Violence Defined--Evid Code § 1037.7

[1] Evid Code § 1037.7 Text

18.104 Information Victim of Limitations on Confidentiality of Communications--Evid Code § 1037.8

[1] Evid Code § 1037.8 Text

18.105 Right to Prevent Disclosure of Confidential Communication Between Victim and Caseworker; Who May Claim Privilege; Notice to Victim--Evid Code § 1038

[1] Evid Code § 1038 Text

[2] Legislative Note

18.106 When Court May Compel Disclosure; Ruling on Claim of Privilege--Evid Code § 1038.1

[1] Evid Code § 1038.1 Text

[2] Legislative Note

18.107 Definitions--Evid Code § 1038.2

[1] Evid Code § 1038.2 Text

[2] Legislative Note

18.108 Official Information Defined--Evid Code § 1040

[1] Evid Code § 1040 Text

[2] Statutory References

[3] Legislative Committee Comment

[4] Case Notes

[a] Scope of Privilege

[b] Holder of Privilege

[c] Burden to Establish Privilege

18.109 Privilege Relating to Identity of Informer--Evid Code § 1041

[1] Evid Code § 1041 Text

[2] Commission Comments

[3] Case Notes

18.110 Criminal Proceedings-Finding Fact Adverse to Public Entity-Search Validity-in Camera Hearings--Evid Code § 1042

[1] Evid Code § 1042 Text

[2] Legislative Committee Comments

[3] Case Notes

18.111 Investigation of Citizens' Complaints--Discovery or Disclosure of Peace or Custodial Officer Personnel Records--Evid Code § 1043

[1] Evid Code § 1043 Text

[2] Case Notes

[a] Pitchess

[b] Notice

[c] In Camera Inspection

[d] Constitutionality

18.112 Restrictions on Access to Medical History--Evid Code § 1044

[1] Evid Code § 1044 Text

18.113 Peace or Custodial Officer Records-Matters Included and Excluded from Disclosure--Evid Code § 1045

[1] Evid Code § 1045 Text

[2] Case Notes

[a] Due Process

[b] In Camera Hearing

[c] Scope

18.114 Disclosure in Actions Alleging Excessive Force by Peace or Custodial Officer--Contents of Motion--Evid

Code § 1046

[1] Evid Code § 1046 Text

[2] Case Notes

18.115 Records of Peace or Custodial Officers Not Present During Arrest, Prior to Time of Booking, or At Time Conduct Alleged to Have Occurred--Evid Code § 1047

[1] Evid Code § 1047 Text

[2] Case Notes

18.116 Secret Ballot Vote--Evid Code § 1050

[1] Evid Code § 1050 Text

[2] Commission Comments

18.117 Trade Secret--Evid Code § 1060

[1] Evid Code § 1060 Text

[2] Commission Comments

[3] Case Notes

18.118 Definitions; Protective Orders--Evid Code § 1061

[1] Evid Code § 1061 Text

[2] Commission Comment

[3] Case Notes

18.119 Protection of Trade Secrets-Closed Proceedings--Evid Code § 1062

[1] Evid Code § 1062 Text

18.120 Procedure for Requesting Articles be Sealed--Evid Code § 1063

[1] Evid Code § 1063 Text

18.121 Privilege of Newsman--Evid Code § 1070

[1] Evid Code § 1070 Text

[2] Legislative Committee Comment

[a] Legislative Notes

[3] Case Notes

[a] Scope of Privilege

[b] Due Process



2 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 900 through 1070* on privileges.



Cross Reference:

Complete discussion of privileges, see California Forms of Pleading and Practice, Ch. 191, Discovery: Privileges and Other Discovery Limitations (Matthew Bender).

Discussion of the privileges, with forms, see California Civil Trial Guide, Unit 51, Privileges (Matthew Bender); Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections).

Discussion of privileges in context of laying foundation, see Imwinkelried et al., California Evidentiary Foundations, Ch. 10, Statutory Privileges and Similar Doctrines, Ch. 11 Constitutional Privileges--The Exclusionary Rule (Matthew Bender).



3 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence

Introduction

[1] Types of Privileges

The Evidence Code provides protections from disclosure of various kinds of communications. These privileges include the lawyer-client privilege [*Evid Code § 954*], attorney-work product protection, the privilege against self-incrimination [*Evid Code § 940*] the privilege for confidential marital communications [*Evid Code § 980*], the physician-patient privilege [*Evid Code § 994*], the psychotherapist-patient privilege [*Evid Code § 1014*], the privilege of a penitent [*Evid Code § 1033*], the privilege of a clergyperson [*Evid Code § 1034*], the sexual assault counselor-victim privilege [*Evid Code § 1035.8*], and the domestic violence counselor-victim privilege [*Evid Code § 1037.5*]. Trade secrets are also protected [*Evid Code § 915*], as are the identities of informers [*Evid Code § 1041*], peace or custodial officer personnel records [*Evid Code § 1043*], and newsperson's sources [*Evid Code § 1070*].

Privileges exist because the Legislature has determined that the benefits derived from the privileges justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. On the other hand, a privilege may be deemed not to exist, if the benefits of extending the privilege are outweighed by the importance of the information.

[2] Holder of Privilege

The Evidence Code defines who the "holder" of each privilege is. For example, under the attorney-client privilege, the holder may be the client, the client's guardian or conservator when the client has a guardian or conservator, or the personal representative of the client if the client is dead [*Evid Code § 953*]. Only the holder of the privilege can assert the privilege.

[3] Waiver

Privileges may be waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, discloses 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 [*Evid Code § 912*].

[4] Prohibition Against Commenting on Exercise of Privilege

If a person exercises a privilege, neither the presiding officer nor counsel may comment on that exercise. In addition, the trier of fact may make no presumption because of the exercise of the privilege and may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding [*Evid Code* § 913].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInformer PrivilegeEvidencePrivilegesSelf-Incrimination PrivilegeGeneral Overview



4 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.01

18.01 Definitions Govern--Evid Code § 900

[1] Evid Code § 900 Text

■ *Evid Code 900.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The definitions in Sections 901-905 apply only to Evid Code Division 8 (Privileges). These definitions, however, are not applicable where the context or language of a particular section in Division 8 requires that a word or phrase used in that section be given a different meaning [Cal Law Rev Com Comment].

The definitions contained in Division 2 (commencing with *Evid Code § 100*) apply to the entire code, including Division 8 (Privileges) [Cal Law Rev Com Comment].



5 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.02

18.02 Proceeding--Evid Code § 901

[1] Evid Code § 901 Text

■ *Evid Code § 901.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comment

"Proceeding" is defined to mean all proceedings of whatever kind in which testimony can be compelled by law to be given so that Division 8 (Privileges) may be made applicable to all situations where a person can be compelled to testify [Cal Law Rev Com Comment].



6 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.03

18.03 Civil Proceeding--Evid Code § 902

[1] Evid Code § 902 Text

■ *Evid Code § 902.*

"Civil proceeding" means any proceeding except a criminal proceeding.

LegH: 1965 ch. 299.

[2] Commission Comments

"Civil proceeding" includes not only a civil action or proceeding, but also any nonjudicial proceeding in which testimony can be compelled to be given [Cal Law Rev Com Comment].



7 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.04

18.04 Criminal Proceeding--Evid Code § 903

[1] Evid Code § 903 Text

■ *Evid Code § 903.*

"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.

LegH: 1965 ch. 299.

[2] Commission Comment

This division treats a proceeding by accusation for the removal of a public officer under *Gov Code* §§ 3060-3073 the same as a criminal action. Proceedings by accusation and criminal proceedings are so nearly alike in their basic nature that, so far as privileges are concerned, this similar treatment is justified [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal Political ActivityElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal Political ActivityPenalties



8 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.05

18.05 Presiding Officer--Evid Code § 905

[1] Evid Code § 905 Text

■ *Evid Code § 905.*

"Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

LegH: 1965 ch. 299.

[2] Commission Comment

"Presiding officer" includes judges, arbitrators, hearing officers, referees, and any other person who is authorized to make rulings on claims of privilege so that reference may be made in Division 8 to the person who makes rulings on questions of privilege in nonjudicial as well as judicial proceedings [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral Overview



9 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.06

18.06 Applicability of Provisions--Evid Code § 910

[1] Evid Code § 910 Text

■ *Evid Code § 910.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in nonjudicial as well as judicial proceedings. This section makes the privilege rules applicable to all proceedings in which testimony can be compelled by law to be given [Leg Com Comment].

A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding [Leg Com Comment].

Division 8 and other statutes provide exceptions to particular privileges for particular types of proceedings [Leg Com Comment].

Statutes that relax the rules of evidence in particular proceedings, in order to admit evidence which is considered too unreliable or prejudicial for judicial proceedings, do not make privileges inapplicable in such proceedings because privileges are based on policy considerations other than reliability and impartiality [Leg Com Comment].

[3] Case Notes

The implied waiver provisions in *Evid Code § 910 et seq.* will not be extended beyond their existing limits to mediation confidentiality rights [*Eisendrath v. Superior Court* (2003) 109 CA4th 351, 134 CR2d 716] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesGeneral OverviewEvidenceProcedural ConsiderationsRule Application & Interpretation



10 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.07

18.07 Preliminary Provisions--Evid Code § 911

[1] Evid Code § 911 Text

■ *Evid Code § 911.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

This section codifies the substance of prior decisional law that privileges are not recognized in the absence of statute [Cal Law Rev Com Comment].

The courts are permitted to develop the details of declared principles to a limited extent, however [Cal Law Rev Com Comment].

[3] Case Notes

[a] Constitutional Considerations

Despite the exclusivity of the Evid Code on the subject of privileges, constitutional considerations may exist that require a limited form of protection for confidential information given to a bank by its customers. A constitutional amendment adopted in 1974 elevated the right of privacy to an "inalienable right" expressly protected by force of constitutional

mandate (*Cal Const, art I, § 1*). It may be safely assumed that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life [*Valley Bank of Nevada v. Superior Court* (1975) 15 C3d 652, 125 CR 553, 542 P2d 977 (bank customers' right to reasonable privacy regarding financial matters must be balanced against civil litigants' right to discover relevant facts)].

Unless a privilege is expressly or implicitly based on statute, its existence may be found only if required by state or federal constitutional principles [*Welfare Rights Organization v. Crisan* (1983) 33 C3d 766, 190 CR 919, 661 P2d 1073 (finding that legislature implicitly extended attorney-client confidentiality to client communications with lay representatives in administrative hearings under *W&I Code § 10950*)].

A statutory privilege cannot override a defendant's constitutional right to confront and cross-examine witnesses [*Vela v. Superior Court* (1989) 208 CA3d 141, 255 CR 921 (attorney-client privilege)].

"The judiciary has a solemn obligation to insure that the constitutional right of an accused to a fair trial is realized. If that right would be thwarted by enforcement of a statute, the state ... must yield" [*Vela v. Superior Court* (1989) 208 CA3d 141, 255 CR 921 (entitlement to privilege must be balanced against defendant's constitutional rights of confrontation and cross-examination, in camera, to determine which privileged matters are essential to ensure these rights)].

[b] New Privileges Not Permitted

Evid Code § 911 declares the California Legislature's determination that evidentiary privileges shall be available only as defined by statute. Courts may not add to the statutory privileges except as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges. Unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal [*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 441, 32 CR3d 209 (reviewing clergy-penitent privilege)].

Unlike the federal courts (*see Fed R Evid 501*), the California courts are not free to create new privileges or exceptions to privileges [*Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 69 CR2d 112 ; *Wellpoint Health Networks v. Superior Court* (1997) 59 CA4th 110, 68 CR2d 844 ; *Dickerson v. Superior Court* (1982) 135 CA3d 93, 185 CR 97 (no exception to the attorney-client privilege (*Evid Code § 954*) in the case of corporate clients in a suit against their shareholders)].

Evid Code § 911(c) reflects the Legislature's clear intent to abolish common-law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy [*People v. Gionis* (1995) 9 C4th 1196, 40 CR2d 456, 892 P2d 1199 ; *Garstang v. Superior Court* (1995) 39 CA4th 526, 46 CR2d 84] .

Because no statute allows a moving party under *CCP § 877.6* to refuse to disclose terms of a sliding scale settlement agreement that it contends was made in good faith, the settlement agreement is not privileged against the nonsettling party's request for disclosure [*Mediplex of California, Inc. v. Superior Court* (1995) 34 CA4th 748, 40 CR2d 397] .

No new privilege would be created for communications made to a non-attorney "jailhouse lawyer" [*People v. Flores Velasquez* (1987) 192 CA3d 319, 237 CR 366] .

No evidentiary privilege protects conversations between a union representative and a union member [*American Airlines, Inc. v. Superior Court*, 114 CA4th 881, 8 CR3d 146 (motion to compel union representative's deposition erroneously denied)].

Under certain circumstances, one may have a reasonable expectation of privacy in a police station even absent a

privileged relationship. An expectation of privacy based upon express representations by police officers, even in a jailhouse setting, is one that society is prepared to recognize as reasonable. When police make express representations that a conversation will be private, they create a legitimate and reasonable expectation of privacy and the surreptitious monitoring and recording of that conversation violates the *Fourth Amendment* [*People v. Hammons* (1991) 235 CA3d 1710 (playing surreptitiously recorded conversation between defendants for jury constituted reversible error)].

[c] Burden of Proof

The burden of establishing that a particular matter is privileged is on the party asserting the privilege [*Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 15 CR 90, 364 P2d 266 ; *American Airlines, Inc. v. Superior Court*, 114 CA4th 881, 8 CR3d 146] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesAttorney-Client PrivilegeElementsEvidencePrivilegesAttorney-Client
PrivilegeExceptionsEvidencePrivilegesClergy CommunicationsExceptions



11 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.08

18.08 Waiver by Disclosure--Joint Holders of Privilege--Evid Code § 912

[1] Evid Code § 912 Text

■ *Evid Code § 912.*

(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.

LegH: 1965 ch. 299, operative January 1, 1967, 1980 ch. 917, 2002 ch. 72, 2004 ch. 405.

[2] Official Comments

Section 912 is amended to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor, which did not exist when the statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim) [Cal Law Rev Com Comment].

Subdivisions (a) and (b) restate the substance of prior case law. Subdivision (c) is new, but it is a logical extension of declared principles. Subdivision (d) apparently reverses prior decisional law by stating that a disclosure in confidence does not constitute a waiver when such disclosure is necessary to accomplish the purpose for which the professional was consulted [Sen Jud Com Comment].

The theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege [Sen Jud Com Comment].

If the holder of the privilege has the legal standing and the opportunity to claim the privilege, but fails to do so until the nature of the testimony is revealed at trial, he cannot assert an objection to strike the privileged testimony from the trial record [Sen Jud Com Comment].

If the revelation of the privileged matter takes place in another privileged communication, the holder of the privilege does not abandon the secrecy to which he is entitled under the privilege [Sen Jud Com Comment].

If the disclosure is reasonably necessary under subdivision (d) the holder of the privilege does not evidence an abandonment of secrecy even when he consents to such disclosure [Sen Jud Com Comment].

[3] Case Notes

Under *Evid Code* § 912(a), a waiver of the attorney-client privilege occurs if the holder of the privilege discloses the communication or consents to disclosure by another, without coercion, or fails to claim the privilege in a proceeding in which he or she has the opportunity to do so. Generally, a waiver of the privilege for purposes of one proceeding is applicable to all subsequent proceedings [*People v. Ledesma* (2006) 39 C4th 641, 691, 47 CR3d 326, 140 P3d 657 (holding that *Evid Code* § 958 establishes exception to, not waiver of, attorney-client privilege)].

[a] Waiver

A defendant who previously testified about his conversations with counsel, and whether or not he had conversations with counsel at a certain time, waived the attorney-client privilege as to those conversations and thus could not object on appeal to the prosecutor's comments on defendant's inconsistent testimony [*People v. Wilson* (2005) 36 C4th 309, 336, 30 CR3d 513, 114 P3d 758] .

The holder of a privilege may contract to waive it. But the holder must clearly manifest that intention, because a court will not reach that conclusion on its own [*Crest Catering Co. v. Superior Court* (1965) 62 C2d 274, 42 CR 110, 398 P2d 150 (waiver is intentional relinquishment or acts inconsistent with intent to enforce a right)].

The right to claim the attorney-client privilege may be lost by an express or implied waiver [*Shooker v. Superior Court* (2003) 111 CA4th 923, 4 CR3d 334] .

If the holder of the privilege voluntarily discloses the content of a confidential communication to an unprivileged third person, the privilege is waived [*Title Ins. and Trust Co. v. California Dev. Co.* (1915) 171 C 173 (giving privileged

letters to third person constitutes waiver); *McKesson HBOC, Inc. v. Superior Court* (2004) 115 CA4th 1229, 9 CR3d 812 (notwithstanding written confidentiality agreement, company waived attorney-client privilege when it shared internal audit memorandum and interview documents, prepared by its lawyers, with investigating agency and prosecutor); *People v. Crow* (1994) 28 CA4th 440, 33 CR2d 624 (defendant conceded that pretrial disclosure of psychiatrist's report to prosecutor waived psychotherapist-patient privilege)].

Disclosure of a patient's name and ailment to a prepaid health plan operator for the purpose of paying the doctor does not result in the waiver of the physician-patient privilege. The disclosure is within the rule of reasonably necessary purpose when it aims to promote the patient's treatment. Coverage determinations require disclosure of the patient's name and ailment for the purpose of paying the doctor's fee. Thus, a health plan operator may assert the physician-patient privilege [*Blue Cross v. Superior Court* (1976) 61 CA3d 798, 132 CR 635] .

If the holder of the privilege intends that the recipient of a confidential communication will subsequently disclose its content to an unprivileged third person, the privilege is waived [*Mission Film Corp. v. Chadwick Pictures Corp.* (1929) 207 C 386 (attorney-client communication clearly intended not to be confidential); *Estate of Nelson* (1901) 132 C 182 64 P 294 (testator intended disclosure); *Kerns Constr. Co. v. Superior Court* (1968) 266 CA2d 405, 72 CR 74 72 LR 74 (deposition concerning accident report)].

Attorney-client privilege may be waived in court even if the holder is not advised about the privilege before the answer that waives the privilege [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384] .

No waiver of the attorney-client privilege exists in a criminal prosecution when (1) the record did not reflect notice to the witness that defense counsel intended to subpoena her attorney; (2) the witness did not authorize her attorney to discuss the conversations at issue with defense counsel; and (3) she had no opportunity to assert the privilege or to offer evidence regarding an intent to waive the privilege [*People v. Hayes* (1999) 21 C4th 1211, 91 CR2d 211, 989 P2d 645 , rev'd, *Hayes v. California* (2000) 531 US 980, 121 S Ct 431, 148 L Ed2d 438 , 148 L 121 438, Ed2d S Ct 431].

Investigation of sexual harassment by an attorney does not cloak the entire investigation in attorney-client privilege, nor is this privilege waived in its entirety when the plaintiff calls into question the propriety of the investigation; specified discrete communications between the attorney and client may still be protected by privilege [*Kaiser Foundation Hospital v. Superior Court* (1998) 66 CA4th 1217, 78 CR2d 543] .

Attorney-client privilege, with regard to a letter written by client to his attorney, was waived when client, without objection, testified under cross-examination not only that there was such a letter but went into details as to its contents [*Julrik Productions, Inc. v. Chester* (1974) 38 CA3d 807, 113 CR 527] .

No waiver of attorney-client privilege exists where written immunity agreement did not mention witness's confidential communication with her attorneys, did not require her to provide statements or testimony about such communication, and did not authorize disclosure of such communications by anyone else [*Maas v. Municipal Court* (1985) 175 CA3d 601, 221 CR 245] .

Merely revealing that counsel had been consulted in deciding upon proper legal action was not a waiver of the attorney-client privilege [*Southern California Gas Co. v. Public Utilities Commission* (1990) 50 C3d 31, 265 CR 801, 784 P2d 1373 (utility's mention that it had relied on counsel's advice regarding buyout of supplier's contract)].

The waiver of the patient-physician privilege that occurs when the patient tenders the issue of his ailments [see *Evid Code* § 996] has no analogue in the attorney-client privilege. Therefore, the fact that a party tenders issues that were discussed in confidence with the attorney does not in itself constitute a waiver of privilege [*Estate of Kime* (1983) 144 CA3d 246, 193 CR 718] .

Since it is not the content of the communication itself, but rather the attorney-client relationship that is protected by the privilege, a conservatee did not waive the attorney-client privilege by issuing a subpoena duces tecum to all of her former attorneys requiring them to produce records regarding their respective representation of the conservatee [*Lohman v. Superior Court* (1978) 81 CA3d 90, 146 CR 171] .

If the disclosure sought is so related to the disclosure already made that the patient has no reasonable privacy interest in preventing it, then the purpose of the privilege no longer exists and is waived. One may not claim privilege where no legitimate claim to confidentiality exists in order to aid a party litigant [*Owens v. Palos Verdes Monaco* (1983) 142 CA3d 855, 191 CR 381 (attorney's testimony concerning occurrences before and after the signing of an alleged sale agreement did not disclose "significant part" of communication); *Jones v. Superior Court* (1981) 119 CA3d 534, 174 CR 148 (waiver is limited to matters inextricably related to matters disclosed; mother admitted ingesting DES, diethylstilbestrol, during pregnancy)].

In a personal injury action against a trolley company, a trolley operator employed by the company testified at her deposition that she was being treated by a psychiatrist at the time of the accident and was taking three prescription medications. The operator was entitled to prevent the disclosure of any confidential communications she had with her psychiatrist, other than those that fell within the dangerous patient exception set forth in *Evid Code* § 1024. Nothing in her testimony could be construed as disclosing any significant part of her communications with her psychiatrist; moreover, neither the operator's workers' compensation claims nor any disclosure of confidential communication information that occurred in the course of those proceedings would support access to the confidential communications. Even assuming a waiver of the privilege, the information at issue was still protected from unconditional disclosure by *Cal Const*, art I, § 1. Although the constitutional protection was not absolute, the plaintiff could not demonstrate a compelling need for access to the otherwise private information [*San Diego Trolley, Inc. v. Superior Court* (2001) 87 CA4th 1083, 105 CR2d 476] .

Because plaintiff on cross-examination revealed nothing more significant than the fact that she had discussed warnings concerning chemicals with her attorney, she did not waive the attorney-client privilege. There was no implied waiver of the privilege such that otherwise privileged communications concerning the health hazards of a chemical had to be disclosed [*Mitchell v. Superior Court* (1984) 37 C3d 591, 208 CR 886, 691 P2d 642] .

Failure to comply with discovery requests may result in waiver of the attorney-client privilege [*Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 69 CR2d 112 (failure to expressly object to request for production on grounds of attorney-client privilege waived the privilege); *Korea Data Systems Co. v. Superior Court* (1997) 51 CA4th 1513, 59 CR2d 925 (timely objections to discovery request, albeit "boilerplate" objections, sufficient to prevent waiver of privilege; appropriate remedy for discovery abuse was sanctions, not the waiver of privilege)].

Attorney-client privilege was waived when an answer to request for production disclosed existence of privileged material and offer to provide a copy [*Hiott v. Superior Court* (1993) 16 CA4th 712, 20 CR2d 157 (videotape of victim after accident)].

Failure to object to the disclosure of privileged information at a pre-trial deposition precludes the assertion of such an objection later in the proceedings [*Merritt v. Superior Court* (1970) 9 CA3d 721, 88 CR 337 (reliance on evidence given by prior counsel)].

If an attorney's answers to interrogatories were preliminary, foundational, and vague, he did not reveal a "significant part of the communication" [*Travelers Insurance Cos. v. Superior Court* (1983) 143 CA3d 436, 191 CR 871] .

A party's attorney-client privilege is waived as to the contents of a report prepared by an expert subsequently to be called as a witness by that party because the confidential nature of the communication is gone when the expert is to be a witness [*National Steel Products Co. v. Superior Court* (1985) 164 CA3d 476, 210 CR 535 (waiver if attorney's agent

is to testify)].

Waiver of privilege for part of psychologist expert's report to attorney on defendant's mental state by using expert as a witness was not waiver of the part of the expert's report that included defendant's statements about the commission of the crime [*Rodriguez v. Superior Court* (1993) 14 CA4th 1260, 18 CR2d 120] .

The attorney-client privilege is not waived when the other party seeks verification of the authenticity of its opponent's position [*Transamerica Title Insurance Co. v. Superior Court* (1987) 188 CA3d 1047, 233 CR 825] .

An implied waiver of the attorney-client privilege occurs when the plaintiff has placed in issue a communication that goes to the heart of the claim [*Chicago Title Ins. Co. v. Superior Court* (1985) 174 CA3d 1142, 220 CR 507] .

Defendant waived attorney-client privilege of defense psychiatrist by having psychiatrist testify at pretrial suppression of evidence hearing [*People v. Clark* (1993) 5 C4 950, 22 CR2d 689, 857 P2d 1099] .

The designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege. If 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, the privilege is secure. If the party produces privileged documents or testifies as an expert (such as by stating an opinion), the privilege is waived [*Shooker v. Superior Court* (2003) 111 CA4th 923, 4 CR3d 334] .

[b] Exception: "Joint Defense" or "Common Interest" Doctrine

The doctrine that parties who possess common legal interests may share privileged information without losing the protection afforded by the privilege is an exception to the general rule that a privilege is waived upon voluntary disclosure of the privileged information to a third party. This doctrine has been variously referred to as the "joint defense" doctrine, the "common interest" doctrine, and the "pooled information" doctrine. The joint defense privilege, established in federal law as an extension of the attorney-client privilege, is not recognized by statute in California. The joint defense or common interest doctrine is more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine [*OXY Resources California LLC v. Superior Court* (2004) 115 CA4th 874, 9 CR3d 646] .

A party seeking to rely on the common interest doctrine does not satisfy its burden to justify a claim of privilege simply by demonstrating that a confidential communication took place between parties who purportedly share a common interest. Rather, the party seeking to invoke the doctrine must first establish that the communicated information would otherwise be protected from disclosure by a claim of privilege. The next step is to determine whether disclosing the information to a party outside the attorney-client relationship waived any applicable privileges [*OXY Resources California LLC v. Superior Court* (2004) 115 CA4th 874, 9 CR3d 646] .

Parties sought to protect from disclosure certain documents, exchanged during negotiation of a commercial transaction under a joint defense agreement, in a lawsuit brought by a third party based on that transaction. The trial court erred in relying on general statements that all of the withheld communications were on matters of common interest and were reasonably necessary to accomplish the purpose for which lawyers were consulted. The appellate court directed the trial court to first establish that the documents were protected by either the attorney-client privilege or the attorney work product doctrine, then determine whether there was a reasonable expectation the communications would be maintained in confidence and that the disclosures were reasonably necessary for the purpose for which attorneys were consulted in finalizing the negotiations. Because this determination would hinge on the content and context of the communication, the trial court was directed to conduct an in camera review of the disputed documents in order to assess the claims of common interest and the necessity of disclosure [*OXY Resources California LLC v. Superior Court* (2004) 115 CA4th 874, 9 CR3d 646] .

Documents prepared by counsel and circulated between two parties bound by an offer and acceptance in contemplation of a binding, detailed license agreement are protected by privilege if the disclosure of such documents is reasonably necessary to further the interests of both parties in finalizing negotiations. In a proceeding under the Public Records Act for the disclosure of certain documents from a county transportation authority regarding a licensing agreement to the successful bidder, the trial court erred in finding that the attorney-client privilege was waived [*STI Outdoor v. Superior Court* (2001) 91 CA4th 334, 109 CR2d 865] .

[c] Relationships Not Covered

The clergy-penitent relationship is notably missing from the enumerated relationships that benefit from the "reasonably necessary disclosure" rule of *Evid Code* § 912(d) [*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 445, 32 CR3d 209 (holding that certain communications between troubled priests and their superiors were not protected by clergy-penitent privilege)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Criminal Process Assistance of Counsel Contracts Law Third Parties General Overview Criminal Law & Procedure Discovery & Inspection Discovery Misconduct General Overview



12 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.09

18.09 Prohibition From Comment on Exercise of Privilege--No Presumption or Inference--Evid Code § 913

[1] Evid Code § 913 Text

■ *Evid Code § 913.*

(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.

LegH: 1965 ch. 299.

[2] Case Notes

[a] Purpose of Evid Code § 913

Evid Code § 913 modifies prior decisional law in civil cases by providing that no inference as to a witness's credibility may be drawn from his or her exercise of the privilege against self-incrimination. Further, no comment may be made as to the exercise of that privilege. However, this section deals only with the exercise of the privilege itself and does not purport to deal with the comments that may be made, or the inferences which may be drawn, from the evidence--or the lack of evidence--in the case [*People v. Gray* (2005) 37 C4th 168, 203, 33 CR3d 451, 118 P3d 496 ; see *In re Scott* (2003) 29 C4th 783, 129 CR2d 605, 61 P3d 402] .

Evid Code § 913 does not refer to *Evid Code § 413*, which allows the trier of fact to draw inferences from a party's "failure to explain or deny by his testimony ... evidence or facts in the case against him"[*Alvarez v. Sanchez* (1984) 158 CA3d 709, 712, 204 CR 864 ("[W]hile the privilege of a criminal defendant is absolute, in a civil case a witness or

party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it").



Cross Reference:

Discussion of judging witness's testimony, see Chapter 11, Weight of Evidence.

Discussion of *Evid Code* § 413, see Ch. 11, Weight of Evidence, § 11.04.

In *Shepard v. Superior Court* (1976) 17 C3d 107, 117, 130 CR 257, 550 P2d 161, the California Supreme Court did not discuss *Evid Code* § 913, but did note that "appropriate juristic consequences" could flow from the assertion of the privilege by a defendant in a civil case, including adverse inferences on particular issues or on credibility, citing *Fross v. Wotton* (1935) 3 C2d 384, 44 P2d 350; *Nelson v. Southern Pacific Co.* (1937) 8 C2d 648, 67 P2d 682. Both of those cases were decided before the enactment of *Evid Code* § 913. See also *A & M Records, Inc. v. Heilman* (1977) 75 CA3d 554, 566, 142 CR 390 (preclusion of defendant from testifying at trial to matters on which he asserted the *Fifth Amendment* privilege during deposition was "appropriate juristic consequence" of asserting the privilege).

Counsel may not comment on a defendant's invocation of *Fifth Amendment* rights [*People v. Estrada* (1998) 63 CA4th 1090, 75 CR2d 17 (misconduct for one defense counsel to comment on codefendant's invocation of right to remain silent at codefendant's preliminary hearing)]. Thus, while counsel may not comment on the exercise of the privilege itself, counsel may argue the logical inferences from a party's failure to deny or explain testimony and evidence against him or her.

California law makes no distinction between civil and criminal litigation concerning adverse inferences from a witness's invocation of the privilege against self-incrimination. Under *Evid Code* § 913, juries are forbidden to make such inferences in both types of cases. No purpose is served in either type of trial by forcing a witness to exercise the privilege on the stand in the jury's presence [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164].

A person may invoke the constitutional privilege against self-incrimination for reasons other than guilt. To avoid the potentially prejudicial impact of having a witness assert the privilege before the jury, the trial court may hold a pre-testimonial hearing outside the jury's presence. A defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference [*People v. Mincey* (1992) 2 C4th 408, 6 CR2d 822, 827 P2d 388 (court did not err in refusing defendant's request to compel witness to invoke privilege in front of jury); *People v. Hill* (1992) 3 CA4th 16, 4 CR2d 258 (only apparent reason for invoking privilege in the presence of the jury would be to call witness's credibility into question, therefore disallowed)].

Where the jury is never told that a witness invoked the *Fifth Amendment* right against self-incrimination, defendant is not entitled to an instruction against making any inference from it under *Evid Code* § 913(b). Even if the jury were to speculate that this absent witness might have provided evidence damaging to defendant, such speculation would have been only consistent with the uncontradicted, properly admitted evidence that the absent witness accepted money from defendant to suppress someone's testimony [*People v. Stewart* (2004) 33 C4th 425, 15 CR3d 656, 93 P3d 271].

[b] Attorney-Client or Work Product Privileges

Information that forensic evidence was made available to the defense does not constitute comment on the "exercise of" the work product privilege [*People v. Gray* (2005) 37 C4th 168, 208, 33 CR3d 451, 118 P3d 496 (after initial objection on basis of attorney-client privilege had been overruled, counsel was not ineffective in failing to renew objection to same evidence during final argument)].

In the sanity phase of a capital case, the prosecutor's reference to the defendant's having been examined by experts other

than those who testified, while improper, does not constitute violation of the attorney-client privilege. *Evid Code* § 913 does not preclude comment on these matters [*People v. Coddington* (2000) 23 C4th 529, 97 CR2d 528, 2 P3d 1081] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsPresumptionsEvidencePrivilegesSelf-Incrimination

PrivilegeElementsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



13 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.10

18.10 Basis of Determination of Claim of Privilege--Contempt for Failure to Disclose--Evid Code § 914

[1] Evid Code § 914 Text

■ *Evid Code § 914.*

(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 Section 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.

LegH: 1965 ch. 299.

[2] Statutory References

Constitutional contempt power, Public Utilities Commission [*Cal Const, art XII, § 22*].

Contempt power of state legislature and its committees [*Gov Code § 9400 et seq.*].

[3] Committee Comments

Subdivision (a) is a new feature of the Evid Code. Subdivision (b) incorporates and restates a number of existing constitutional, statutory, and judicial provisions without substantial change [*see Assemb Com Jud Comment*].

This subdivision makes the general provisions concerning preliminary determinations on admissibility of evidence applicable when nonjudicial as well as judicial presiding officers are called upon to determine whether or not a privilege exists [*Assemb Com Jud Comment*].

Since nonjudicial proceedings are often conducted by persons untrained in the law, it is desirable to have a judicial determination of whether a person is required to disclose information claimed to be privileged before he can be held in contempt for failing to disclose such information [Assemb Com Jud Comment].

If a claim of privilege is made in a nonjudicial proceeding and is overruled, application must be made to a court for an order compelling the witness to answer. Only if such order is made and is disobeyed may a witness be held in contempt [Assemb Com Jud Comment].

[4] Case Notes

On appeal, the trial court's conclusion regarding the existence or non-existence of facts sufficient to support a claim of privilege is reviewable only to determine whether the trial court abused its discretion [*Holm v. Superior Court (1954)* 42 C2d 500, 267 P2d 1025] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawAgency InvestigationsConstitutional RightsGeneral OverviewEnergy & Utilities

LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEvidencePrivilegesGeneral Overview



14 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.11

18.11 Disclosure of Information to Determine Claim--Official Information--Identity of Informer--Trade Secrets--Evid Code § 915

[1] Evid Code § 915 Text

■ *Evid Code § 915.*

(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.

LegH: 1965 ch. 299, operative January 1, 1967, 1979 ch. 1034, 2001 ch. 812, 2004 ch. 182, operative July 1, 2005.

[2] Commission Comments

Disclosure of information claimed to be privileged under Sections 1040, 1041, and 1060 may be necessary to determine the existence of these privileges, for the interest in maintaining the secrecy of the information must outweigh the interest in seeing justice done in the particular case for these privileges to be recognized [Cal Law Rev Com Comment].

Subdivision (b) applies only when a court is ruling on a claim of privilege; disclosure of such information cannot be

required in nonjudicial proceedings [Cal Law Rev Com Comment].

[3] Committee Comments

This section is designed to protect only privileged information that the holder of the privilege could protect by claiming the privilege at the proceeding; it is not designed to protect unprivileged information [Assemb Com Jud Comment].

This section is needed to protect the holder of a privilege when he is not available to protect his own interest [Assembly Committee on Judiciary Comments].

[4] Case Notes

[a] Disclosure to Establish Privilege

The party claiming the privilege has the burden to show that the communication sought to be suppressed falls within the terms of the claimed privilege; and the party opposing the privilege bears the burden of showing that the claimed privilege does not apply or that an exception exists or that there has been an expressed or implied waiver [*Lipton v. Superior Court* (1996) 48 CA4th 1599, 56 CR2d 341] .

In ruling on a motion to disqualify a law firm on the basis that letters between present and past counsel were confidential material, the court found *Evid Code* § 915 inapplicable where no attempt was made to introduce the letters into evidence [*Cornish v. Superior Court* (1989) 209 CA3d 467, 257 CR 383] .

A trial court should exercise its discretion in favor of allowing defense to discover all felony convictions when good cause is shown and it does not appear that disclosure will unduly hamper the prosecution or impair some other legitimate government interest [*Hill v. Superior Court* (1974) 10 C3d 812, 112 CR 257, 518 P2d 1353] .

Defendant not entitled to privileged documents to decide whether trial court's ruling was proper [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

In ruling on motion for return of seized documents, the trial court cannot order disclosure of those documents where attorney-client privilege was claimed. The issue of attorney-client privilege must first be decided before disclosure [*People v. Geilim* (1991) 234 CA3d 166, 285 CR 602] .

[b] In Camera Review

The rule in *Evid Code* § 915 against in camera review is not absolute. Generally, in camera hearings should be limited to determining whether there is an exception to, or waiver of, the privilege, and whether the exception or waiver depends on the content of the communication. In camera review will permit a determination of whether disclosure to a third party was reasonably necessary to accomplish the lawyer's purpose in the consultation, and thus whether the lawyer-client privilege was waived by disclosure [*OXY Resources California LLC v. Superior Court* (2004) 115 CA4th 874, 9 CR3d 646] .

On a colorable claim of privilege, the trial court cannot order the unsealing of seized documents until the validity of the claim is determined. If the only means to assess the validity of the claim requires examining the purported privileged documents, the trial court must examine the documents 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 of the privilege to be present. If the trial court determines that the information is privileged, neither the trial court 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 in camera proceedings [*State Comp. Ins. Fund v. Superior Court* (2001) 91 CA4th 1080, 111 CR2d 284 (trial court was ordered to hold an in camera hearing to see if documents were protected by the attorney-client privilege or the work

product doctrine)].

Although ordinarily a patient cannot be required to disclose privileged information in order to claim the privilege, because the privileged status of psychotherapeutic communications under the patient-litigant exception depends upon the content of the communication, a patient may have to reveal some information about a communication to enable the trial judge to pass on his claim of irrelevancy. Upon such revelation, the trial judge should take necessary precautions to protect the confidentiality of these communications. For example, the judge might routinely permit such disclosure to be made ex parte in chambers [*In re Lifschutz* (1970) 2 C3d 415, 85 CR 829, 467 P2d 557] .

A police officer has an express statutory right under *Evid Code* § 915 to be present at the in camera review of his or her personnel files, once good cause has been shown. This provision, in combination with the more general right of access to the personnel files under *Evid Code* § 1045, gives to each individual officer the practical ability to access the information in the specific complaints the court has determined to be sufficiently relevant to the case before the court to order *Pitchess* disclosure. The distinction between an officer's ability to review his or her files with the list of relevant complaints in hand, and to receive a copy of the disclosure report containing information extracted from those same files, is a distinction without a difference. Under either scenario, the officer has gained access to the same information. However, no officer is required to attend the in camera hearing, to request the information, to review the files, or to share any of that material with the prosecution. The privacy rights of the officer are expressly protected [*Becerrada v. Superior Court* (2005) 131 CA4th 409, 414, 31 CR3d 735 (denying petition for writ of mandate to disclose police officer personnel records)].

Evid Code § 915(a) is "not absolute" in the sense that a litigant may still have to reveal some information in camera to permit the court to evaluate the basis for the claim of privilege [*Moeller v. Superior Court (Sanwa Bank)* (1997) 16 C4th 1124, 69 CR2d 317, 947 P2d 279] .

In camera evidentiary hearing excluding the holders of the privilege and their counsel to determine whether psychotherapist-patient privilege applied to audiotape recording of psychotherapist notes proper [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

Documents that were testing materials rather than personnel file data sufficient to allow explanatory hearing in camera [*Britsch v. City of Los Angeles* (1992) 3 CA4th 354, 4 CR2d 456] .

Although a court may not require disclosure of allegedly privileged communications when ruling on a claim of privilege, except in certain specified cases, *Evid Code* § 915(b) authorizes in camera disclosure where an exception to a privilege depends upon the content of a communication. In a criminal trial, an in camera hearing regarding disclosure of the identity of the prosecution's percipient witnesses who are not confidential informants is improper unless the prosecutor either explains in open court why the official privilege under *Evid Code* § 1040 applies, or declares that it cannot do so without betraying the privilege. If that showing is made, and the trial court needs the information to evaluate the privilege claim, an in camera hearing is appropriate [*Torres v. Superior Court* (2000) 80 CA4th 867 95 CR2d 686 ; *Mavroudis v. Superior Court* (1980) 102 CA3d 594, 162 CR 724 (exception to psychotherapist-patient privilege where patient presents danger)].

In an in camera hearing pursuant to *Evid Code* §§ 915(b) and 1040, a court reporter should be present to transcribe the proceedings because the defendants have the affirmative duty to provide an adequate record in a writ proceeding to contest an adverse discovery ruling [*People v. Hertz* (1980) 103 CA3d 770, 163 CR 233 (charges dismissed where no reporter present at in camera hearing)].

A hearing on the possibility that a witness would claim the privilege against self-incrimination may be conducted in camera [*People v. Manago* (1990) 220 CA3d 982, 269 CR 819] .

At an in camera review of rap sheets, the rap sheets themselves need not be disclosed, but all felony convictions must be disclosed to defense under state procedural law [*People v. Roberts* (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274] .

For civil discovery, while it is generally true that a court cannot compel disclosure of the contents of privileged information or documents in order to rule on an objection to a discovery request, it can and should determine all of the facts on which the claim of privilege depends. If the court finds the information or documents relevant, then an in camera review is necessary to determine the scope of the privilege [*Lipton v. Superior Court* (1996) 48 CA4th 1599, 56 CR2d 41 (trial court ordered to conduct in camera review of insurance company documents)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInformer

PrivilegeEvidencePrivilegesPsychotherapist-Patient PrivilegeElementsTrade Secrets LawCivil ActionsDiscovery



15 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.12

18.12 Basis of Exclusion of Information--Exceptions--Evid Code § 916

[1] Evid Code § 916 Text

■ *Evid Code § 916.*

(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.**

LegH: 1965 ch. 299.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGeneral Overview



16 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.13

18.13 Presumption of Confidential Nature of Communication; Electronic Communication Retains Privileged Character--Evid Code § 917

[1] Evid Code § 917 Text

■ *Evid Code § 917.*

(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*.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 72, 2003 ch. 468, 2004 ch. 183, 2006 ch. 689.

[2] Legislative Note--2002

Evid Code § 917(a) is amended to make clear that it also applies to confidential communication privileges created after its original enactment in 1965 [see *Evid Code §§ 1035-1036.2* (sexual assault victim), 1037-1037.7 (domestic violence victim)]. The presumption set forth in *Evid Code § 917(a)* applies regardless of how a communication is transmitted. In each instance, the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Subdivision (b) is drawn from New York law (*N.Y. C.P.L.R. 4548* (McKinney 2001)) and from language formerly found in *Evid Code § 952* relating to confidentiality of an electronic communication between a client and a lawyer. For waiver of privileges, see *Evid Code § 912*.

Under subdivision (c), the definition of "electronic" is broad, including any "intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form." Unif. Electronic Transactions Act, § 2 comment (1999) (enacted as CC § 1633.2).

For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see *B&P Code § 6068(e)* (attorney has duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 ("Protecting the Confidentiality of Unencrypted E-Mail"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 ("Inadvertent Disclosure of Confidential Materials").

[3] Commission Comments

For examples of provisions on the admissibility of electronic communications, see *Evid Code §§ 1521 & Comment* (Secondary Evidence Rule), 1552 (printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); CC § 1633.13 ("In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form"). See also *People v. Martinez*, 22 C4th 106, 91 CR2d 687, 990 P2d 563 (2000); *People v. Hernandez*, 55 CA4th 225, 63 CR2d 769 (1997); *Aguimatang v. California State Lottery*, 234 CA3d 769, 286 CR 57 (1991); *People v. Lugashi*, 205 CA3d 632, 252 CR 434 (1988) [Cal Law Rev Com Comment].

[4] Committee Comments

This section is included to establish a presumption of confidentiality so that a claimant need not reveal the subject matter of the communication to show that it was made in confidence and hence entitled to be privileged [Assembly Committee on Judiciary Comments].

To overcome the presumption, the proponent of the evidence must persuade the presiding officer that the communication was not made in confidence [Assemb Com Jud Comment].

[5] Case Notes

The person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action [*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 CA4th 110, 68 CR2d 844 (employer would waive attorney-client privilege to the extent it relied on attorney's investigation as defense to employee's claims); *Mitchell v. Superior Court* (1984) 37 C3d 591, 208 CR 886, 691 P2d 642 (no implied waiver occurred under facts of case)].

Attorney-client communications are presumed confidential [*Gordon v. Superior Court* (1997) 55 CA4th 1546, 65 CR2d 53 (party seeking disclosure has burden to prove otherwise)].

The party claiming privilege has the burden to show that the communication sought to be suppressed falls within the terms of the statute. In the present case, petitioner at best demonstrated that its corporate directors possessed certain information protected by the attorney-client privilege. This was inadequate to prove that any protected communications were divulged by them to the opposing parties' lawyer, notwithstanding that those directors had been elected to the board by the opposing parties [*La Jolla Cove Motel & Hotel Apartments, Inc.* (2004) 121 CA4th 773, 17 CR3d 467] .

Presumption of confidentiality in claim of attorney-client privilege is not overcome by cooperation clauses in liability insurance policies [*Rockwell Internat. Corp. v. Superior Court* (1994) 26 CA4th 1255, 32 CR2d 153 (in coverage action by insured against its insurers, insured was entitled to claim attorney-client privilege as to certain documents, and

standard clauses in policies providing that insured must cooperate with insurer did not render expectation of attorney-client privilege unreasonable or impliedly waive it)].

A communication between a husband and wife is presumed to be confidential and the burden is on the opponent of the privilege to prove otherwise. If the facts show that the communication was not intended to be kept in confidence, however, it is not privileged [*People v. Carter* (1973) 34 CA3d 748, 110 CR 324 (husband's statement, "I'm going to kill them all," made during knife attack on wife, not made in confidence)].

A Medi-Cal patient could be deemed to know that for the limited purpose of obtaining public payment for his treatment certain information concerning him must be communicated to the state and be subject to state audit, so to that extent the patient could be deemed not to have intended his communications to be confidential in the sense requisite to the psychotherapist-patient privilege [*Reynaud v. Superior Court* (1982) 138 CA3d 1, 187 CR 660 (psychiatrist accused of fraud and grand theft could not claim privilege)].

Confidential information that became a part of a probation report should not have been admitted into evidence. The fact that the probation officer did not know whether the holder of the privilege had consented to the release of the communication was irrelevant. The burden of proof is on the party attacking the privilege to prove that the communication was not confidential [*People v. Gardner* (1984) 151 CA3d 134, 198 CR 452 (physician-patient privilege)].

In order for a letter to defendant's wife while in custody to be covered by confidential marital communication, letters should have been sent "in confidence" where defendant believed authorities were intercepting his mail [*People v. Mickey* (1991) 54 C3d 612, 286 CR 801, 818 P2d 84] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Civil Actions Damages Evidence Inferences & Presumptions General
Overview Evidence Privileges Attorney-Client Privilege Waiver



17 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.14

18.14 Error on Claim Disallowance--Evid Code § 918

[1] Evid Code § 918 Text

■ *Evid Code § 918.*

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 Section 971.

LegH: 1965 ch. 299.



18 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.15

18.15 Basis of Admissibility of Privileged Information--Evid Code § 919

[1] Evid Code § 919 Text

■ *Evid Code § 919.*

(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.

LegH: 1965 ch. 299, 1974 ch. 227.

[2] Commission Comment

This section protects a holder of a privilege by making inadmissible, in a later proceeding, evidence of disclosure of the information in a prior proceeding where the presiding officer erroneously overruled a claim of privilege or erroneously failed to exclude privileged information [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Privilege Criminal Law & Procedure Appeals Reviewability Waiver Admission of Evidence Evidence Privileges General Overview



19 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.16

18.16 Privilege Statutes Immune to Repeal by Implication--Evid Code § 920

[1] Evid Code § 920 Text

- *Evid Code § 920.*

Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.

LegH: 1965 ch. 299.

[2] Statutory References

Marketing program records confidential [F&A Code § 59616].

County employee retirement system records confidential [*Gov Code § 31532*].

Privileges inapplicable, prosecution under venereal disease control statutes [*H&S Code § 3197*].

Marital privileges inapplicable, enforcement of civil support statutes [*CCP § 1688*].

Marital privileges inapplicable, enforcement of criminal support statutes [*Pen Code § 270(e)*].

Marital privileges inapplicable, prosecution for placing wife in house of prostitution [*Pen Code § 266(g)*].

[3] Commission Comments

This section assures that nothing in this division makes privileged any information declared by statute to be unprivileged or makes unprivileged any information declared by statute to be privileged [Cal Law Rev Com Comment].

[4] Case Notes

The Evidence Code defines "statute" broadly to include treaties and constitutional provisions; the term is not limited to statutes codified in the Evidence Code or to state statutes in general [*Evid Code § 230; see also Evid Code § 920*].

(enumeration of privileges does not repeal by implication privileges not listed)]. Thus, federal statutes and treaties may supply the basis for a privilege recognized by California courts [*Union Bank of California v. Superior Court* (2005) 130 CA4th 378, 388-389, 29 CR3d 894 (giving effect to "suspicious activity report" privilege as statutory privilege created by federal statute and regulations implementing it)].

In an action for elder abuse and wrongful death, brought against a care facility by decedent's estate, the trial court erred in requiring a third party, an authorized representative of the Office of the State Long-Term Care Ombudsman, to produce all investigatory records pertaining to the facility for the period of decedent's residence, even with the names of other residents or complainants redacted. *Welf & Inst Code* § 9725 provides a statutory privilege against disclosure of such complaints and investigatory records and files. The consent exception, even if it applied to plaintiff after the death of her father, does not allow disclosure of any records of third persons [*Ombudsman Services of Northern California v. Superior Court* (2007) 154 CA4th 1233, 65 CR3d 456 (issuing writ of mandate requiring trial court to vacate portion of order)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Writs Common Law Writs Mandamus Evidence Privileges Marital Privileges General Overview Governments Legislation Expirations, Repeals & Suspensions



20 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.17

18.17 Privilege of Defendant--Evid Code § 930

[1] Evid Code § 930 Text

■ *Evid Code § 930.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

This section incorporates the constitutional privilege of a criminal defendant to refuse to testify as articulated in the judicial decisions [Cal Law Rev Com Comment].

[3] Statutory References

Federal privilege against self-incrimination [*US Const, amend 5*].

State privilege against self-incrimination [*Cal Const, art I, § 15*].

[4] Case Notes

[a] Constitutional Considerations

A state cannot apply a state constitutional provision permitting comment by the prosecutor or by the court on defendant's failure to testify in a state criminal prosecution, for such a provision violates the *Fifth* and *Fourteenth Amendments to the United States Constitution* [*Griffin v. California* (1964) 380 US 609, 85 S Ct 1229, 14 L Ed2d 106, 5 Ohio Misc. 127, reh. den. 381 US 957, (comment on the refusal to testify is a remnant of the "inquisitorial" system of criminal justice that the *Fifth Amendment* outlaws); *People v. Bostick* (1965) 62 C2d 820, 44 CR 649, 402 P2d 529 (*Cal Const, art I, § 13* (now § 15) purporting to authorize comment must bow to superior mandates of the *US Const, 5th and 6th amendments*)].

If the prosecutor's comment or the judge's instruction constitute *Griffin* error, a conviction will be reversed unless the state has demonstrated, beyond a reasonable doubt, that the comment or instruction did not contribute to the conviction [*Chapman v. California* (1967) 386 US 18, 87 S Ct 824, 17 L Ed2d 705] .

If the prosecution injects inadmissible evidence under circumstances calculated to give it a false coloration and to force the accused to surrender his constitutional right not to take the stand, a mistrial motion should be made and granted [*People v. Cabrellis* (1967) 251 CA2d 681, 59 CR 795 (court's admission of inadmissible prosecution evidence held reversible error)].

In a proceeding to extend a commitment to the California Youth Authority pursuant to *W&I Code § 1800*, which permits further detention if the ward would be physically dangerous to the public because of a mental disorder, the allegedly pedophile ward was entitled to all the rights guaranteed to a criminal defendant. He had the right not to testify at the extended-commitment trial, and the trial court erred in refusing his request to instruct the jury that he had that right and that no inference could be drawn from the fact that he did not testify [*In re Luis C.* (2004) 116 CA4th 1397, 11 CR3d 429] .

The privilege against self-incrimination bars the prosecution from questioning defendant about his mental state at a proceeding to extend his commitment to a state hospital for treatment of insanity [*People v. Haynie* (2004) 116 CA4th 1224, 11 CR3d 163] .

In a joint trial of multiple codefendants, comment by an attorney representing one defendant on the silence of a codefendant violates the codefendant's right to freedom from adverse comment on his silence [*People v. Estrada* (1998) 63 CA4th 1090, 75 CR2d 17 (comment by codefendant's counsel on other defendant's invocation of 5th Amendment privilege violated constitutional right); see *Evid Code § 940*; *People v. Hardy* (1992) 2 C4th 86, 5 CR2d 796, 825 P2d 781 ; *People v. Jones* (1970) 10 CA3d 237, 88 CR 865] .

While a comment made by the prosecutor would be reversible error, comment by co-counsel may be deemed harmless or even not an error [*People v. Hardy* (1992) 2 C4th 86, 5 CR2d 796, 825 P2d 781 (no reversible error where reference is indirect, defendants' positions are not antagonistic, or substantial incriminating evidence exists against all defendants)].

If a defendant takes the stand and limits his testimony to explaining or contradicting a particular aspect of the case against him, the prosecutor's commenting on the defendant's failure to testify about other matters that the prosecutor could not have explored on cross-examination violates the *Griffin* rule [*People v. Eaton* (1969) 275 CA2d 584, 80 CR 192 (prosecutor's comment held harmless error)].

The *Griffin* rule does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses [*People v. Hardy* (1969) 271 CA2d 322, 76 CR 557 (comment on state of the evidence); *People v. Grant* (1968) 268 CA2d 470, 74 CR 111 (failure to call logical witness); *People v. Vaughn* (1968) 262 CA2d 42, 68 CR 366 (failure to introduce material evidence)].

Indirect, mild, brief references to defendant's failure to testify are harmless error [*People v. Vargas* (1973) 9 C3d 470, 108 CR 15, 509 P2d 959 ; *People v. Jackson* (1980) 28 C3d 264, 168 CR 603, 618 P2d 149 (prosecution's comment that defendant can "take the stand" and testify as to his age was harmless)].

For *Griffin* error to be prejudicial, the improper comment must fill an evidentiary gap [*People v. Vargas* (1973) 9 C3d 470, 108 CR 15, 509 P2d 959 (consider whether comment increases possibility to jury that defendant's silence indicates guilt); *People v. Garnica* (1981) 121 CA3d 727, 175 CR 521 (brief comments about tattoo were harmless error)].

A criminal defendant's privilege against self-incrimination does not apply to revelation of witness's physical or mental characteristics relevant to issues being considered [*People v. Collins* (1992) 10 CA4th 690, 12 CR2d 768 ; *People v. Pretzer* (1992) 9 CA4th 1078, 11 CR2d 860, 863] .

[b] Applicable Only in Criminal Cases

The privilege not to be called as a witness and not to testify does not apply in civil or quasi-criminal proceedings [*In re Scott* (2003) 29 C4th 783, 129 CR2d 605, 61 P3d 402 (defendant has no right not to be called as witness in habeas corpus proceeding, which for that purpose is essentially civil proceeding); *In re Vaughn* (1922) 189 C 491 (attorney disbarment proceeding held civil in nature); *People v. Whelchel* (1967) 255 CA2d 455, 63 CR 258 (narcotic addiction rehabilitation proceeding held civil in nature)].

A mentally disordered offender (MDO) proceeding is not a criminal action, so the alleged offender can be called to the stand and questioned about his or her mental state [*People v. Merfeld* (1997) 57 CA4th 1440, 67 CR2d 759 (no privilege for mental state at issue)].

[c] Waiver

If a criminal defendant who is represented by counsel voluntarily takes the witness stand, the defendant waives his or her privilege not to testify [*People v. De Georgio* (1960) 185 CA2d 413, 8 CR 295 (by voluntarily taking the stand, defendant becomes just another witness); *People v. Huerta* (1957) 148 CA2d 272, 306 P2d 505 (voluntary election to testify waives privilege); *People v. Outcault* (1949) 90 CA2d 25, 202 P2d 602 (took stand on own volition at request of his counsel)].

A trial court ordinarily is not required to advise a self-represented defendant who chooses to represent himself or herself after the defendant knowingly, intelligently, and voluntarily forgoes the assistance of counsel. Therefore, if a self-represented defendant is about to take the stand in a criminal case, the court has no duty to warn the defendant of the constitutional privilege not to testify [*People v. Barnum* (2003) 29 C4th 1210, 131 CR2d 499, 64 P3d 788 (striking down rule of *People v. Kramer* (1964) 227 CA2d 199, 38 CR 487)].

The fact that a defendant testified at a prior stage in a criminal proceeding does not constitute a waiver of his right to claim the privilege at trial [*In re Petition of Sales* (1933) 134 CA 54, 124 P2d 916 (prior testimony given before grand jury)].

[d] Compulsion

The phrase "not to be called as a witness" clearly requires some affirmative or deliberate positive action or intent by either the court or state before a violation can be charged; indirect constructive "compulsion" to testify is insufficient [*People v. Kelly* (1986) 183 CA3d 1235, 228 CR 681] .

Legal Topics:

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21 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.18

18.18 Self-Incrimination Privilege--Evid Code § 940

[1] Evid Code § 940 Text

■ *Evid Code § 940.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section incorporates the constitutional privilege against self-incrimination as articulated in the judicial decisions [see Cal Law Rev Com Comment].

[3] Statutory References

Federal privilege against self-incrimination [*US Const, amend 5*].

State privilege against self-incrimination [*Cal Const, art I, § 15*].

Determination whether testimony is incriminating [*Evid Code § 404*].

[4] Application of Proposition 8--The Victims' Bill of Rights

While Proposition 8 does not on its face refer to use immunities, the language is broad enough to include within its reach judicial decisions relating to the privilege against self-incrimination. Use immunities provided by California decisions, giving juveniles substantial protection against the use at trial of any statements made to the probation officer or court at the fitness hearing, fall within the exception to *Cal Const, art I, § 28(d)* for "existing statutory rule(s) of evidence relating to privilege."

Before self-incriminating statements may be admitted in evidence, the prosecution must lay a foundation that the

statements were voluntary and not the result of compulsion or promise of reward. The foundation includes proof that the defendant's constitutional rights were respected. The voluntariness of a confession must be established by a preponderance of the evidence, in accordance with the federal standard applicable to California following the adoption of Proposition 8 [*Cal Const, art I, § 28*].

[5] Application of Proposition 115--Reciprocal Discovery

Proposition 115, the initiative measure known as the Crime Victims Justice Reform Act, was adopted by California voters at the June 5, 1990 Primary Election. The stated purpose of the act is to adopt "comprehensive reforms ... needed in order to restore balance and fairness to our criminal justice system." To facilitate these purposes, the initiative made changes to the California Constitution and to statutory law dealing with criminal behavior and the conduct of trials. Proposition 115 adds section 30(c) to Cal Const, art I, which provides that "discovery in criminal cases shall be reciprocal in nature" as prescribed by statute. The initiative also adds *Pen Code § 1054 et seq.*, which sets forth almost mirror-image sets of disclosure duties, with any asymmetry favoring the defense.

[6] Case Notes

[a] Evidence of Crime

The privilege not only extends to answers that would in themselves support a conviction but likewise embraces those that would furnish a link in the chain of evidence needed to prosecute [*Malloy v. Hogan (1963) 378 US 1 84 S Ct 1489, 12 L Ed2d 653* (evident from implications of the question in the setting in which it was asked that an answer would result in an injurious disclosure); *Zonver v. Superior Court (1969) 270 CA2d 613, 76 CR 10* (allegations of adultery)].

The constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law [*Murphy v. Waterfront Commission (1963) 378 US 52*; *Zonver v. Superior Court (1969) 270 CA2d 613, 76 CR 10* (allegations of adultery)].

If trial court is aware from circumstances of case of a potential for self-incrimination on witness's part, court has duty to protect witness [*People v. Berry (1991) 230 CA3d 1449, 281 CR 543*].

If a petitioner has a right not to disclose information to an opponent that the petitioner reasonably believes might be used against the petitioner in a criminal proceeding, it is error for the court to issue an order precluding the petitioner from testifying at trial [*Pacers, Inc. v. Superior Court (1984) 162 CA3d 686, 208 CR 743*].

The privilege against self-incrimination does not prevent the court from ordering a person to execute a consent form that would authorize banking institutions to produce bank records of that person, even if the records themselves may be incriminating [*Doe v. United States (1988) 487 US 201, 108 S Ct 2341, 101 L Ed2d 184*].

[b] Applicable in Certain Types of Actions

The privilege not to disclose any incriminating matter may be asserted by any witness in a civil or criminal proceeding [*In re Gault (1966) 387 US 1, 87 S Ct 1428* (privilege applicable in juvenile delinquency proceeding); *Murphy v. Waterfront Commission (1963) 378 US 52, 84 S Ct 1594, 12 L Ed2d 678* (civil contempt proceeding); *In re Scott (2003) 29 C4th 783, 129 CR2d 605, 61 P3d 402* (in habeas proceeding, petitioner called as witness had right to assert privilege against self-incrimination as to individual questions); *In re Vaughn (1922) 189 C 491, 209 P 353* (attorney disbarment proceeding)].

The privilege against self-incrimination bars the prosecution from questioning a defendant about his mental state at a proceeding to extend his commitment to a state hospital for treatment of insanity [*People v. Haynie (2004) 116 CA4th*

1224, 11 CR3d 163 ; *Fisher v. Gibson* (2001) 90 CA4th 275, 109 CR2d 145 (claiming privilege in summary judgment supporting papers did not preclude summary judgment)].

The privilege may be asserted in administrative tribunals [*People v. Berry* (1991) 230 CA3d 1449, 281 CR 543] .

The privilege applies in criminal and civil discovery proceedings [*Prudhomme v. Superior Court* (1970) 2 C3d 320, 85 CR 129, 466 P2d 673 (criminal discovery); *Zonver v. Superior Court* (1969) 270 CA2d 613, 76 CR 10 (civil discovery)].

A proposed conservatee cannot refuse to testify at his own conservatorship trial. The proposed conservatee is not a criminal defendant, but rather is a person whose need for the state's assistance may be great [*Conservatorship of Baber* (1984) 153 CA3d 542, 200 CR 262] .

A father who failed to make court-ordered support payments could not invoke the *Fifth Amendment* privilege against self-incrimination in response to questions about personal income at a judgment debtor examination [*In re Marriage of Sachs* (2002) 95 CA4th 1144, 116 CR2d 273 (father could not rely on his failure to pay support as justification for his subsequent refusal to provide financial information that could be utilized to collect arrearages; to conclude otherwise would allow him to take advantage of his own wrong and thus, mother could obtain copy of father's income tax returns and examine him about their contents, subject to statutory requirements of confidentiality)].

There is no *Fifth Amendment* privilege against self-incrimination to resist a child custody order [*Baltimore City Dep't of Social Servs. v. Bouknight* (1990) 493 US 549, 110 S Ct 900, 107 L Ed2d 992 (mother whose child was taken away from her on evidence of abuse and then returned to her custody pursuant to court order could not invoke the *Fifth Amendment* to resist subsequent order to produce the child; although turning over the child may be sufficiently incriminating and testimonial in nature, the ability to invoke the privilege against self-incrimination is diminished when it would interfere with the state's regulatory interest in the child's care and safety)].

[c] Scope of the Privilege--Witnesses

A hearing on the possibility that a witness would claim the privilege against self-incrimination may be conducted in camera [*People v. Manago* (1990) 220 CA3d 982, 269 CR 819] .

Nonparty deponents may assert their privilege at the taking of a deposition or the production of documents in a civil context. The person invoking the privilege must demonstrate that the possibility of prosecution and the fear of incrimination is reasonable and not fanciful, and that person must object with specific reference to particular questions asked or evidence sought. A blanket refusal to testify is unacceptable [*Warford v. Medeiros* (1984) 160 CA3d 1035, 207 CR 94 (hearing to determine right to privilege may be in camera at court's discretion)].

A witness called under the authority of an immunity statute cannot decline to testify by asserting the privilege against self-incrimination, and upon testifying, is entitled to the immunity [*People v. King* (1967) 66 C2d 633, 58 CR 571, 427 P2d 171 (if no statute requires witness to claim privilege before testifying, then it is not necessary to do so)].

The privilege is a bar against compelling "communications" or "testimony," but compulsion that makes a suspect the source of "real or physical evidence" does not violate it [*Schmerber v. California* (1965) 384 US 757 86 S Ct 1826, 16 L Ed 2d 908 (results of blood alcohol test held nontestimonial evidence); *People v. White* (1968) 69 C2d 751, 72 CR 873, 446 P2d 993 (results of clothing size test held physical evidence); *People v. Ellis* (1966) 65 C2d 529, 55 CR 385, 421 P2d 393 (results of voice identification test held physical evidence)].

[d] Corporations

A corporation, unlike an individual criminal defendant, does not have a *Fifth Amendment* privilege against self-incrimination. Therefore, the records of a corporate defendant charged with a misdemeanor are not protected by the privilege [*People v. Superior Court (Keuffel v. Esser Co.)* (1986) 181 CA3d 785, 227 CR 13 (corporate defendant charged with misdemeanor of discharging excess amounts of zinc into sewers cannot invoke privilege)].

The privilege against self-incrimination does not extend to collective entities such as corporations or partnerships, and an agent of such a collective entity may be compelled to produce the books and records of that entity even if the act of producing the documents may itself tend to incriminate the agent [*Braswell v. United States* (1988) 487 US 99, 108 S Ct 2284 101 L Ed 2d 98] .

A criminal defendant has no standing to object to a violation of a third party's *Fifth Amendment* privilege against self-incrimination. A defendant cannot seek exclusion of a third party's trial testimony on the sole ground that it is the "fruit" of an involuntary extrajudicial statement of the party. To have standing to argue that the testimony of a third party should be excluded because it is coerced or involuntary, a defendant must allege a violation of his or her own federal rights. The defendant must allege that the third party's trial testimony is coerced and that its admission will deprive him or her of due process right to a fair trial [*People v. Badgett* (1995) 10 C4th 330, 41 CR2d 635, 895 P2d 877 (nor does defendant have standing to raise another's *Fourth Amendment* violation); *People v. Douglas* (1990) 50 C3d 468, 268 CR 126, 788 P2d 640] .

[e] Waiver

The admission for rebuttal purpose of a pretrial psychiatric evaluation, which has been requested by the defendant, does not violate the *Fifth Amendment* privilege against self-incrimination if the excerpt contains no references to the crimes charged and is offered after the defendant has "opened the door" by introducing other psychiatric testimony [*Buchanan v. Kentucky* (1988) 483 US 402, 107 S Ct 2906, 97 L Ed2d 336 (court distinguished its ruling from that in *Estelle v. Smith* (1981) 451 US 454, 101 S Ct 1866, 68 L Ed2d 359)].

If a witness exercises the privilege against self-incrimination in a proceeding and thereafter waives the privilege and testifies at his or her own criminal trial, the prosecutor cannot introduce evidence of this exercising of the privilege to impeach the defendant at a criminal trial [*People v. Sharer* (1964) 61 C2d 869, 40 CR 851, 395 P2d 899] .

Striking a civil defendant's answer and entering a default judgment awarding punitive damages, where the defendant had exercised the privilege against self-incrimination, was overly harsh and denied the defendant's right to trial. The privilege, invoked by the defendant at trial, was not waived by filing a verified answer [*Alvarez v. Sanchez* (1984) 158 CA3d 709 204 CR 864] .

A witness in any civil proceeding who voluntarily takes the stand and offers testimony in his or her own behalf waives the privilege against self-incrimination to the entire scope of relevant cross-examination [*Brown v. United States* (1957) 356 US 148 78 S Ct 622, 2 L Ed2d 589] .

A witness in any civil proceeding who is called to the stand and is compelled to testify waives the privilege against self-incrimination only to the extent that he or she testifies about facts that tend to incriminate him or her [*Brown v. United States* (1957) 356 US 148 78 S Ct 622, 2 L Ed2d 589] .

If a criminal defendant voluntarily testifies in his or her own defense, the state may fully amplify the testimony by inquiring into the facts and circumstances surrounding his or her assertions or by introducing evidence through cross-examination that explains or refutes any statements or the inferences that may necessarily be drawn from them [*People v. Schader* (1969) 71 C2d 761, 80 CR 1, 457 P2d 841 ; *People v. Doebke* (1969) 1 CA3d 931, 81 CR 391 (cross-examination about drug sale)].

If a criminal defendant takes the stand and limits testimony to explaining or contradicting a particular aspect of the case, he or she may be cross-examined only as to matters about which he or she was examined in the case-in-chief [*People v. Robinson* (1964) 61 C2d 373, 38 CR 890, 392 P2d 970] .

A witness testifying at a prior stage in the proceeding does not waive the right to claim the privilege at the trial of the action [*Overend v. Superior Court* (1900) 131 C 280, 63 P 372 (witness's statements elsewhere have nothing to do with the question)].

A witness retains the privilege against self-incrimination during the pendency of an appeal [*In re Strick* (1983) 34 C3d 891, 196 CR 509, 671 P2d 1251 (attorney facing discipline has privilege)].

[f] Proposition 115--Reciprocal Discovery

Decisional authority compelling discovery from a criminal defendant violating the state constitutional right against self-incrimination has been supplanted by Proposition 115 and is no longer controlling. The state constitution does not preclude reciprocal discovery in criminal cases [*People v. Izazaga* (1991) 54 C3d 356, 285 CR 231, 815 P2d 304 ; *Meeks v. Superior Court of Sacramento County* (1991) 230 CA3d 698, 281 CR 796] .

With respect to furnishing a defendant's inculpatory writings to the prosecution, four requirements trigger the privilege against self-incrimination. The information sought must be: (1) incriminating; (2) personal to the defendant; (3) obtained by compulsion; and (4) testimonial or communicative in nature [*People v. Sanchez* (1994) 24 CA4th 1012, 30 CR2d 111 (defendant's inculpatory writings turned over to court by defendant's attorney; court released them to prosecution; no error, quoting *Izazaga v. Superior Court* (1991) 54 C 3d 356, 285 CR 231, 815 P2d 304)].

[g] Involuntary Confession

A confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency, whether express or implied [*People v. Jimenez* (1978) 21 C3d 595, 147 CR 172, 580 P2d 672] .

The line between permissible police conduct and conduct deemed to induce an involuntary statement depends on the nature of the benefit, as represented by the police, to be derived by a defendant if he or she speaks the truth. When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, there is no impropriety. But if the suspect is given to understand that he or she might reasonably expect more lenient treatment by the police, prosecution, or court in consideration of making a statement, such motivation renders the statement involuntary. The promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear [*People v. Hill* (1967) 66 C2d 536, 58 CR 340, 426 P2d 908] .

Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary [*People v. Howard* (1988) 44 C3d 375, 243 CR 842, 749 P2d 279 ; *People v. Forster* (1994) 29 CA4th 1746, 35 CR2d 705 (detective's statement that if suspect told truth, detective would speak to D.A., and any further action would be up to D.A., not promise of leniency)].

Because threats of harsh penalty often contain an implicit promise of more lenient treatment, they are treated as promises of leniency [*People v. McClary* (1977) 20 C3d 218, 142 CR 163, 571 P2d 620] .

An implied promise of leniency must be a motivating cause of a subsequent confession to make the confession involuntary. But where the dominant focus of an interrogation is an implied promise of leniency, a subsequent confession must be attributed to the implied promise, absent countervailing evidence such as a substantial time lapse [*People v. Cahill* (1994) 22 CA4th 296, 28 CR2d 1 (involuntary statements obtained by promise of leniency)].

While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary, such deception is a factor that weighs against a finding of voluntariness [*People v. Thompson* (1990) 50 C3d 134, 266 CR 309, 785 P2d 857 (statement not rendered involuntary despite false statements given by police to defendant where defendant did not make incriminating statements until several hours later after the conversation had turned to other subjects, and during which period defendant twice declined the interrogators' suggestions that the discussion stop)].

Deception alone will not render a confession involuntary unless it is of a type reasonably likely to procure an untrue statement. However, where the deception is allied with false promises of leniency or is used to make more plausible a promise of assistance, a statement may be rendered inadmissible [*People v. Cahill* (1994) 22 CA4th 296, 28 CR2d 1 (officer represented defendant could avoid more severe charge, plus officer's account of law of murder was misleading, making implicit promise more plausible)].

The admission of an involuntary confession comes within the harmless error rule as a "trial error" occurring during the presentation of a case to the trier of fact and as such will not result in automatic reversal. The confession may be quantitatively assessed in the context of other evidence in order to determine whether its admission is harmless beyond a reasonable doubt [*Arizona v. Fulminante* (1991) 499 US 279, 111 S Ct 1246, 113 L Ed2d 302 (suspected murderer of stepdaughter confessed crime to another inmate, a paid FBI informer, in exchange for protection from other inmates' rough treatment of a child killer); *People v. Cahill* (1994) 22 CA4th 296, 28 CR2d 1 (admission of involuntary statements obtained by use of threat or promise of leniency not prejudicial)].

[h] Custody

A defendant is in custody if there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest [*California v. Beheler* (1983) 463 US 1121, 77 L Ed2d 103, 1275 S Ct 3517] .

Custody occurs if the suspect is physically deprived of his freedom of action in any way or is led to believe, as a reasonable person, that he or she is so deprived [*People v. Forster* (1994) 29 CA4th 1746, 35 CR2d 705 , quoting *Green v. Superior Court* (1985) 40 C3d 126, 219 CR 186, 707 P2d 248] .

To determine whether custody exists, the most important considerations include: (1) the site of the interrogation; (2) whether the investigation has focused on the subject; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning [*People v. Aguilera* (1996) 51 CA4th 1151, 59 CR2d 587 (*Miranda* violated; defendant agreed to interview but not told free to terminate interview, "tag-team" interrogation lasted two hours with intense, accusatory, and sometimes threatening questioning); *In re Victor B.* (1994) 24 CA4th 521, 29 CR2d 362 (only temporary detention; brief and casual questioning; no focus on subject as an individual)].

Objective indicia of custody include: (1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning [*People v. Forster* (1994) 29 CA4th 1746, 35 CR2d 705] .

To determine custody, it is the totality of circumstances that is relevant; no one factor is dispositive [*People v. Forster* (1994) 29 CA4th 1746, 35 CR2d 705 (while defendant had been detained, he was not in custody for *Miranda* purposes, quoting *People v. Boyer* (1989) 48 C3d 247, 256 CR 96, 768 P2d 610)].

For determining custody, the only relevant inquiry is how a reasonable person in the suspect's shoes would understand the situation [*Berkemer v. McCarty* (1984) 468 US 420, 82 L Ed2d 104, 317 S Ct 3138 (investigatory questioning by officer pursuant to routine traffic stop does not implicate *Miranda*); *In re Joseph R.* (1998) 65 CA4th 954, 76 CR2d 887 (juvenile not in custody even though previously handcuffed and placed in police car because questioning occurred after juvenile released from car, handcuffs removed, told he was not under arrest or would be arrested, and informed he

need not answer questions)].

The subjective impressions of police officers regarding the defendant's custody status or status as a suspect are irrelevant unless they are communicated to the defendant and would affect how a reasonable person would perceive his or her freedom to leave [*People v. Stansbury* (1995) 9 C4th 824, 38 CR2d 394, 889 P2d 588 (disapproving, to the extent they suggest that an officer's subjective focus of suspicion is an independently relevant factor in establishing custody: *People v. Morris* (1991) 53 C3d 152, 279 CR 720, 807 P2d 949; *People v. Holloway* (1990) 50 C3d 1098, 269 CR 530, 790 P2d 1327; *People v. Boyer* (1989) 48 C3d 247, 256 CR 96, 768 P2d 610); *Stansbury v. California* (1994) 511 US 318, 114 S Ct 1526, 128 L Ed2d 293] .

[i] Sufficiency of Advisement and Waiver

When an individual is taken into custody or is otherwise deprived of his or her freedom by the authorities in any significant way and is subjected to questioning, procedural safeguards must be employed to protect the privilege against self-incrimination [*Miranda v. Arizona* (1966) 384 US 436, 86 S Ct 1602, 16 L Ed2d 694] .

A person who is to be subjected to custodial interrogation must be warned prior to any questioning that he or she has the right to remain silent, that anything he or she says can be used against him or her in a court of law, that he or she has the right to the presence of an attorney, and that if he or she cannot afford an attorney, one will be appointed for him or her prior to any questioning, if he or she so desires [*Miranda v. Arizona* (1966) 384 US 436, 86 S Ct 1602, 16 L Ed2d 694] .

Police need not give *Miranda* warnings before questioning a suspect in custody if the public safety exception is involved [*People v. Simpson* (1998) 65 CA4th 854, 76 CR2d 851 (questioning permissible about guns in residence when officers' safety at issue when serving a warrant on a known drug house)].

The *Miranda* advisement need not be given in any "precise formulation," "talismatic incantation," or in the exact form as in the *Miranda* decision [*Duckworth v. Eagan* (1989) 492 US 195, 109 S Ct 2875, 492 US 195, 109 S Ct 2875, 106 L Ed2d 166; *California v. Prysock* (1981) 453 US 355, 101 S Ct 2806, 69 L Ed2d 696; *People v. Nitschmann* (1995) 35 CA4th 677, 41 CR2d 325 ("con-wise" arrestee interrupted officer and recited admonitions himself; though self-admonition did not recite when he was entitled to attorney, evidence showed he was aware of right to counsel then and there); *People v. Wash* (1993) 6 C4th 215, 24 CR2d 421, 861 P2d 1107; *People v. Mattson* (1990) 50 C3d 826, 268 CR 802, 789 P2d 983] .

Miranda warnings need not be given in the exact form described in *Miranda* but must reasonably convey to a suspect his or her rights. *Miranda* does not require that attorneys be producible on call, but only that the suspect be informed of the right to an attorney before and during questioning, and that an attorney would be appointed if the suspect could not afford one. If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel. Thus, in a case involving a suspect's exculpatory statement, after being read and signing a waiver form that provided that if he could not afford a lawyer, one would be appointed for him "if and when you go to court," the court did not render *Miranda* warnings inadequate [*Duckworth v. Eagan* (1989) 492 US 195, 109 S Ct 2875, 106 L Ed2d 166] .

The individual may knowingly and intelligently waive *Miranda* rights and agree to answer questions or make a statement [*In re Paul A.* (1980) 111 CA3d 928, 168 CR 891 (rights waived where accused minor did not make explicit statement that he understood rights); *In re Peter G.* (1980) 110 CA3d 576, 168 CR 3 (waiver by drunken minor not intelligently made); *People v. Jackson* (1980) 28 C3d 264, 168 CR 603, 618 P2d 149 (*Miranda* invoked and waived in the same sentence; statements admissible); *People v. Taylor* (1980) 112 CA3d 348, 169 CR 290 (statements by person heavily under the influence of heroin not involuntary); *People v. Hurlic* (1971) 14 CA3d 122, 92 CR 55 (defendant said he "heard" rather than "understood"; acceptable waiver)].

No particular manner or form of waiver of *Miranda* rights is required [*United States v. Hayes* (4th Cir 1967) 385 F2d 375] .

Unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against the defendant [*Miranda v. Arizona* (1966) 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 Ohio Misc. 9] .

Subsequent to the adoption of Proposition 8 (*Cal Const, art I, § 28*), California applies federal standards in reviewing a defendant's claim that his or her statements were elicited in violation of *Miranda* [*People v. Crittenden* (1994) 9 C4th 83, 36 CR2d 474, 885 P2d 887 ; *People v. Sims* (1993) 5 C4th 405, 20 CR2d 537, 853 P2d 992 ; *People v. Markham* (1989) 49 C3d 63, 260 CR 273, 775 P2d 1042 ; *People v. May* (1988) 44 C3d 309, 243 CR 369, 748 P2d 307] .

When a suspect asserts his or her right to remain silent, all questioning must cease [*People v. Samayoa* (1997) 15 C4th 795, 64 CR2d 400, 938 P2d 2 (mere refusal to allow tape recording of conversation is not assertion of right to remain silent); *Miranda v. Arizona* (1966) 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 Ohio Misc. 9] .

The suspect may not make an anticipatory assertion of right to counsel before being taken into custody [*People v. Calderon* (1997) 54 CA4th 766, 63 CR2d 104] .

If an individual states that he or she wants counsel, the interrogation must cease until an attorney is present. No further interrogation, regardless whether on the same or a different subject matter, may take place without an attorney present, unless the accused initiates further communication, exchanges, or conversations with police [*Edwards v. Arizona* (1981) 451 US 477, 101 S Ct 1880, 68 L Ed2d 378 ; *People v. Sims* (1993) 5 C4 405, 5 C4th 405, 20 CR2d 537, 853 P2d 992 ; *People v. Mattson* (1990) 50 C3d 826, 268 CR 802, 789 P2d 983 (defendant initiated interview)].

This rule applies only when the suspect has expressed his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*, i.e., for the assistance of an attorney in dealing with custodial interrogation by the police [*McNeil v. Wisconsin* (1990) 501 US 171, 111 S Ct 2204, 115 L Ed2d 158] .

In order for a suspect to invoke the *Miranda* right to counsel, the suspect must unambiguously request counsel. The suspect must articulate his or her desire to have counsel present sufficiently clearly that a reasonable police officer would understand the statement to be a request for an attorney. Police officers do not have to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney [*Davis v. United States* (1994) 512 US 452, 114 S Ct 2350, 129 L Ed2d 362 ("Maybe I should talk to a lawyer" ambiguous and not request for counsel); *People v. Crittenden* (1994) 9 C4th 83, 36 CR2d 474, 885 P2d 887 ("Did you say I could have a lawyer," and silence following officer's affirmative response, not request for counsel)].

There is no "good faith" exception for *Miranda* violations, as there is for *Fourth Amendment* violations [*People v. Smith* (1995) 31 CA4th 1185, 37 CR2d 524 (after deaf suspect unequivocally requested counsel, officer's further good-faith questioning to clarify suspect's response resulted in admissions that should have been suppressed)].

Federal law, not California law, controls the admissibility of a defendant's confession obtained in a subsequent interrogation after a suspect has invoked either his or her right to remain silent or his or her right to counsel. Proposition 8 abrogated the prior contrary rule of *People v. Pettingill* (1978) 21 C3d 231, 145 CR 861, 578 P2d 108 and *People v. Fioritto* (1968) 68 C2d 714, 68 CR 817, 441 P2d 625 [*People v. DeLeon* (1994) 22 CA4th 1265, 27 CR2d 818 ; *People v. Warner* (1988) 203 CA3d 1122, 250 CR 462] .

Miranda delineates two separate rights--the right to remain silent and the right to have counsel present during interrogation. Later cases make clear that there are distinctions in the scope of these rights, which become most

important in the case of subsequent interrogations after a suspect has invoked one of his rights. The right to counsel affords broader protection than the right to remain silent [*Michigan v. Mosley* (1975) 423 US 96, 96 S Ct 321, 46 L Ed2d 313] .

If a suspect has invoked his right to remain silent, but not his right to counsel, the police may reinterrogate the suspect if:

- The accused initiates further communication, exchanges, or conversations with police [*Edwards v. Arizona* (1981) 451 US 477, 101 S Ct 1880, 68 L Ed2d 378] .

- Subsequent interrogation concerns a different subject matter and the suspect's right to cut off the questioning was respected in the totality of the circumstances [*Michigan v. Mosley* (1975) 423 US 96, 96 S Ct 321, 46 L Ed2d 313 ; *People v. DeLeon* (1994) 22 CA4th 1265, 27 CR2d 818 (suspect invoked only right to remain silent, not right to counsel, on one robbery; five days later, readvised of *Miranda* by different officers and confessed to other robberies)].

- Subsequent interrogation concerns the same subject matter and the suspect's right to cut off the questioning was respected in the totality of the circumstances [*People v. Warner* (1988) 203 CA3d 1122, 250 CR 462 (allowing subsequent interrogation on same crime, after passage of significant time, by officer unaware of defendant's first invocation of right to remain silent, and readmonishment and waiver of rights)].

If an individual states that he or she wants an attorney, the interrogation must cease and the suspect may not be reapproached regarding any offense until an attorney is present, unless the suspect initiates further communication, exchanges, or conversations with police [*Arizona v. Roberson* (1988) 486 US 675, 108 S Ct 2093, 100 L Ed2d 704 ; *Edwards v. Arizona* (1981) 451 US 477, 101 S Ct 1880, 68 L Ed2d 378 ; *People v. Sims* (1993) 5 C4th 405, 20 CR2d 537, 853 P2d 992] .

Once an accused has invoked his or her right to counsel, assuming there is no break in custody, if the police initiate a meeting in the absence of counsel on the same subject matter, the accused's statements are presumed involuntary and are inadmissible as substantive evidence at trial, even if the accused executes a waiver and the statements would be considered voluntary under traditional standards [*McNeil v. Wisconsin* (1990) 501 US 171, 111 S Ct 2204, 115 L Ed2d 158 ; *People v. Crittenden* (1994) 9 C4th 83, 36 CR2d 474, 885 P2d 887] .

Once an accused has invoked his or her right to counsel, even if the suspect initiates further conversation with the police, reinterrogation may not follow unless the suspect waives the right to counsel, and it is the prosecution's burden to establish this [*Oregon v. Bradshaw* (1983) 462 US 1039, 103 S Ct 2830, 77 L Ed2d 405 (officer readvised suspect of *Miranda* rights and procured waiver); *People v. Sims* (1993) 5 C4th 405, 20 CR2d 537, 853 P2d 992 (defendant's remark not waiver; officer did not readvise suspect of *Miranda* rights or procure waiver before first confession)].

A request by a defendant to discuss only routine matters related to incarceration generally will not "initiate a conversation" within the meaning of *Miranda* [*Oregon v. Bradshaw* (1983) 462 US 1039, 103 S Ct 2830, 77 L Ed2d 405 ; *People v. Mattson* (1990) 50 C3d 826, 268 CR 802, 789 P2d 983] .

If an accused first confesses as a result of improper police conduct, and subsequently makes a second confession, it is presumed the subsequent confession is a product of the first. But this presumption is rebuttable by a showing of a break in the causative chain. The degree of attenuation to dissipate the taint requires at least an intervening independent act by the defendant or a third party [*People v. Sims* (1993) 5 C4th 405, 20 CR2d 537, 853 P2d 992 (defendant initiated further contact; officer readvised defendant of *Miranda* rights and procured waiver for second confession)].

Concerning subsequent admissions, the U.S. Supreme Court has held that an admission not preceded by *Miranda* warnings, but otherwise voluntary, is not presumed to taint a second admission. Where the first admission results from *Fourth* or *Fifth Amendment* violations, several factors must be examined in considering the taint of the second admission (i.e., the time between confessions, change in place of interrogation, and change of identities of interrogators) [*Oregon v. Elstad* (1985) 470 US 298, 105 S Ct 1285, 84 L Ed2d 222] .

When a defendant's statements, taken in violation of *Miranda*, are admitted for the purpose of impeaching the defendant, there is a split of authority as to whether the trial court has a sua sponte duty to instruct the jury that the statements may be used only for the purpose of evaluating the defendant's testimony. In *People v. Nudd* (1974) 12 C3d 204, 115 CR 372, 524 P2d 844 , the California Supreme Court held that, absent a request by a party, the court has no duty to give an instruction limiting the purpose for which evidence may be considered. *Nudd* was overruled by *People v. Disbrow* (1976) 16 C3d 101, 127 CR 360, 545 P2d 272 , but on a different issue. The court subsequently held, in *People v. May* (1988) 44 C3d 309, 243 CR 369, 748 P2d 307 , that *Disbrow* had been abrogated by Proposition 8. *May* also held that since Proposition 8, California courts apply federal standards to *Miranda*-related issues, both of substance and procedure. Since *May*, appellate courts have differed in whether trial courts must give a limiting instruction, sua sponte, on the use of a defendant's inculpatory or inconsistent statements obtained in violation of *Miranda*. Holding that such an instruction is a sua sponte duty is *People v. Duncan* (1988) 204 CA3d 613, 251 CR 355 , citing *Richardson v. Marsh* (1987) 481 US 200, 107 S Ct 1702, 95 L Ed2d 176 . Coming to the opposite conclusion, and holding that *Nudd* is still good law, are *People v. Torrez* (1995) 31 CA4th 1084, 37 CR2d 712 ; *People v. Baker* (1990) 220 CA3d 574, 269 CR 475 ; and *People v. Wyatt* (1989) 215 CA3d 255, 263 CR 556 .

Defendant's nonresponsive rejoinder to *Miranda* warnings (he asked to read a book and have some cigarettes) was not an invocation of *Miranda* rights [*People v. Mitchell* (1982) 132 CA3d 389, 183 CR 166] .

Spanish language *Miranda* warning that did not contain an effective and express explanation of an indigent's right to appointed counsel was defective [*People v. Diaz* (1983) 140 CA3d 813, 189 CR 783] .

A social worker who reports suspected child abuse under the duty imposed by *Pen Code* § 11166 does not thereby become an agent of the state, who must give *Miranda* warnings to the suspected abuser. This situation differs from that in *Estelle v. Smith* (1981) 451 US 454, 101 S Ct 1866, 68 L Ed2d 359 , where the U.S. Supreme Court found that testimony of a court-appointed psychiatrist concerning statements made to him in jail by an indicted murder suspect were not freely and voluntarily given. At this point, the psychiatrist had become an agent of the state so that before the suspect gave a statement, he should have been apprised of his rights. The difference is that in *Estelle*, the defendant was questioned in custody. If the setting is noncustodial, a listener who is required by law to report certain statements does not have to give a *Miranda* warning [*People v. Battaglia* (1984) 156 CA3d 1058, 203 CR 370 ; *Estelle v. Smith* (1981) 451 US 454, 101 S Ct 1866, 68 L Ed2d 359] .

Considering the totality of circumstances, a young suspect's repeated requests to call his mother, coupled with the police officers' response, is conduct patently inconsistent with willingness to discuss the case freely [*People v. Soto* (1984) 157 CA3d 694, 204 CR 204 (note this was not treated as a request for an attorney)].

Highway patrol officer's question to an automobile accident victim did not need to be preceded with *Miranda* warnings where the officer had no indication that criminality was involved [*People v. Milham* (1984) 159 CA3d 487, 205 CR 688 (vehicular manslaughter, driving while intoxicated; driver stated that he thought he killed his wife)].

Tape recorded telephone conversations between defendant and complaining witness's spouse were not "interrogations" [*People v. Wojtkowski* (1985) 167 CA3d 1077, 213 CR 846 (admission did not violate *Miranda*)].

[j] Impeachment--By Defendant's Silence

Whether evidence of a defendant's silence is admissible to impeach the defendant depends on whether the silence is pre-*Miranda* (before *Miranda* rights were given, or when no *Miranda* rights were given), or the silence is post-*Miranda*, after *Miranda* rights were given. Evidence of pre-*Miranda* silence is admissible to impeach a defense claimed for the first time at trial. After Proposition 8, evidence of pre-*Miranda* silence may be excluded only if federal law so requires. Since federal law permits the admission of pre-*Miranda* silence to rebut a defense offered for the first time at trial, such evidence is permissible [*People v. O'Sullivan* (1990) 217 CA3d 237, 265 CR 784] .

When the defendant's silence is post-*Miranda*, after *Miranda* rights were given, it may not be used for impeachment. The prosecution violates due process if it uses the defendant's post-*Miranda* silence to impeach an exculpatory explanation offered for the first time at trial [*Doyle v. Ohio* (1976) 426 US 610, 96 S Ct 2240, 49 L Ed2d 91] . The rule is contrary if the prosecution uses a defendant's post-*Miranda* statement to impeach exculpatory testimony offered at trial if the defendant's statement is inconsistent with that testimony.

A *Doyle* violation has two components, both of which must exist: (1) the prosecution makes use of the post-*Miranda* silence. Such use can occur either by questioning or reference in closing argument; and (2) the trial court permits such use. This will usually take the form of overruling a defense objection, thus conveying to the jury the impression that the prosecution's question or reference is legitimate [*Greer v. Miller* (1987) 483 US 756, 107 S Ct 3102, 97 L Ed2d 618] .

If the prosecution asks the defendant a question about his or her post-*Miranda* silence, and if the trial court permits the question, a *Doyle* violation occurs, even if the defendant does not answer the question. It is not a defendant's answer that establishes the first element of a *Doyle* violation but the activity of the prosecutor in calling attention to the defendant's post-*Miranda* silence, whether by question or argument [*People v. Evans* (1994) 25 CA4th 369, 31 CR2d 20 (but finding the violation to be harmless beyond a reasonable doubt)].

Whether the *Doyle* rule applies even if it is the defendant who first raises the issue of post-*Miranda* silence depends on the circumstances [*People v. Evans* (1994) 25 CA4th 369, 31 CR2d 20 (*Doyle* rule applies even if defendant first raises issue of post-*Miranda* silence, since there can be no waiver of *Doyle* protection); *People v. Austin* (1994) 23 CA4th 1596, 28 CR2d 885 (no *Doyle* violation where defendant sought to create impression, on cross-examination of police officer, that officer denied him opportunity to explain damaging statement, and prosecution established defendant's post-*Miranda* silence on redirect)].

If the trial court does not permit use of a defendant's post-*Miranda* silence, such as by sustaining a defense objection, no *Doyle* violation occurs [*Greer v. Miller* (1987) 483 US 756, 107 S Ct 3102, 97 L Ed2d 618 (court sustained defense objection and instructed jury to disregard question)].

Where an in-custody defendant's post-*Miranda* silence is in response to questions from a private party, *Doyle* applies if the evidence demonstrates that defendant's silence in front of the private party results primarily from the conscious exercise of his or her constitutional rights [*People v. Eshelman* (1990) 225 CA3d 1513, 275 CR 810] .

[k] Impeachment--By Defendant's Statements

A statement obtained in violation of *Miranda* may be used for impeachment purposes [*Harris v. New York* (1971) 401 US 222, 91 S Ct 643, 28 L Ed2d 1] .

A confession obtained in violation of the *Sixth Amendment* right to counsel may be used to impeach a defendant's conflicting testimony [*Michigan v. Harvey* (1990) 494 US 344, 110 S Ct 1176, 108 L Ed2d 293] .

Statements obtained in violation of *Miranda* are admissible for impeachment, even if the police purposefully violated *Miranda* in order to secure evidence to be used for impeachment [*People v. Peevy* (1998) 17 C4th 1184, 73 CR2d 865, 953 P2d 1212 (statements must still be voluntary; misrepresentations or coercive behavior will make statements

inadmissible for impeachment)].

The impeachment exception to the exclusionary rule does not extend to impeachment of the testimony of nondefendant witnesses. Expanding the scope of the exception would significantly weaken the exclusionary rule's deterrent effect on police misconduct. The truth-seeking rationale supporting the impeachment of defendants does not apply with equal force to other witnesses [*James v. Illinois* (1990) 493 US 307, 110 S Ct 648, 107 L Ed2d 676 (evidence obtained in violation of *Fourth Amendment*)].

[I] Proposition 8--Victims' Bill of Rights

The California Supreme Court has ruled that Proposition 8 and its "Truth-in-Evidence" component (*Cal Const, art I, § 28(d)*) abrogated the rule of *People v. Disbrow* (1976) 16 C3d 101, 127 CR 360, 545 P2d 272 . Under *Disbrow*, statements obtained in violation of *Miranda* could not be used for impeachment purposes. California law is now in line with federal law [*People v. May* (1988) 44 C3d 309, 243 CR 369, 748 P2d 307] .

People v. May is retroactive to all prosecutions for crimes committed on or after June 9, 1982, the effective date of Proposition 8. It is the passage of Proposition 8 and its effective date, rather than the date of the *May* decision, that is controlling [*People v. Aguilar* (1990) 218 CA3d 1556, 267 CR 879] .

Although Proposition 8 preserved the rights recognized under *Evid Code § 940*, it eliminated the remedy of exclusion for violation of the state Constitution unless federal law would also compel exclusion of the evidence if unconstitutionally obtained [*People v. May* (1988) 44 C3d 309, 243 CR 369, 748 P2d 307] .

Going beyond *May*, one court has permitted the use of statements admissible under *Harris* to prove a defendant's breach of a plea agreement in a revocation proceeding [*People v. Collins* (1996) 45 CA4th 849, 53 CR2d 367] .

Statements made to a probation officer in connection with a guilty plea can be used for impeachment if the defendant testified at trial following withdrawal of the guilty plea. The admission of these statements does not violate the defendant's due process rights under the *Fourteenth Amendment to the United States Constitution* [*People v. Goodner* (1992) 7 CA4th 1324, 9 CR2d 543] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Justiciability
Standing
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Criminal Law & Procedure
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22 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.19

18.19 Lawyer Defined--Evid Code § 950

[1] Evid Code § 950 Text

■ *Evid Code § 950.*

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.

LegH: 1965 ch. 299.

[2] Statutory Reference

Admission to practice of law [*B&P Code § 6060 et seq.*].

[3] Commission Comments

Since the privilege is intended to encourage full disclosure, the client's reasonable belief that the person he is consulting is an attorney is sufficient to justify application of the privilege [Cal Law Rev Com Comment].

Since a client should not be forced to inquire about the jurisdictions where the lawyer is authorized to practice and whether such jurisdictions recognize the lawyer-client privilege, there is no requirement that the client reasonably believe that the lawyer is licensed to practice in a jurisdiction that recognizes the privilege [Cal Law Rev Com Comment].

[4] Case Notes

When attorney told prospective client that she was no longer licensed and did not practice law, privilege did not apply [*People v. Resendez* (1993) 12 CA4th 98, 15 CR2d 575] .

The legislature may extend the attorney-client privilege to lay representatives [*Welfare Rights Organization v. Crisan* (1983) 33 C3d 766, 190 CR 919, 661 P2d 1073 (administrative hearings under *W&I Code § 10950*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeScope



23 of 169 DOCUMENTS

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.20

18.20 Client Defined--Evid Code § 951

[1] Evid Code § 951 Text

■ *Evid Code § 951.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned [Cal Law Rev Com Comment].

Unincorporated organizations such as labor unions, social clubs, and fraternal societies have a lawyer-client privilege when the organization (rather than its individual members) is the client [Cal Law Rev Com Comment].

[3] Case Notes

By including "authorized representative" in the definition of "client," *Evid Code § 951* extends the privilege to cover not only communications directly between the client and the attorney, but also communications between the client's agents and the attorney. Nothing in the statute suggests, however, that an unregistered individual or entity may charge a fee for referring potential clients to attorneys without violating other statutes [*Selten v. Hyon* (2007) 152 CA4th 463, 60 CR3d 896] .

Labor unions have a lawyer-client privilege when the organization is the client [*Benge v. Superior Court* (1982) 131 CA3d 336, 182 CR 275] .

A trustee is a client, but the privilege attaches to the office of trustee, not the trustee personally [*Moeller v. Superior*

Court (Sanwa Bank) (1997) 16 C4th 1124, 69 CR2d 317, 947 P2d 279 (former trustee could not assert privilege against successor trustee); *Fletcher v. Superior Court (American Cancer Society) (1996) 44 CA4th 773, 52 CR2d 65* (beneficiary of trust not a client)].

A corporation that retains the services of an attorney is a "client" protected by the privilege [*Hoiles v. Superior Court (1984) 157 CA3d 1192, 204 CR 111* ; *Dickerson v. Superior Court (1982) 135 CA3d 93, 185 CR 97*] .

It is not enough that the client seek advice from an attorney. *Evid Code § 951* requires that the advice be sought from the attorney "in his professional capacity" [*People v. Gionis (1995) 9 C4th 1196, 40 CR2d 456, 892 P2d 1199*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesAttorney-Client PrivilegeScope



24 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.21

18.21 "Confidential Communication Between Client and Lawyer"--Evid Code § 952

[1] Evid Code § 952 Text

■ *Evid Code § 952.*

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.

LegH: 1965 ch. 299, operative January 1, 1967, 1967 ch. 650, 1994 chs. 186, 587, 2002 ch. 72.

[2] Statutory Reference

"Confidential communication" as to use of device for eavesdropping [*Pen Code § 632(c)*].

[3] Commission Comments

Section 952 changes prior law in two respects: First, under Section 952 consultations with an expert do not destroy the privilege. Prior law permitted the use of a third person to act as a conduit of information sent from the client to his attorney but did not allow consultation [*see Evid Code § 912(d)*]. Secondly, Section 952 preserves the privilege when third persons are present to further the interests of the client in the consultation. Thus, the presence of a spouse, parent, business associate, or other persons having an interest in a matter of joint concern may not impair the efficiency of the privilege. This would appear to change prior law [Cal Law Rev Com Comment].

An attorney's communicated legal opinion, which includes his impressions and conclusions, is protected by the privilege [Cal Law Rev Com Comment].

A communication is nonetheless confidential even though it is made by the client in the presence of another person, such as a spouse, parent, business associate, or joint client who is present "to further the interest of the client in the

consultation" [Cal Law Rev Com Comment].

Confidential communications include those made by the client to third parties, such as the lawyer's secretary, a physician, or similar expert, for the purpose of transmitting such information to the lawyer because they are "reasonably necessary for the transmission of the information" [Cal Law Rev Com Comment].

Confidential communications include those made by the client to an expert consultant in order that the lawyer may adequately advise his client because they are "reasonably necessary for the accomplishment of the purpose for which the lawyer is consulted" [Cal Law Rev Com Comment].

Evid Code § 952 is amended to delete the last sentence concerning confidentiality of electronic communications, because this rule is generalized in Section 917(b), (c) applicable to all confidential communication privileges [Cal Law Rev Com Comment].

[4] Case Notes

[a] Scope of Privilege

The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his or her attorney [*Holm v. Superior Court* (1954) 42 C2d 500, 268 P2d 722 (photos, documents); *City & County of San Francisco v. Superior Court of San Francisco* (1951) 37 C2d 227 231 P2d 26 (physician's examination of client in preparation for lawsuit); *Wellpoint Health Networks v. Superior Court* (1997) 59 CA4th 110, 68 CR2d 844 (attorney-client privilege covers all forms of communications)].

If legal advice is discussed or contained in a communication between corporate employees, then to that extent it is presumptively privileged. A communication reflecting a discussion of litigation strategy that expresses that the strategy is in response to advice of counsel would come within the attorney-client privilege. *Evid Code* § 952 extends the privilege to confidential communications shared with "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." Disputed documents must be reviewed to determine whether the employees to whom legal advice was relayed come within this broad definition, or whether the company waived the privilege by distributing the advice within the corporation beyond those with the "need to know" [*Zurich American Ins. Co. v. Superior Court* (2007) 155 CA4th 1485, 66 CR3d 833 (writ granted; remanded for in camera review of disputed documents)].

A lawyer's analysis and evaluation of an expert's report, as distinguished from the report itself, is part of the advice given by the lawyer to the client and therefore protected by the privilege [*Sheets v. Superior Court* (1967) 257 CA2d 1, 64 CR 753] .

While the privilege fully covers communications, it does not extend to subject matter otherwise unprivileged merely because that subject matter has been communicated to an attorney [*People ex rel. Dept. of Public Works v. Donovan* (1962) 57 C2d 346, 19 CR 473, 369 P 2d. 1 (privilege does not encompass matters remote from the actual communication); *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355 15 CR 90, 364 P2d 266 (nonprivileged matter in privileged document may be subject to disclosure); *Wellpoint Health Networks v. Superior Court* (1997) 59 CA4th 110, 68 CR2d 844 (documents prepared independently by a party, including witness statements, do not become privileged communications or work-product merely because they are turned over to counsel; written statements must be a communication between parties to be protected)].

Defense counsel's comments at a bench conference about the risk that defendant would become violent were based on counsel's past experience with defendant. They did not reveal any confidential communications with his client, and thus

did not violate the attorney-client privilege. An attorney's impression of his client's mental state is not protected by the attorney-client privilege [*People v. Perry* (2006) 38 C4th 302, 315-316, 42 CR3d 30, 132 P3d 235] .

Only those communications reflecting the requesting of, or rendering of, legal advice are protected by the attorney-client privilege, and only the attorney's legal impressions, conclusions, opinions, or legal research or theories are subject to the attorney work product privilege [*2,022 Ranch, LLC v. Superior Court* (2003) 113 CA4th 1377, 7 CR3d 197 (fact that insurance claims adjusters were also attorneys did not automatically protect in-house files)].

If defense counsel removes or alters evidence, the attorney-client privilege does not bar revelation of the original location or condition of the evidence [*People v. Meredith* (1981) 29 C3d 682, 175 CR 612, 631 P2d 46 (privileged status is lost when defense frustrates prosecution discovery)].

The work-product doctrine applies to criminal cases and protects the work-product of defense investigators [*People v. Collie* (1981) 30 C3d 43, 177 CR 458, 634 P2d 534] .

The showing of a police report by an attorney to a criminal defendant the attorney is representing is a privileged transmission of information. The public nature of the document does not defeat the confidentiality of the communication [*In re Navarro* (1979) 93 CA3d 325, 155 CR 522] .

Pen Code § 1054.3, requiring a criminal defendant's disclosure of witnesses and statements of witnesses, does not require disclosure of attorney-client privileged statements, because *Pen Code* § 1054.6 provides that privileged material may not be disclosed [*Rodriguez v. Superior Court* (1993) 14 CA4th 1260, 18 CR2d 120] .

When an attorney has determined that particular publications (though they be law review articles or newspaper clippings in the public domain) are relevant to an inmate-client's case, such publications may become an integral part of the advice or strategy and are entitled to protection of privilege accorded to confidential correspondence [*In re Jordan* (1974) 12 C3d 575, 116 CR 371, 526 P2d 523] .

A communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client. Moreover, it is not enough that the client seek advice from an attorney; such advice must be sought from the attorney "in his professional capacity" [*People v. Gionis* (1995) 9 C4th 1196, 40 CR2d 456, 892 P2d 1199] .

After an attorney's explicit refusal to undertake representation, a person can have no reasonable expectation of being represented by the attorney. Moreover, evidence of an attorney's express refusal of representation may give rise to an inference that, in continuing to speak to the attorney, the person is not thereafter consulting with the attorney for advice "in his professional capacity" [*People v. Gionis* (1995) 9 C4th 1196, 40 CR2d 456, 892 P2d 1199 (defendant communicated with attorney as friend, not in professional capacity)].

The attorney-client privilege does not require that the attorney actually be retained. When a person seeks the assistance of an attorney with a view to employing him or her professionally, any information acquired by the attorney is privileged whether or not actual employment results [*People v. Gionis* (1995) 9 C4th 1196, 40 CR2d 456, 892 P2d 1199 ; *People v. Canfield* (1974) 12 C3d 699, 117 CR 81, 527 P2d 633] .

To make a communication privileged, a client must predominantly intend to transmit the information to an attorney in the course of professional employment [*D. I. Chadbourne, Inc. v. Superior Court* (1964) 60 C2d 723, 36 CR 468, 388 P2d 700 (employer's intent controls confidentiality of employee's statement); *Holm v. Superior Court* (1954) 42 C2d 500, 267 P2d 1025 (communication used for other incidental purposes as well); *Scripps Health v. Superior Court* (2003) 109 CA4th 529, 135 CR2d 126 (confidential hospital reports prepared for in-house lawyer under risk-management plan, and not used for peer review, were protected by attorney-client privilege)].

Not all pre-litigation conversations between the insured and the insurer are, as a matter of law, subject to the attorney-client privilege. The "dominant purpose" of the communication must be evaluated and a determination must be made concerning the facts asserted as a basis for the privilege [*Travelers Insurance Cos. v. Superior Court* (1983) 143 CA3d 436, 191 CR 871 (dominant purpose must be transmittal of information to attorney in the course of employment)].

The attorney-client privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened [*Wellpoint Health Networks v. Superior Court* (1997) 59 CA4th 110, 68 CR2d 844] .

Preliminary statements made to an attorney concerning a potential legal problem with a view to obtaining legal services are held to be privileged whether or not actual employment of the attorney occurs [*Benge v. Superior Court* (1982) 131 CA3d 336, 182 CR 275] .

Confidential matters that an attorney learns from a client do not become subject to disclosure because the client later discharges the attorney [*People v. Linden* (1959) 52 C2d 1, 338 P2d 397 (confidential matters do not become subject to disclosure merely because they become known to other parties); *Hardy v. Martin* (1907) 150 C 341, 89 P 111 (communications during professional employment privileged)].

Facts involved in a lawsuit are not insulated from discovery simply because they have been communicated to counsel [*Sawyer v. First City Financial Corp.* (1981) 124 CA3d 390, 177 CR 398] .

Department of Corrections may not limit attorney-inmate confidential correspondence privilege to members of the California State Bar to the exclusion of out-of-state attorney [*In re Jordan* (1974) 12 C3d 575, 116 CR 371, 526 P2d 523] .

The guarantee of confidentiality is extended to communications between welfare claimants and lay representatives as well as attorneys in connection with welfare hearings. Otherwise, the welfare claimants' confidential statements to the legislatively authorized lay representatives could be used against the claimants, something that the legislature could not have intended [see *W&I Code § 10950*; *Welfare Rights Organization v. Crisan* (1983) 33 C3d 766, 190 CR 919, 661 P2d 1073] .

Neither statutory nor case law differentiates between communications of factual information as opposed to legal advice between attorney and client. Information transmitted between a client and attorney in the context of investigating, preparing, and prosecuting a lawsuit is within the purview of the privilege [*Mitchell v. Superior Court* (1984) 37 C3d 591, 208 CR 886, 691 P2d 642 (attorney's warnings to client concerning exposure to chemicals were privileged)].

Contents of an undelivered letter written to an attorney with the intent of retaining his or her services are privileged [*People v. Gardner* (1980) 106 CA3d 882, 165 CR 415 (letter written by jail inmate to public defender)].

In an action by an insured's assignee against an insurer for bad faith refusal to defend a suit by the assignee against the insured, communications between the insurer and its counsel concerning the insurer's obligation to defend the insured were privileged, and the *Evid Code § 962* exception to the privilege existing where two or more clients have retained an attorney on a matter of common interest was not applicable, when the attorney was consulted with respect to the action filed by the assignee against the insured, and the attorney gave advice to the insurer, but there was no evidence that the attorney was employed by the insured to defend the action [*Houston General Insurance Co. v. Superior Court* (1980) 108 CA3d 958, 166 CR 904] .

Prelitigation letter from city attorney to city council is privileged and its production is not required by the Public Records Act [*Roberts v. City of Palmdale* (1993) 5 C4th 363, 20 CR2d 330, 853 P2d 496] .

Similarly, the general rules of attorney-client privilege do not apply to determine whether a meeting with legal counsel may be held in closed session. Instead, a legislative body of a local agency is permitted to hold closed-session meetings with counsel to discuss pending litigation only as permitted by the Brown Act [*Shapiro v. Bd. of Directors* (2005) 134 CA4th 170, 182, 35 CR3d 826] .

There is no attorney-client privilege for communications made to a "jailhouse lawyer" known not to be a licensed attorney [*People v. Flores Velasquez* (1987) 192 CA3d 319, 237 CR 366] .

[b] Third-Party Disclosures

The attorney-client privilege extends to communications that are intended to be confidential if they are made to attorneys, family members, business associates, or agents on matters of joint concern [*Cooke v. Superior Court* (1978) 83 CA3d 582, 147 CR 915] .

A corporation, like a natural person, is entitled to the full benefit of the attorney-client privilege. Absent some conflict of interest or some evidence of antagonism among entities, disclosure of a corporate subsidiary's counsel's legal opinion to its holding company and affiliated officers and employees who need to know the information in order to properly perform their duties is a disclosure that is reasonably necessary to accomplish the purpose for which counsel has been consulted, and therefore is privileged. Accordingly, the presence of a representative of a parent or affiliated company at a legal briefing of a subsidiary does not destroy confidentiality. The privilege also exists when the information is transmitted through intermediaries [*Insurance Co. of North America v. Superior Court* (1980) 108 CA3d 758, 166 CR 880] .

Documents prepared by counsel and circulated between two parties bound by an offer and acceptance in contemplation of a binding, detailed license agreement are protected by privilege if the disclosure of such documents is reasonably necessary to further the interests of both parties in finalizing negotiations. In a proceeding under the Public Records Act for the disclosure of certain documents from a county transportation authority regarding a licensing agreement to the successful bidder, the trial court erred in finding that the attorney-client privilege was waived [*STI Outdoor v. Superior Court* (2001) 91 CA4th 334, 109 CR2d 865] .

"When an employee's only connection is as an independent witness, not as a codefendant or as the natural person to speak for the employer, such statements do not become privileged just because they are given for transmittal to the employer's attorney in preparation for litigation" [*Martin v. Workers' Compensation Appeals Board* (1997) 59 CA4th 333, 69 CR2d 138 (when employee is no more than witness to accident, his or her statement is not privileged even if taken in preparation for litigation; employer should not be allowed to silence witnesses when a natural person could not)].

A guardian ad litem may be a third person to whom communication is reasonably necessary for the transmission of information to the lawyer or the accomplishment of the purpose for which the lawyer was consulted. A guardian ad litem should be apprised of matters that the minor communicates to the attorney for the purpose of prosecuting or defending the action. Whether the guardian obtains such knowledge by his or her presence at consultations between the attorney and the minor or by securing the information from the minor for transmission to the attorney is of no consequence [*De Los Santos v. Superior Court* (1980) 27 C3d 677, 166 CR 172, 613 P2d 233 (information disclosed by son to mother in her capacity of guardian ad litem privileged)].

The right to communicate privately with counsel is violated when a government agent is present at confidential attorney-client meetings. A client's communications with an attorney do not lose their confidential nature simply because they are made in the presence of joint clients [*Barber v. Municipal Court* (1979) 24 C3d 742, 157 CR 658, 598 P2d 818] .

When a court appoints an expert who is needed to assist an indigent defendant in his defense, such appointment should be confidential within the meaning of *Evid Code* § 952. Although no statute specifically covers the appointment of an expert for the defense other than for the purposes of an insanity plea (*Evid Code* §§ 1016, 1017), there can be no question that equal protection demands that in a proper factual situation a court must appoint an expert who is needed to assist an indigent defendant in his defense. Since the trial court determined that an expert was necessary to defendant's defense, it abused its discretion in failing to make the appointment confidential within the meaning of *Evid Code* § 952 [*Torres v. Municipal Court* (1975) 50 CA3d 778, 123 CR 553] .

Communications at closed meetings between union attorney and members of the union concerning members' legal rights were privileged, notwithstanding the fact that the members' purpose in attending the meeting was to secure information concerning workers' compensation benefits and not to retain counsel [*Benge v. Superior Court* (1982) 131 CA3d 336, 182 CR 275 (not all members chose to participate in suit)].

The nonwaiver principles expressed in *Evid Code* §§ 912 and 952 are not limited in application to communications disclosed to third parties during the course of litigation. The need to exchange privileged information may arise in the negotiation of a commercial transaction [*OXY Resources California LLC v. Superior Court* (2004) 115 CA4th 874, 9 CR3d 621 (applying "common interest" doctrine to documents exchanged during transaction)].

[c] Privilege Not Applied

For purposes of a conflict of interest analysis, when the former contact with the attorney was a preliminary conversation that did not result in professional employment or services, the party seeking disqualification must show, directly or by reasonable inference, that the attorney acquired confidential information in the conversation. [*Med-Trans Corp., Inc. v. City of California City* (2007) 156 CA4th 655, 68 CR3d 17 (citing *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 C4th 1135, 1148-1149, 86 CR2d 816, 980 P2d 371)].

In an action by an air ambulance company against a city for misrepresentation and breach of contract, the trial court erred in granting a motion to disqualify the company's attorney on the basis of a prior meeting between the attorney and a city official. Since the meeting did not result in professional employment or services, the presumption that confidential information passed would not apply. The city failed to establish that confidential information was imparted in the prior meeting. The attorney had sought the meeting, and the discussion included the presence of a third party, another attorney, whose interest was limited to another lawsuit. The meeting unsuccessfully sought to involve the city in the other lawsuit. To the extent the attorney offered his opinions about the city's permit application, such unsolicited advice in this context was only his initial impressions [*Med-Trans Corp., Inc. v. City of California City* (2007) 156 CA4th 655, 68 CR3d 17 (reversing grant of motion to disqualify counsel)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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25 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.22

18.22 Holder of the Privileged Defined--Evid Code § 953

[1] Evid Code § 953 Text

■ *Evid Code § 953.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(2)*. Subsection (b) clarifies an uncertain prior law. Subsection (c) probably changes the law as it permits the personal representative, if the client is dead, to waive the privilege [Cal Law Rev Com Comment].

The guardian of a client is the holder of the privilege if the client has a guardian, and the client becomes the holder of the privilege when he no longer has a guardian [Cal Law Rev Com Comment].

The personal representative of a client is the holder of the privilege when the client is dead, and he may either claim or waive the privilege on behalf of the deceased client. The purpose of confidentiality does not require maintenance of the privilege when to do so is detrimental to the client's interest or the interests of his estate [Cal Law Rev Com Comment].

[3] Case Notes

The attorney-client privilege belongs only to the attorney's client, whether the client is a natural person, an unincorporated organization, or some other entity, and in some cases the client's successor or representative. The successor of an unincorporated organization that managed an individual's assets or business interests claimed to hold the attorney-client privilege that arose when the represented individual, either personally or through agents, consulted an attorney about those assets or business. The validity of this claim depended on whether the management company itself, as opposed to the represented entertainer, had been the client and privilege holder with respect to the written communications at issue. No authority suggested that the entertainer himself could not be the client on whose behalf those attorneys were consulted, merely because he employed others to assist him in managing his business interests and assets [*HLC Properties, Ltd. v. Superior Court* (2005) 35 C4th 54, 63-64, 24 CR3d 199, 105 P3d 560 (substantial evidence supported trial court's finding that deceased entertainer was original client who held attorney-client privilege for communications pertaining to his three contracts)].

A person other than the holder of the privilege cannot vicariously assert the attorney-client privilege [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384 (defendant could not vicariously assert, for his own benefit on appeal, that attorney-client privilege improperly waived by a witness at trial)].

There is no shareholder exception to the corporate attorney-client privilege in California. An attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation [*National Football League Properties, Inc. v. Superior Court* (1998) 65 CA4th 100, 75 CR2d 893 (declining to adopt federal rule permitting shareholders to inspect corporate attorney-client privileged documents upon a showing of good cause)].

An attorney-client privilege held by a corporation may also be claimed by its successor in interest [*Venture Law Group v. Superior Court* (2004) 118 CA4th 96, 12 CR3d 656 ; *Dickerson v. Superior Court* (1982) 135 CA3d 93, 185 CR 97] .

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 the client's objection, but in the absence of the attorney, the client has standing to claim the privilege on the client's behalf [*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 CA3d 1240, 245 CR 682 ; *Fellows v. Superior Court* (1980) 108 CA3d 55, 166 CR 274] .

The personal representative of a deceased client is a "holder of the privilege" and may assert it [*HLC Properties, Ltd. v. Superior Court* (2005) 35 C4th 54, 61, 24 CR3d 199, 105 P3d 560 (dicta); *People v. Pena* (1984) 151 CA3d 462, 198 CR 819 (decedent's father, the representative of his estate, claimed privilege)].

The office of trustee is the holder of the privilege, not the trustee personally [*Moeller v. Superior Court (Sanwa Bank)* (1997) 16 C4th 1124, 69 CR2d 317, 947 P2d 279 (former trustee could not assert privilege against successor trustee)].

The State Compensation Insurance Fund's standing to assert the attorney-client privilege and work product doctrine is well established under *Lab Code* § 3762. This statute obligates insurers to provide information and copies of documents to insured employers, but specifically exempts from disclosure documents protected by the attorney-client privilege or any other applicable privilege [*State Comp. Ins. Fund v. Superior Court* (2001) 91 CA4th 1080, 111 CR2d 284 (insured employer could not waive State Fund's attorney-client privilege).

Legal Topics:

For related research and practice materials, see the following legal topics:

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Privileges
Attorney-Client Privilege
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26 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.23

18.23 Privilege Claimants--Evid Code § 954

[1] Evid Code § 954 Text

■ *Evid Code § 954.*

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.

LegH: 1965 ch. 299, 1968 ch. 1375, 1994 ch. 1010.

[2] Comments

Based on former *CCP § 1881(2)*, *Evid Code § 954* expands the protection against eavesdropping afforded by *Pen Code § 653(i), (j)*.

Evid Code § 954 appears to change the prior law with respect to the termination of the privilege. Under *Evid Code § 954*, the privilege disappears when the client dies, his estate is distributed, and his personal representative is discharged.

[3] Commission Comments

The privilege protects against disclosure of confidential communications by anyone who obtained knowledge of the communication without the client's consent (e.g., eavesdroppers). It does not affect the rule that the making of the communication under circumstances where others could easily overhear it is evidence that the client did not intend the communication to be confidential [Cal Law Rev Com Comment].

The privilege ceases to exist when the client's estate is finally distributed and his personal representative discharged because thereafter no holder of the privilege exists [Cal Law Rev Com Comment].

[4] Case Notes

[a] Scope of Privilege

If there is a prima facie claim of attorney-client privilege, the trial court must accord a full hearing, with oral argument, before ordering the revelation of client confidences to the other party and, in effect, compelling attorney testimony against a client [*Titmas v. Superior Court* (2001) 87 CA4th 738, 104 CR2d 803 (in shareholders' derivative action in which plaintiffs noticed depositions of two partners at the law firm retained by defendant, the corporation's majority shareholder and chief executive officer, and served subpoena for documents from firm, trial court erred in summarily denying motion to quash and ruling that attorney-client privilege was waived)].

A prisoner's prima facie showing of eavesdropping by prison authorities on conversations between the prisoner and his or her attorney shifts the burden of proof to the prosecution to prove the legality of its conduct by clear and convincing evidence [*People v. Jordan* (1990) 217 CA3d 640, 266 CR 86] .

The attorney-client privilege applies to all proceedings which, under *Evid Code* § 901, includes hearings before administrative agencies [*Southern California Gas Co. v. Public Utilities Commission* (1990) 50 C3d 31, 265 CR 801, 784 P2d 1373] .

Prosecution of family support enforcement action did not create attorney-client relationship necessary to support legal malpractice claim [*Jager v. County of Alameda* (1992) 8 CA4th 294, 10 CR2d 293] .

The attorney-client privilege is founded on a belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence [*City & County of San Francisco v. Superior Court* (1951) 37 C2d 227, 231 P2d 26 (physician's examination of client in preparation for lawsuit); *Brown v. Superior Court* (1963) 218 CA2d 430, 32 CR 527 (without the privilege, attorney would become an informer for benefit of opponent)].

The purpose of the privilege is to encourage a client to make a complete disclosure to his or her attorney without fear that others may be informed [*People ex rel. Dept. of Public Works v. Donovan* (1962) 57 C2d 346, 19 CR 473, 369 P2d 1 ; *Greyhound Corp. v. Superior Court* (1961) 56 C2d 355, 15 CR 90, 364 P2d 266 (transmitting agent also privileged); *Holm v. Superior Court* (1954) 42 C2d 500, 267 P2d 1025 (city attorney representing city employee in damage suit)].

Attorney-client privilege includes communications and observations made as a consequence of protected communications [*People v. Meredith* (1981) 29 C3d 682, 175 CR 612, 631 P2d 46 (privileged status is lost when defense frustrates prosecution discovery)].

In a prosecution for first-degree murder, the defense may not call a witness's attorney to testify about conversations regarding the witness's need for immunity, when (1) there was no waiver of the attorney-client privilege; (2) there was

no notice to the witness that defense counsel intended to subpoena her attorney; (3) she did not authorize her attorney to discuss the conversations at issue with defense counsel; and (4) she had no opportunity to assert the privilege or to offer evidence regarding an intent to waive the privilege [*People v. Hayes* (1999) 21 C4th 1211, 91 CR2d 211, 989 P2d 645, *Hayes v. California* (2000) 531 US 980, 121 S Ct 431, 148 L Ed2d 438] .

Whether a client's name, address, and fee arrangement with his or her attorney are privileged communications depends on an analysis of the facts of the case and the potential for harm to the client if the identification and compensation are compelled [*Willis v. Superior Court* (1980) 112 CA3d 277, 169 CR 301] .

Party claiming the privilege has the burden of proving that the communications fall within the terms of the statute itself [*Nalian Truck Lines, Inc. v. Nakario Warehouse & Transportation Corp.* (1992) 6 CA4th 1256, 8 CR2d 467] .

Billing statements from counsel are generally not protected by the attorney-client privilege [*Clarke v. American Commerce Nat'l Bank* (9th Cir 1992) 974 F2d 127] .

Reports prepared by deputy sheriffs (who were involved in an altercation in a restaurant while off duty) and delivered to their attorney were not protected by the attorney-client privilege, because the deputies prepared the reports as part of their official duties, and the reports were thus public records [*Green & Shinee v. Superior Court* (2001) 88 CA4th 532, 105 CR2d 886] .

Pen Code § 1368, requiring a judge who doubts the mental competence of a criminal defendant to ask the defendant's attorney's opinion as to the mental competence of the client, does not violate the attorney-client privilege [*People v. Bolden* (1979) 99 CA3d 375, 160 CR 268] .

The requirement of the Political Reform Act of 1974 to identify the source of income, over a specified minimum amount, from business interests of an attorney who is a public official was not intended to affect or dilute the attorney-client privilege [*Hays v. Wood* (1979) 25 C3d 772 160 CR 102, 603 P2d 19] .

The privilege can be claimed during the discovery stage of the proceedings [*McMullen v. Superior Court* (1970) 6 CA3d 224, 85 CR 729 (criminal prosecution); *McGuire v. Superior Court* (1969) 274 CA2d 583, 79 CR 155 (physician's reports)] .

Unlike the federal courts (see *Fed R Evid* 501), the California courts are not free to create new privileges or exceptions to privileges (*Evid Code* § 911). Therefore, there can be no exception to the attorney-client privilege in the case of corporate clients in suit against their shareholders [*Dickerson v. Superior Court* (1982) 135 CA3d 93, 185 CR 97] .

There is no attorney-client privilege for affirmative action plans generated by corporations [*Cloud v. Superior Court (Litton Industries)* (1996) 50 CA4th 1552, 58 CR2d 365 (rejecting "self-critical analysis privilege" in gender discrimination case)] .

Where a corporate successor in interest is the holder of the privilege, the attorney has the duty to exercise the privilege unless the holder instructs him or her not to do so. The attorney does not require express authorization of the successor interest to exercise the privilege [*Dickerson v. Superior Court* (1982) 135 CA3d 93, 185 CR 97] .

There is no difference in effect on a jury between a confession admitted in violation of the lawyer-client privilege and a confession admitted in violation of a constitutional principle. The error, therefore, calls for the application of the general rule that the erroneous admission of a confession is considered prejudicial per se within the meaning of *Cal Const, art VI, § 15* [*People v. Gardner* (1980) 106 CA3d 882, 165 CR 415 (defendant's confession in letter written in view of retaining attorney's services was privileged)] .

Because the privilege tends to suppress otherwise relevant facts, it is strictly construed [*Merritt v. Superior Court* (1970) 9 CA3d 721, 88 CR 337] .

The attorney-client privilege was not designed to afford the client protection against diversion of its attorney's resources by forcing the attorney to sift through numerous documents to determine which documents were responsive to discovery motion, but rather to prevent disclosure of confidential communication between the lawyer and client [*People v. Superior Court* (1986) 181 CA3d 785, 227 CR 13] .

Unlike the privilege against self incrimination, the attorney-client privilege continues even after the threat of punishment because the purpose of the privilege is to preserve confidentiality [*Littlefield v. Superior Court* (1982) 136 CA3d 477, 186 CR 368 (argument that privilege is attenuated because attorney-client relationship is at an end was rejected)].

Defendant is not estopped to assert privilege because defendant testified to facts he or she may have discussed with lawyer [*Littlefield v. Superior Court* (1982) 136 CA3d 477, 186 CR 368 (attack on defendant's credibility); *De Los Santos v. Superior Court* (1980) 27 C3d 677, 166 CR 172, 613 P2d 233] .

Asking a defendant during cross-examination if he or she had told lawyer the same story he or she had just told on the stand violates the attorney-client privilege but was harmless beyond a reasonable doubt pursuant to *Chapman v. California* (1967) 386 US 18, 87 S Ct 824, 17 L Ed2d 705 [*People v. Tamborrino* (1989) 215 CA3d 575, 263 CR 731] .

In the sanity phase of a capital case, the prosecutor's cross-examination of certain experts that revealed that defendant had also been examined by other experts and the prosecutor's mention during closing argument that the experts who did testify had no knowledge of the findings of the experts who did not, while improper, does not violate the attorney-client privilege [*People v. Coddington* (2000) 23 C4th 529, 97 CR2d 528, 2 P3d 1081] .

A prosecutor who is the subject of a criminal investigation for misuse of his or her official office, is not the holder of the attorney-client privilege with respect to documents that he or she generated as a prosecutor and were seized by law enforcement officials pursuant to a search warrant [*People ex rel. Lockyer v. Superior Court* (2000) 83 CA4th 387, 99 CR2d 646] .

[b] Trustee As Client

The trustee, rather than the beneficiary, is the client of an attorney who gives legal advice to the trustee, whether on the subject of trust administration or the trustee's own potential liability [*Wells Fargo Bank v. Superior Court* (2000) 22 C4th 201, 91 CR2d 716, 990 P2d 591 (accounting action)].

The trustee is entitled to assert the attorney-client privilege against the beneficiaries with respect to an attorney who has given advice to the trustee [*Wells Fargo Bank v. Superior Court* (2000) 22 C4th 201, 91 CR2d 716, 990 P2d 591 (accounting action)].

A trustee does not waive the attorney-client privilege as to communications with its attorneys about the beneficiaries' claims of misconduct, by producing documents that reflect confidential communications with its attorneys on the subject of trust administration, when the trustee believes in good faith that the law required disclosure, and no controlling authority on point existed at the time the trustee responded to the beneficiaries' discovery request [*Wells Fargo Bank v. Superior Court* (2000) 22 C4th 201, 91 CR2d 716, 990 P2d 591 (accounting action)].

A successor trustee, not the prior trustee, is the holder of the privilege [*Moeller v. Superior Court (Sanwa Bank)* (1997) 16 C4th 1124, 69 CR2d 317, 947 P2d 279] .

[c] Waiver

The failure of certain clients to appear at a hearing in an action in which they were not parties did not constitute a waiver of their privilege. The attorney-client privilege is retained, even without express assertion of it, until the holder discloses a substantial part of the privileged communication [*Glade v. Superior Court* (1978) 76 CA3d 738, 143 CR 119] .

An attorney cannot claim the privilege for his or her client if the client waives it [*People v. Dubrin* (1965) 232 CA2d 674, 43 CR 60 (privilege is waived if client calls attorney as witness); *Rigolfi v. Superior Court of Alameda County* (1963) 215 CA2d 497, 30 CR 317] .

Surgeon, who was insured under medical malpractice policy, could not waive, on behalf of insurer, the lawyer-client privileges relating to intramural communications given and received in confidence between insurer and the lawyer who had been retained by insurer to represent surgeon in such suits. Both insured and insurer were clients [*American Mutual Liability Ins. Co. v. Superior Court* (1974) 38 CA3d 579, 113 CR 561] .

Changes in testimony by defendant as a result of information received from his or her attorney does not waive attorney-client privilege [*Littlefield v. Superior Court* (1982) 136 CA3d 477, 186 CR 368 (theory that defendant used information to fabricate testimony against codefendant)].

Communications potentially may be privileged under both the psychotherapist-patient privilege and the attorney-client privilege, and even if the former privilege is waived or otherwise inoperative, the latter privilege will still operate to render the communication confidential and privileged [*People v. Gurule* (2002) 28 C4th 557, 123 CR2d 345, 51 P3d 224 (defendant's constitutional confrontation rights were not violated on asserted basis that he was not given access to the material generated by two psychiatrists in connection with their employment by the attorney for the primary prosecution witness since the attorney-client privilege under *Evid Code* § 954 applied)].

The in-issue exception does not apply where an insured does not tender any privileged communication or any issue that could not be proved or disproved by other, more direct evidence. The in-issue doctrine creates an implied waiver of the attorney-client privilege only when the client tenders an issue involving the substance or content of a protected communication, not where the privileged communication simply represents one of several forms of indirect evidence in a particular case. For this reason, the doctrine has no application in a coverage action between an insured and its carrier where the issues turn on the underlying facts and the insured is not relying on the advice of counsel for any purpose [*Rockwell Internat. Corp. v. Superior Court* (1994) 26 CA4th 1255, 32 CR2d 153] .

Investigation of sexual harassment by an attorney does not cloak the entire investigation in attorney/client privilege, nor is this privilege waived in its entirety when the plaintiff calls into question the propriety of the investigation; specified discrete communications between the attorney and client may still be protected by privilege [*Kaiser Foundation Hospitals v. Superior Court* (1998) 66 CA4th 1217, 78 CR2d 543] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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27 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.24

18.24 Lawyer's Obligation to Claim Privilege--Evid Code § 955

[1] Evid Code § 955 Text

■ *Evid Code § 955.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

The obligation of a lawyer to claim the privilege on behalf of the client, unless otherwise instructed by a person authorized to permit disclosure, is consistent with *B&P Code § 6068(e)* [Cal Law Rev Com Comment].

[3] Case Notes

Generally, a lawyer has the duty to claim the privilege on behalf of the client unless the holder instructs the lawyer otherwise [*Benge v. Superior Court* (1982) 131 CA3d 336, 182 CR 275 ; *Dickerson v. Superior Court* (1982) 135 CA3d 93, 185 CR 97] .



28 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.25

18.25 Lawyer Obtained to Aid in Planning, Committing Crime--Evid Code § 956

[1] Evid Code § 956 Text

■ *Evid Code § 956.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

Based on former *CCP § 1881(2)*, Section 956 is declarative of prior law [see Cal Law Rev Com Comment].

[3] Case Notes

To invoke exception, adverse party must make a prima facie showing that attorney was retained and utilized to enable the client to commit a crime or fraud, and whether there exists a reasonable relationship between the crime or fraud and the attorney-client communication [*National Football League Properties, Inc. v. Superior Court* (1998) 65 CA4th 100, 75 CR2d 893 (insufficient showing of fraud and conspiracy); *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 CA4th 625, 62 CR2d 834 (exception applied; extensive fraud in denying earthquake coverage); *Travelers Ins. Cos. v. Superior Court* (1983) 143 CA3d 436, 191 CR 871 (preliminary burden of proof not shown); *Dickerson v. Superior Court* (1982) 135 CA3d 93, 185 CR 97] .

A note passed to defendant's counsel that read in part that neither defendant nor a co-defendant were willing to restrain themselves from doing a third co-defendant bodily harm if they were forced to be locked up to him or sit next to him and that the co-defendant would be hurt if something could not be worked out was not admissible under *Evid Code § 956* because defendant did not seek counsel's services to commit a crime; instead, he was asking counsel's help to avoid the commission of a crime [*People v. Michaels* (2002) 28 C4th 486, 122 CR2d 285, 49 P3d 1032] .

It is the intent of the client, and not the lawyers, that is the focus of the inquiry [*State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 CA4th 625, 62 CR2d 834] .

Crime/fraud exception applies only to attorney-client privileged communication, and not to attorney work-product protection; however same analysis for crime/fraud exception may be applicable to invoke exception to work-product privilege [*State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 CA4th 625, 62 CR2d 834 (work-product disclosed to avoid injustice)].

Standard of review is to support finding of crime/fraud exception if there is substantial evidence, no matter how slight it may appear in comparison with contradictory evidence [*State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 CA4th 625, 62 CR2d 834] .

An affidavit sufficient to support the issuance of a search warrant requires only a showing of probable cause, not the prima facie showing required to invoke the crime/fraud exception. The probable cause showing for the warrant does not obviate the need for an in camera hearing on whether the privilege applies to the seized materials [*State Comp. Ins. Fund v. Superior Court* (2001) 91 CA4th 1080, 111 CR2d 284 (affidavit supporting application for search warrant was not sufficient to invoke crime/fraud exception to attorney-client privilege)].

This exception is inapplicable in an action against an attorney for misuse of confidential information to defraud others if there is no contention that there was a fraudulent motive in securing the attorney's legal services [*Glade v. Superior Court* (1978) 76 CA3d 738, 143 CR 119] .

The exception does not extend to communications involving contemplated tortious acts other than fraud [*Nowell v. Superior Court* (1963) 223 CA2d 652, 36 CR 21] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals Standards of Review Substantial Evidence General

Overview Evidence Privileges Attorney-Client Privilege Exceptions Torts Procedure Multiple Defendants General Overview



29 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.26

18.26 No Privilege if Disclosure Will Prevent Criminal Act--Evid Code § 956.5

[1] Evid Code § 956.5 Text

■ *Evid Code § 956.5.*

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.

LegH: 1993 ch. 982, 2003 ch. 765, operative July 1, 2004, 2004 ch. 183.

[2] Case Notes

The attorney-client privilege did not apply to an attorney's testimony pursuant to *Evid Code § 956.5* because the defendant threatened witnesses with death if they testified. Before trial, the defendant told his attorney that he was going to try to pay off some witnesses and that he would kill any witnesses that he was not successful in bribing. The attorney reported the threats to the State and was relieved as counsel. The attorney testified at trial about the defendant's statements [*People v. Dang* (2001) 93 CA4th 1293, 113 CR2d 763] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesWitness TamperingGeneral OverviewLegal EthicsClient RelationsConfidentiality of Information



30 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.27

18.27 Communication Between Parties Claiming Under Deceased Client--Evid Code § 957

[1] Evid Code § 957 Text

■ *Evid Code § 957.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(2)*, Section 957 expands the rule under prior law, which required that the parties claim through the client by testate or intestate succession in order to remove the privilege, to include inter vivos transactions [see Cal Law Rev Com Comment].

This exception is based on the theory claimants in privity with the property claim through the deceased client, not adversely, and the client presumably would want his communications disclosed in litigation between such claimants so that his desires in regard to the disposition of his property might be correctly ascertained and carried out [Cal Law Rev Com Comment].

[3] Case Notes

The *Evid Code § 957* attorney-client relationship refers only to the relationship between the attorney and the deceased client [*Fletcher v. Superior Court (American Cancer Society)* (1996) 44 CA4th 773, 52 CR2d 65 (beneficiary of trust not a client)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeExceptions



31 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.28

18.28 Communication in Issue of Breach of Duty Arising of Lawyer-Client Relations--Evid Code § 958

[1] Evid Code § 958 Text

■ *Evid Code § 958.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

It would be unjust to permit a client either to accuse his attorney of a breach of duty and invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge, or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim [Cal Law Rev Com Comment].

If, in litigation between an attorney and his client, an attorney's integrity, good faith, authority, or performance of his duties is questioned, the attorney is permitted to meet this issue with testimony as to communications between himself and his client [Cal Law Rev Com Comment].

The duties involved must have arisen out of the lawyer-client relationship (e.g., duty of lawyer to exercise reasonable diligence on behalf of his client, to faithfully care for and account for his client's property, or the client's duty to pay for the lawyer's services) [Cal Law Rev Com Comment].

[3] Case Notes

Strictly speaking, *Evid Code § 958* establishes an exception to the attorney-client privilege, not a waiver. Where a defendant successfully argues ineffective assistance of counsel on habeas corpus, disclosing otherwise privileged communications, there has been no waiver of the privilege, which continues to apply to those privileged communications, for purposes of retrial [*People v. Ledesma* (2006) 39 C4th 641, 695, 47 CR3d 326, 140 P3d 657] .

A law firm could not rely on attorney-client privilege to protect itself from claims of equitable indemnification brought

by experts which the law firm itself had retained. The expert witnesses provided enough of a record to controvert the law firm's contention that it could not conduct a defense of the bifurcated cross-complaint indemnity matters, without betraying confidential client communications obtained from the former client. The allegations of the cross-complaints for equitable indemnification focused on matters of litigation strategy and preparation, which had not been shown to jeopardize confidential client communications [*Forensis Group, Inc. v. Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 40, 29 CR3d 622 (reversing order denying motions to set aside judgment)].

Allegations of legal malpractice against a law firm waive all claims of confidentiality related to the allegations [*Smith & Kring v. Superior Court* (1997) 60 CA4th 573, 70 CR2d 507 ; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 CA2d 212, 64 CR 915 (good faith); *Grove v. Grove Valve & Regulator Co.* (1963) 213 CA2d 646, 29 CR 150 (conflict in representation)].

Cases under *Evid Code* § 958 have been limited to communications between the client and the attorney charged with malpractice [*Travelers Insurance Cos. v. Superior Court* (1983) 143 CA3d 436, 191 CR 871 (does not abrogate privileged communications between malpractice carrier and its attorney); *Schlumberger Limited v. Superior Court* (1981) 115 CA3d 386, 171 CR 413] .

Evid Code § 958 is not a general client-litigant exception allowing disclosure of any privileged communication simply because it is raised in litigation. The section only authorizes disclosure of relevant communications between a client and an attorney charged with professional wrongdoing. This approach gives the attorney a meaningful opportunity to defend against the charge but does not deter the client from confiding in other attorneys about the dispute [*Brockway v. State Bar* (1991) 53 C3d 51, 278 CR 836, 806 P2d 308] .

There is no attorney-client privilege concerning matters put in issue in a habeas corpus proceeding where the competency of defendant's trial attorney is at issue [*In re Scott* (2003) 29 C4th 783, 129 CR2d 605, 61 P3d 402 (by claiming trial counsel provided ineffective assistance, petitioner waived attorney-client privilege to extent relevant to claim); *In re Gray* (1981) 123 CA3d 614, 176 CR 721] .

The question presented was whether the applicability of the *Evid Code* § 958 exception to lawyer-client privilege, in a habeas corpus proceeding alleging incompetency of counsel, rendered the lawyer-client privilege inapplicable in all further proceedings involving the same defendant, including the retrial. Defendant did not dispute that the attorney-client privilege was lost for purposes of the habeas corpus proceeding but contended that his statements to a defense psychiatrist remained privileged for other purposes, including the retrial. Generally, a waiver of the privilege for purposes of one proceeding is applicable to all subsequent proceedings. However, *Evid Code* § 958 establishes an exception to the lawyer-client privilege, not a waiver. Therefore, there was no waiver of the privilege as to subsequent hearings, and the statements remained protected [*People v. Ledesma* (2006) 39 C4th 641, 691, 47 CR3d 326, 140 P3d 657] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeExceptionsEvidencePrivilegesPsychotherapist-Patient PrivilegeScopeEvidencePrivilegesPsychotherapist-Patient PrivilegeWaiver



32 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.29

18.29 Communication of Intention or Competence of Client Executing Attested Document--Evid Code § 959

[1] Evid Code § 959 Text

■ *Evid Code § 959.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(2)*, Section 959 narrows the exception, since under prior law the lawyer as an attesting witness was allowed to divulge information received in his capacity as lawyer as well as in his role as an attesting witness [Cal Law Rev Com Comment].

This exception relates to the type of communication about which an attesting witness would testify. The mere fact that an attorney acts as an attesting witness should not destroy the lawyer-client privilege as to all statements made concerning the document attested; but the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness [Cal Law Rev Com Comment].

[3] Case Notes

Questions to attorney who notarized deed exceeded narrow scope that limits such questions to attorney's role as attesting witness [*Estate of Kime (1983) 144 CA3d 246, 193 CR 718*] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeExceptions



33 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.30

18.30 Communication of Intention of Deceased Client with Respect to Writing Affecting Property Interest--Evid Code § 960

[1] Evid Code § 960 Text

■ *Evid Code § 960.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(2)*, Section 960 broadens prior law which removed the privilege only when the lawyer was an attesting witness [see Cal Law Rev Com Comment].

This section is founded on the supposition that a client ordinarily would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased [Cal Law Rev Com Comment].



34 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.31

18.31 Validity of Writing by Deceased Client Affecting Interest in Property--Evid Code § 961

[1] Evid Code § 961 Text

■ *Evid Code § 961.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(2)*, Section 961 expands prior law, as the exception was recognized only where the lawyer was an attesting witness [*see Cal Law Rev Com Comment*].

The rationale for this section is that the client ordinarily would desire his attorney to testify to communications relevant to the validity of such instruments after the client dies [*Cal Law Rev Com Comment*].



35 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.32

18.32 Communication Made If Two or More Clients Retain Same Lawyer in Matter of Common Interest--Evid Code § 962

[1] Evid Code § 962 Text

■ *Evid Code § 962.*

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).

LegH: 1965 ch. 299.

[2] Case Notes

A former co-plaintiff in an employment discrimination case agreed, as part of settlement of his case, to share with the defendant's attorney all papers in his possession relating to present plaintiff's claim. Present plaintiff brought a motion to disqualify defendant's attorney, which the trial court properly denied. The plaintiff did not carry her initial burden to show that the former co-plaintiff possessed plaintiff's confidential information materially related to these proceedings. It was not enough for plaintiff to show merely that she had shared confidential information with the other employee. The appellate court did not reach the question whether she had waived her claim of confidentiality by sharing her information with a third party [*Roush v. Seagate Technology* (2007) 150 CA4th 210, 58 CR3d 275] .

By selecting the same attorney and making their communications in the presence of each other, each party effectively waives the right to place those communications under the shield of professional confidence [*Clyne v. Brock* (1947) 82 CA2d 958, 188 P2d 263 (mutually employed counsel); *Croce v. Superior Court* (1937) 21 CA2d 18, 68 P2d 369 (privilege still exists against strangers)].

This section is not applicable to communications made in confidence to the attorney by one of the joint clients at a time when the other client is not present [*Glade v. Superior Court* (1978) 76 CA3d 738, 143 CR 119] .

The language of *Evid Code § 962* does not limit its application to communications made to an attorney by joint clients

in each other's presence but, rather, includes all communications, bilateral as well as trilateral [*Glacier Gen. Assurance Co. v. Superior Court* (1979) 95 CA3d 836, 157 CR 435] .

The joint client exception removes communications between one partner and the partnership attorney from the protection of the attorney-client privilege. Thus, the attorney may be compelled to divulge all partnership information to all partners [*Wortham & Van Liew v. Superior Court* (1987) 188 CA3d 927, 233 CR 725] .

If insurance companies select attorneys to represent an insured in an underlying action, the carriers are not joint clients of those attorneys on matters of common interest. Such attorneys are not "retained or consulted" by the carriers within the meaning of *Evid Code* § 962, but are retained to represent the insured and only the insured. Thus, the insured can claim the attorney-client privilege to prevent discovery of documents in a coverage action by the insured against the carriers [*Rockwell Internat. Corp. v. Superior Court* (1994) 26 CA4th 1255, 32 CR2d 153] .

Conversations regarding an insurance policy between the insurance company and its attorney prior to the time that the company accepts its obligation under that policy are protected by the attorney-client privilege against the inquiries of the person insured under the policy [*Aetna Cas. & Sur. v. Superior Court (Pietrzak)* (1984) 153 CA3d 467, 200 CR 471 (joint client exception inapplicable)].

Communications by insurer to attorney other than the attorney retained to defend its insured are privileged and not subject to the joint client exception [*Native Sun Investment Group v. Ticor Title Insurance Co. of California* (1987) 189 CA3d 1265, 235 CR 34] .

Dissident condominium owners who are members of the condominium community association, but are not individually named as plaintiffs in construction-defect litigation, are not joint clients under *Evid Code* § 962 with respect to the association's law firm if they did not consult with or retain the firm [*Smith v. Laguna Sur Villas Community Assn.* (2000) 79 CA4th 639, 94 CR2d 321] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



36 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.33

18.33 General Provisions--Evid Code § 970

[1] Evid Code § 970 Text

■ *Evid Code § 970.*

Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

LegH: 1965 ch. 299.

[2] Statutory Reference

Privilege not applicable in proceeding on violation of statutes or regulations respecting venereal disease quarantine [*H&S Code § 3197*].

[3] Commission Comments

Based on former *CCP § 1881(1)* and former *Pen Code § 1322*, Article 4 changes prior law by restricting the privilege. Under prior law a married person could prevent a witness spouse from testifying against him. Under this article only the witness spouse has the privilege. In addition, unlike prior law there is no privilege for a married person to refuse to testify for the other spouse [Cal Law Rev Com Comment].

The rationale of the privilege not to testify against one's spouse is that such testimony would seriously disturb or disrupt the marital relationship. Society stands to lose more from such disruption than it stands to gain from the testimony which would be available if the privilege did not exist [Cal Law Rev Com Comment].

A married person has no privilege to prevent his spouse from testifying against him; only the witness spouse has the privilege under Sections 970-973 [Cal Law Rev Com Comment].

A married person has no privilege to refuse to testify for the other spouse under Sections 970-973 [Cal Law Rev Com Comment].

[4] Case Notes

The privilege may be claimed only if there is a valid marriage in existence at the time the witness is called to the stand [*People v. Bradford* (1969) 70 C2d 333, 74 CR 726, 450 P2d 46 (ex-wife may testify); *People v. Dake* (1960) 185 CA2d 525, 8 CR 283 (void marriage)].

The marital privilege applies only to a valid marriage. It does not apply if a person enters into a second marriage before his or her first marriage is legally dissolved [*People v. Catlin* (2001) 26 C4th 81, 109 CR2d 31, 26 P3d 357 (couple divorced at time of communication)].

The court refused to extend the *Marvin v. Marvin* (1976) 18 C3d 660, 134 CR 815, 557 P2d 106 decision into nonproperty rights areas. Cohabitants do not have marital privileges [*People v. Delph* (1979) 94 CA3d 411, 156 CR 422 (meretricious relationship is not a marriage)].

In a double murder case, the wife of the accused could not be compelled to testify against her husband. Although the wife had not seen her husband in 17 years, the legislature had created no applicable exception to the privilege [*Jurcoane v. Superior Court* (2001) 93 CA4th 886, 113 CR2d 483] .

Comment on a spouse's failure to testify for a defendant spouse does not constitute prohibited comment on the exercise of a privilege that defendant has or on his or her failure to call a witness that he or she cannot compel to testify on his or her behalf [*People v. Coleman* (1969) 71 C2d 1159, 80 CR 920, 459 P2d 248] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesMarital PrivilegesGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageGeneral Overview



37 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.34

18.34 Exemption of Spouse of Party Called as Witness--Evid Code § 971

[1] Evid Code § 971 Text

■ *Evid Code § 971.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is based on former *CCP § 1881(1)* and former *Pen Code § 1322* [see Cal Law Rev Com Comment].

This privilege is necessary to avoid the prejudicial effect, for example, of the prosecution's calling the defendant's wife as a witness, thus forcing her to object before the jury [Cal Law Rev Com Comment].

The privilege not to be called as a witness does not apply in a proceeding where the other spouse is not a party. Thus, a married person may be called as a witness in a grand jury proceeding because his spouse is not a party to that proceeding. But the spouse-witness in the grand jury proceeding may claim the privilege (under *Evid Code § 970*) not to testify against his spouse in refusing to answer a question [Cal Law Rev Com Comment].

[3] Statutory Reference

Privilege is not applicable in proceeding on violation of statutes or regulations respecting venereal disease quarantine (*H&S Code § 3197*).

[4] Case Notes

The privilege not to testify is that of the spouse-witness rather than that of the spouse-party [*People v. Villarino*

(1970) 7 CA3d 56, 86 CR 338 ; *People v. Chavez* (1968) 262 CA2d 422, 68 CR 759 (can't prevent spouse's testimony)].

The prosecution's calling a spouse-witness to testify and forcing the defense to object is error; however, a judgment of conviction will be set aside only if the error is prejudicial [*People v. Ward* (1968) 50 C2d 702, 328 P2d 777 (nonprejudicial error)].

The prosecution's calling the defendant's spouse to the witness stand in the face of a prior warning that there would be an objection to such procedure constitutes prejudicial error [*People v. Solis* (1961) 193 CA2d 68, 13 CR 813 ; *People v. Gill* (1956) 143 CA2d 46, 299 P2d 682] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesIllegal Consensual RelationsGeneral
OverviewCriminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewEvidencePrivilegesMarital
PrivilegesGeneral Overview



38 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.35

18.35 Privilege Exception--Evid Code § 972

[1] Evid Code § 972 Text

- Evid Code § 972.

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 such 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 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.

LegH: 1965 ch. 299, 1975 ch. 71, 1982 ch. 256, 1983 ch. 244, 1986 ch. 769, urgency eff. Sept. 15, 1986, 1989 ch. 1359.

[2] Commission Comments

Based on former *CCP* § 1881(1) and former *Pen Code* § 1322, the exceptions in Section 972 are now consistent with the privilege for confidential marital communications (*Evid Code* § 980 et seq.) [Cal Law Rev Com Comment].

[3] Case Notes

[a] Spousal Privilege

The prosecution bears the burden of proof of an exception to the spousal privilege not to testify [*Fortes v. Municipal Court for the Judicial District of Sacramento County* (1980) 113 CA3d 704, 170 CR 292 (estranged husband killed man in wife's home; burglary against wife must be proved to qualify as exception, *Evid Code* § 972(e)(2))].

Evid Code § 972 does not contain an exception for marriages in which the parties have not lived together for a certain time or for marriages that, although still legally extant, are no longer viable or intact [*Jurcoane v. Superior Court* (2001) 93 CA4th 886, 113 CR2d 483 (in a double murder case, the wife of the accused could not be compelled to testify against her husband, even though the wife had not seen her husband in 17 years)].

[b] Cohabitants

Cohabitants for purposes of inapplicability of marital privilege when crime is committed against cohabitant includes persons who live together as housemates or cotenants. There is no requirement of a male-female relationship or family relationship [*People v. Siravo* (1993) 17 CA4th 555, 21 CR2d 350] .

Foster child is a child and a cohabitant for purposes of the inapplicability of the marital privilege [*Dunn v. Superior Court* (1993) 21 CA4th 721, 26 CR2d 365] .

[c] Crime Against Third Person

A court may compel spousal testimony pursuant to *Evid Code* § 972(e)(2) even if no accusatory pleading charges the defendant with a crime against his or her spouse. A defendant commits a crime against a third person in the course of

committing a crime against the person or property of his or her spouse if the crimes are part of a continuous course of criminal conduct and have some logical relationship to each other. Rejecting defendant's contention that *Evid Code* § 972(e)(2) did not apply because defendant did not kidnap or murder the victim "in the course of committing a crime" against his wife, the court held that *Evid Code* § 972(e)(2) applies whenever the crime against the third person is part of the same continuous transaction as, and bears some logical relationship to, the crime against the spouse [*People v. Sinohui* (2002) 28 C4th 205, 120 CR2d 783, 47 P3d 629 (defendant was accused of falsely imprisoning his wife, while at the same time kidnapping and murdering the victim, who was his wife's boyfriend)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild

SupportObligationsModificationGeneral OverviewFamily LawParental Duties & RightsGeneral Overview



39 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.36

18.36 Privilege Waiver--Proceeding for Benefit of Self or Spouse--Evid Code § 973

[1] Evid Code § 973 Text

■ *Evid Code § 973.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*. The exception in Section 973 does not change prior law [see Cal Law Rev Com Comment].

[3] Legislative Committee Comments

A married person who testifies in a proceeding to which the other spouse is a party waives both privileges provided for in this article [Leg Com Comment].

A married person who testifies in a proceeding to which his spouse is not a party waives his Section 970 privilege as to all matters in a proceeding when he testifies against his spouse as to any matter in that proceeding [Leg Com Comment].

If the spouse entitled to claim the privilege testifies at any stage during an action, the privilege is permanently waived for all purposes in the action [Leg Com Comment].

This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to

give testimony under Section 776 [Leg Com Comment].

This principle of waiver prevents a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse [Leg Com Comment].

[4] Case Notes

If a husband brings suit for the immediate benefit of his wife, the question of spousal privilege is not tendered until the spouse with the privilege is able procedurally to interpose the privilege [*Hand v. Superior Court* (1982) 134 CA3d 436, 184 CR 588] .

Evid Code § 973 is operative even though a witness spouse was not advised by the trial court or by a party in the proceeding, including the other spouse (1) of his/her privileges under *Evid Code* §§ 970 and 971, and (2) of the potential loss of those privileges [*People v. Resendez* (1993) 12 CA4th 98, 15 CR2d 575] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals Reviewability Waiver Prosecutorial Misconduct Evidence Privileges Marital Privileges General Overview Family Law Marriage General Overview



40 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.37

18.37 General Provision--Evid Code § 980

[1] Evid Code § 980 Text

■ *Evid Code § 980.*

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.

LegH: 1965 ch. 299.

[2] Statutory Reference

Inapplicability of privilege provided by this section, in proceeding on violation of statutes or regulations respecting venereal disease quarantine [*H&S Code § 3197*].

[3] Commission Comments

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*, Section 980 represents a major deviation from prior law insofar as under former *CCP § 1881(1)*, the nontestifying spouse held the privilege. Under Section 980 both spouses hold the privilege. Section 980 also changed the law by permitting the privilege to be asserted against anyone, including eavesdroppers, and against third persons to whom one of the spouses had revealed a confidential communication [Cal Law Rev Com Comment].

Both the witness spouse and the nonwitness spouse are the holders of the privilege and either spouse can claim it [Cal Law Rev Com Comment].

The privilege may be asserted to prevent testimony by anyone, including third parties to whom one of the spouses had revealed a confidential communication, as well as third party eavesdroppers [Cal Law Rev Com Comment].

If a spouse is dead, no one can claim the privilege for him; if the privilege is to be claimed at all, it can be claimed only by or on behalf of the surviving spouse [Cal Law Rev Com Comment].

The privilege may be claimed as to confidential communications made during marriage even though the marriage has been terminated at the time the privilege is claimed [Cal Law Rev Com Comment].

The claimant of the confidential marital communications privilege has the burden of proving, by a preponderance of the evidence, the facts necessary to sustain the claim [*People v. Mickey* (1991) 54 C3d 612, 286 CR 801, 818 P2d 84] .

[4] Case Notes

The trial court correctly found that defendant waived the marital privilege of *Evid Code* § 980 by taking the stand and testifying about his version of what he told his wife the evening of the murder. The trial court correctly rejected a claim of ineffective assistance of counsel, notwithstanding that the wife's testimony on rebuttal was extremely damaging. Defense counsel was aware that the trial court had ruled that defense counsel could not introduce evidence of the defense's version of a conversation between defendant and his wife without opening the door to the prosecution's version of that conversation [*Edwards v. Lamarque* (9th Cir. 2007) 475 F3d 1121, 1129 , cert den 128 US 532 (reversing district court's grant of habeas corpus)].

Husband's threats on the life of wife's lover are not confidential if made to the wife in the presence of other people [*People v. Gomez* (1982) 134 CA3d 874, 185 CR 155] .

The marital privilege did not apply to a husband's statement to wife that he was at a certain motel to meet a certain person. It was an innocuous communication when made, and no reason appears for him to have wanted it kept in confidence. Later, he told others in his wife's presence that he had previously dealt with that person at that motel, and he told a detective that he had been at that motel. There is no evidence he intended to keep this confidential [*People v. Cleveland* (2004) 32 C4th 704, 11 CR3d 236, 86 P3d 302] .

Generally, the privilege does not exist where one spouse is charged with committing crime against the other [*People v. Johnson* (1991) 233 CA3d 425, 284 CR 579] .

Communications between an unmarried man and woman in a relationship "tantamount to marriage" are not privileged [*People v. Hunt* (1982) 133 CA3d 543, 184 CR 197] .

The fact that a spouse communicated to his spouse as distinguished from the substance thereof or that he performed various nonverbal acts in the presence of his spouse are not "communications" within the meaning of the privilege [*People v. Cleveland* (2004) 32 C4th 704, 11 CR3d 236, 86 P3d 302 (wife observed husband wearing new watch and with cocaine in his possession); *People v. Bradford* (1969) 70 C2d 333, 74 CR 726, 450 P2d 46 (spouse made phone call and performed incriminating acts); *Tanzola v. De Rita* (1955) 45 C2d 1, 285 P2d 897 (spouse performed commercial transaction); *People v. Saidi-Tabatabai* (1970) 7 CA3d 981, 86 CR 866 (spouse wrote on pictures)].

The confidential communication must have been made during the course of a valid marriage [*People v. Catlin* (2001) 26 C4th 81, 109 CR2d 31, 26 P3d 357 (couple divorced at time of communication); *People v. Gallego* (1990) 52 C3d 115, 276 CR 679, 802 P2d 169 (marriage was illegal and void); *People v. Delph* (1979) 94 CA3d 411, 156 CR 422 (meretricious relationship is not a marriage); *People v. Keller* (1958) 165 CA2d 419, 332 P2d 174 (bigamous marriage); *People v. Glab* (1936) 13 CA2d 528, 57 P2d 588 (bigamous marriage)].

Although California does not recognize common-law marriages in this state, under *Fam Code* § 308 it does recognize the validity of a common-law marriage contracted in another state that would be valid by the laws of that state [*People v. Badgett* (1995) 10 C4th 330, 41 CR2d 635, 895 P2d 877 (party seeking to exercise privilege failed to prove

valid common-law marriage by preponderance of evidence); *Colbert v. Colbert* (1946) 28 C2d 276, 169 P2d 633 (construing former CC § 4104)].

Although recordation of sexual acts depicted on videotape by a married couple is a communication within the meaning of the privilege, the description of a witness at trial of what she saw in the tape, as the recitation of an eavesdropper, is not privileged [*Rubio v. Superior Court* (1988) 202 CA3d 1343, 249 CR 419 (in prosecution for felony child molestation, the tape was ordered to be produced for in camera review by the trial court to determine whether petitioner's right to a fair trial compelled discovery)].

A married jail inmate generally cannot claim the confidential communications privilege with respect to oral or written communications between inmate and spouse [*People v. Von Villas* (1992) 10 CA4th 201, 13 CR2d 62 (conversation in regular jail visiting room, speaking loudly through Plexiglass with knowledge that guard was watching); *People v. Mickey* (1991) 54 C3d 612, 286 CR 801, 818 P2d 84 (letter to spouse not sent in confidence where inmate believed that letters were being intercepted)].

Jail inmate who signed statement authorizing jail personnel to open his mail and who left unsealed letters on cell bars to be delivered to his wife in the same jail did not have expectation of privacy as to interspousal communications [*People v. Rodriguez* (1981) 117 CA3d 706, 173 CR 82] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Privileges Marital Privileges General Overview Family Law Marriage Proof Common Law Marriages General Overview



41 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.38

18.38 Communication Made to Enable Commission of Crime or Fraud--Evid Code § 981

[1] Evid Code § 981 Text

■ *Evid Code § 981.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(1)*, and former *Pen Code § 1327*. Section 981 provides an exception not recognized by prior law [see Cal Law Rev Com Comment].

This exception is quite limited; it does not apply unless a spouse communicates for the purpose of obtaining assistance in the commission of a crime or fraud or in the furtherance thereof [Cal Law Rev Com Comment].

[3] Case Notes

No privilege when there was obstruction of justice and removal of evidence related to criminal activity [*People v. Von Villas* (1992) 10 CA4th 201, 13 CR2d 62] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesObstruction of JusticeGeneral Overview



42 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.39

18.39 Proceedings to Commit Spouse Due to Alleged Condition--Evid Code § 982

[1] Evid Code § 982 Text

■ *Evid Code § 982.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*. Section 982 codifies prior law [Cal Law Rev Com Comment].



43 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.40

18.40 Proceedings to Establish Spouse's Competence--Evid Code § 983

[1] Evid Code § 983 Text

■ *Evid Code § 983.*

There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.

LegH: 1965 ch. 299.

[2] Commission Comment

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*. Section 983 codifies prior law [Cal Law Rev Com Comment].



44 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.41

18.41 Proceedings Brought by One Spouse Against Other--Against Person Claiming Through Deceased Spouse--Evid Code § 984

[1] Evid Code § 984 Text

■ *Evid Code § 984.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comment

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*. Section 984 codifies prior law but extends the exception to cases where one of the spouses is dead and the litigation is between his successor and the surviving spouse [Cal Law Rev Com Comment].



45 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.42

18.42 Criminal Proceedings--Evid Code § 985

[1] Evid Code § 985 Text

■ *Evid Code § 985.*

There is no privilege under this article in a criminal proceeding in which one party 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*.**

LegH: 1965 ch. 299, 1975 ch. 71.

[2] Commission Comment

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*. Section 985 basically restates prior law [Cal Law Rev Com Comment].

[3] Case Notes

The term "child" in *Evid Code § 985(a)* refers to a child of any age and is not limited to minor children [*People v. McGraw* (1983) 141 CA3d 618, 190 CR 461 (marital privilege inapplicable where defendant killed 22-year-old son of his wife)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesIllegal Consensual RelationsBigamy &
PolygamyGeneral OverviewEvidencePrivilegesMarital PrivilegesAdverse Spousal
TestimonyExceptionsEvidencePrivilegesMarital PrivilegesAdverse Spousal TestimonyScope



46 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.43

18.43 Juvenile Court Proceedings--Evid Code § 986

[1] Evid Code § 986 Text

■ *Evid Code § 986.*

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.

LegH: 1965 ch. 299, 1982 ch. 256.

[2] Commission Comment

Based on former *CCP* § 1881(1), and former *Pen Code* § 1322, this exception is new [Cal Law Rev Com Comment].



47 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.44

18.44 Communication by Spouse, Defendant in Criminal Action--Evid Code § 987

[1] Evid Code § 987 Text

■ *Evid Code § 987.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Based on former *CCP § 1881(1)*, and former *Pen Code § 1322*, this exception is new [Cal Law Rev Com Comment].

When a married person is the defendant in a criminal proceeding and seeks to introduce evidence which is material to his defense, his spouse (or his former spouse) should not be privileged to withhold the information [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesMarital PrivilegesGeneral Overview



48 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.45

18.45 "Physician" Defined--Evid Code § 990

[1] Evid Code § 990 Text

■ *Evid Code § 990.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section changes the rule stated in former *CCP § 1881(4)* by providing that a physician be reasonably believed by the patient to be licensed rather than actually licensed [Cal Law Rev Com Comment].

"Physician" is defined to include a person "reasonably believed by the patient to be authorized" to practice medicine in order to protect the patient from reasonable mistakes as to unlicensed practitioners [Cal Law Rev Com Comment].

The privilege is applicable to communications made to a physician authorized to practice "in any state or nation" because a patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege [Cal Law Rev Com Comment].

[3] Case Notes

Unless the statute expressly extends the privilege to specific persons or classes, the law will not permit such individuals to refuse to disclose facts contained in documents which would otherwise be competent evidence [*Green v. Superior Court* (1963) 220 CA2d 121, 33 CR 604 (pharmacists held not physicians)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesDoctor-Patient PrivilegeScopeHealthcare LawBusiness Administration &

OrganizationLicensesGeneral Overview



49 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.46

18.46 "Patient" Defined--Evid Code § 991

[1] Evid Code § 991 Text

■ *Evid Code § 991.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section modifies the rule stated in prior case law by providing that a patient is a person who consults a physician for either diagnosis or treatment rather than strictly for diagnosis and treatment [Leg Com Comment].

"Patient" means a person who consults a physician for the purpose of diagnosis or treatment [Leg Com Comment].

[3] Case Notes

"Patient" is defined as a person who reasonably believes that the physician he consults is the one who will diagnose or treat him [*Kramer v. Policy Holders Life Ins. Assn. (1935) 5 CA2d 380, 42 P2d 665* (examination by doctor at clinic of person who applies for treatment creates privilege); *McRae v. Erickson (1905) 1 CA 326, 82 P 209* (railroad employee and railroad's physician)].

A dead man is not a "patient" capable of sustaining the relationship of confidence toward a physician but is a mere piece of senseless clay which has passed beyond the reach of human prescription, medical or otherwise [*Harrison v. Sutter St. Ry. Co. (1897) 116 C 156, 47 P 1019* (corpse held not a patient)].



50 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.47

18.47 Confidential Communication Between Patient and Physician Defined--Evid Code § 992

[1] Evid Code § 992 Text

■ *Evid Code § 992.*

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.

LegH: 1965 ch. 299, 1967 ch. 650.

[2] Legislative Committee Comments

This section restates the substance of former *CCP § 1881(4)* and extends the definition of confidential communication between patient and physician to cover the physician's stated or uncommunicated diagnosis [Leg Com Comment].

The definition of "communications" is sufficiently broad to include matters not ordinarily thought of as communications; it includes information obtained by an examination of the patient, an uncommunicated diagnosis made by the physician, and advice given by the physician, all in the course of the physician-patient relationship [Leg Com Comment].

[3] Case Notes

A communication between physician and patient which has no relation to treatment by the physician or to the ailment of the patient is not privileged [*Ascherman v. Superior Court (1967) 254 CA2d 506, 62 CR 547* (another doctor's unethical solicitation of patient)].

Photographs that physician had caused to be taken of patient's lesions for the purpose of obtaining information to assist

in diagnosis and treatment were privileged [*Binder v. Superior Court* (1987) 196 CA3d 893, 242 CR 231] .

A communication between a physician and a patient, made in the presence of a necessary third party, who was acting as the agent of the doctor, is privileged [*Kramer v. Policy Holders Life Ins. Assn.* (1935) 5 CA2d 380, 42 P2d 665 (stenographer-office nurse)].

Whether there is an *Evid Code* § 992 confidential communication is determined as of the time the information is communicated to, or ascertained by, the physician [*Rudnick v. Superior Court* (1974) 11 C3d 924, 114 CR 603, 523 P2d 643] .

This section must be liberally construed in favor of the patient [*Carlton v. Superior Court* (1968) 261 CA2d 282, 67 CR 568 (opponent must establish that communication is not confidential)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesDoctor-Patient PrivilegeScopeHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentGeneral Overview



51 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.48

18.48 Holder of the Privilege--Evid Code § 993

[1] Evid Code § 993 Text

■ *Evid Code § 993.*

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.**

LegH: 1965 ch. 299.

[2] Comment

This section changes prior law to the extent that a personal representative may hold a decedent's privilege and elect to waive it under *Evid Code § 994*.

[3] Commission Comments

If the patient has separate guardians of his estate and of his person, either guardian may claim the privilege [Cal Law Rev Com Comment].

The personal representative of the patient can invoke the privilege to protect the interest of the patient's estate in the confidentiality of such communications or he can waive the privilege to benefit the estate by their disclosure [Cal Law Rev Com Comment].

When the patient's estate has been distributed and the representative discharged, there is no holder of the privilege in existence and the privilege terminates [Cal Law Rev Com Comment].

[4] Case Notes

A hospital, as third party recipient of privileged physician-patient records, has standing to claim the privilege on behalf of the absent nonconsenting patient [*Board of Medical Quality Assurance v. Gherardini* (1979) 93 CA3d 669, 156 CR 55] .

A parent may not assert the privilege on behalf of his or her child if a potential conflict of interest exists between the parent and the child [*In re Troy D.* (1989) 215 CA3d 889, 263 CR 869 (court properly permitted disclosure of minor's medical records during dependency hearing)].

Physician-patient and psychotherapist-patient privileges continue after death of patient, and personal representative of patient has the same rights to claim or waive privilege as any other holder [*Rittenhouse v. Superior Court* (1991) 235 CA3d 1584, 1 CR2d 595] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
 Conservators & Guardians
 General Overview
 Estate, Gift & Trust Law
 Probate
 General Overview
 Evidence
 Privileges
 Psychotherapist-Patient Privilege
 Waiver



52 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.49

18.49 Patient's Right of Privilege--Evid Code § 994

[1] Evid Code § 994 Text

■ *Evid Code § 994.*

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 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.

LegH: 1965 ch. 299, 1968 ch. 1375, 1980 ch. 1313, 1994 ch. 1010.

[2] Commission Comments

This section restates prior law except to the extent that certain terms have been modified as discussed in the comments to the sections defining those terms [see Cal Law Rev Com Comment to *Evid Code* §§ 993, 994].

An eavesdropper or other interceptor of a privileged communication cannot testify to the communication if a holder of the privilege makes a valid objection [Cal Law Rev Com Comment].

[3] Statutory References

Dentist, professional secrets confidential [*B&P Code § 1680*].

Physician, professional secrets confidential [*B&P Code § 2379*].

[4] Case Notes

Confidential communications have been defined broadly to include the physician's diagnosis and advice to the patient, but not information that does not intrude on the physician-patient relationship [*Jones v. Superior Court* (1981) 119 CA3d 534, 174 CR 148] .

In investigating a claim that a doctor recommended the medicinal use of marijuana to one of his patients, the Medical Board of California issued an administrative subpoena for the patient's medical records. When the patient refused to waive his right of privacy and the doctor refused to produce the records, the superior court erred in directing the doctor to comply with the subpoena. The Medical Board failed to demonstrate sufficient facts to support a finding of good cause to invade the patient's right of privacy [*Bearman v. Superior Court* (2004) 117 CA4th 463, 11 CR3d 644] .

The purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. The word "communication" is to be construed liberally [*Jones v. Superior Court* (1981) 119 CA3d 534, 174 CR 148] .

To introduce a witness-physician's confidential report about a nonparty client's mental condition over the physician's objection, the proponent party must indicate that the nonparty client has or will waive the privilege [*Newell v. Newell* (1956) 146 CA2d 166, 303 P2d 839] .

When a provider of health care services is required by law to disclose medical information, *Pen Code § 1171(c)* provides that neither the physician-patient nor the psychotherapist-patient privilege applies to information reported in any court proceeding or administrative hearing. Thus, where a hospital social worker makes a risk assessment of a newborn's situation and concludes there is a reasonable suspicion of child abuse under *Pen Code § 11166*, and reports that fact to a child protective agency based on that statute's reporting mandate, no violation of the physician-patient privilege has occurred [*In re Troy D.* (1989) 215 CA3d 889, 263 CR 869 (assuming that mother held privilege to prevent disclosure of her child's medical records, court properly overruled her objections to their admission in a dependency hearing based on the fact that the child was reported to have been under the influence of dangerous drugs)].

In an action against a sperm bank for selling sperm that allegedly transmitted a kidney disease to the child conceived with that sperm, the parents and the child may compel the donor's deposition and the production of relevant documents; the physician-patient privilege is inapplicable because the donor is not a "patient" within the meaning of the holder of the privilege [*Johnson v. Superior Court* (2000) 80 CA4th 1050, 95 CR2d 864] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeScopeHealthcare LawBusiness Administration & OrganizationGeneral Overview



53 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.50

18.50 Physician's Obligation to Claim Privilege--Evid Code § 995

[1] Evid Code § 995 Text

■ *Evid Code § 995.*

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.

LegH: 1965 ch. 299.

[2] Statutory References

Dentist, professional secrets confidential [*B&P Code § 1680*].

Physician, professional secrets confidential [*B&P Code § 2379*].

[3] Commission Comment

The obligation of the physician to claim the privilege on behalf of the patient, unless otherwise instructed by a person authorized to permit disclosure, is consistent with *B&P Code § 2379* [Cal Law Rev Com Comment].

[4] Case Notes

A doctor correctly claimed the patient's privilege of privacy in the face of an administrative subpoena by the Medical Board of California for the patient's medical records, when the patient refused to waive the privilege [*Bearman v. Superior Court* (2004) 117 CA4th 463, 11 CR3d 644 (investigation of recommendation of medical marijuana)].

Disclosure of the patient's identity violates the physician-patient privilege where the disclosure reveals the patient's ailment [*Blue Cross v. Superior Court* (1976) 61 CA3d 798, 132 CR 635 (psoriasis patients)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesDoctor-Patient PrivilegeWaiverHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral Overview



54 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.51

18.51 Condition of Patient--Evid Code § 996

[1] Evid Code § 996 Text

■ *Evid Code § 996.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comment

This section generalizes an exception to the physician-patient privilege which was formerly recognized only in specific types of actions and proceedings [see Cal Law Rev Com Comment].

[3] Case Notes

There are two distinct grounds for the exception. First, the patient, in raising the issue of a specific ailment or condition in litigation, in effect dispenses with the confidentiality of that ailment and may no longer justifiably seek protection from the humiliation of its exposure. Second, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters [*In re Lifschutz* (1970) 2 C3d 415, 85 CR 829, 467 P2d 557 (inquiry limited to ailments patient has voluntarily disclosed in pleadings); *City & County of San Francisco v. Superior Court* (1951)

37 C2d 227, 231 P2d 26 (physician's examination of client in preparation for lawsuit); *Carlton v. Superior Court* (1968) 261 CA2d 282, 67 CR 568 (exception doesn't apply when doctor tenders issue)].

In actions for personal injury, permitting the plaintiff to claim the privilege is a burlesque upon logic and justice [*Moreno v. New Guadalupe Mining Co.* (1917) 35 CA 744, 170 P 1088] .

A patient who files a medical malpractice action against a treating physician may waive any physician-patient confidentiality surrounding that physician's treatment, but the patient does not waive the physician-patient privilege as to confidential information the patient relayed to an associate of the treating physician [*Heller v. Norcal Mutual Ins. Co.* (1994) 8 C4th 30, 32 CR2d 200, 876 P2d 999] .

"Through or under" exception does not apply to plaintiff in strict products liability action where plaintiff claimed injury resulting from her mother's ingestion of DES, diethylstilbestrol. The injuries are to plaintiff's body [*Jones v. Superior Court* (1981) 119 CA3d 534, 174 CR 148 (section does not apply to DES litigation when warranties invoked by plaintiff are really a species of strict tort liability)].

Mother cannot claim privilege for her prenatal medical records in action brought by her child for failure to diagnose and treat cardiac problems detected at birth. Mother and child's prenatal records are one indivisible unit to which privilege was waived when the action was brought by the child [*Palay v. Superior Court* (1993) 18 CA4th 919, 22 CR2d 839] .

The attorney-client privilege can be invoked to prevent a physician to whom the client was sent by his attorneys for examination from divulging the results of the examination despite the applicability of the patient-litigant exception to the physician-patient privilege [*San Francisco Unified School District v. Superior Court* (1961) 55 C2d 451, 11 CR 373, 359 P2d 925 (patient-litigant exception applies only to physician-patient privilege); *City & County of San Francisco v. Superior Court* (1951) 37 C2d 227, 231 P2d 26 (physician's examination of client in preparation for lawsuit)].

The automatic waiver of the physician-patient and psychotherapist-patient privileges contemplated by the patient-litigant exception must be construed not as a complete waiver, but only as a limited waiver consonant with the purposes of the exception [*Britt v. Superior Court* (1978) 20 C3d 844, 143 CR 695, 574 P2d 766 (in action by residents against public agency which operated airport for property value diminution and personal injuries, trial court erred in making discovery order that required plaintiffs to make unlimited disclosure of their lifetime medical histories without regard to whether such histories had any bearing on present litigation); *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 CA4th 654, 84 CR2d 915 (workers' comp claim waived privilege regarding claimed injury; but error for judge to make general inquiries about claimant's hospitalization history)].

The physician-patient privilege applies in custody disputes between parents unless the patient-parent tenders the issue of his or her medical condition [*Koshman v. Superior Court* (1980) 111 CA3d 294, 168 CR 558] .

A parent, under treatment by a psychiatrist, does not waive his privilege by asserting his visitation rights [*Simek v. Superior Court* (1981) 117 CA3d 169, 172 CR 564] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers



55 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.52

18.52 When Services of Physician Sought to Aid in Commission of or to Escape Crime or Tort--Evid Code § 997

[1] Evid Code § 997 Text

■ *Evid Code § 997.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section establishes an exception to the physician-patient privilege which had not been recognized in prior case law [Cal Law Rev Com Comment].

This physician-patient privilege exception, which pertains to communications relating to a crime or tort, is considerably broader in scope than the attorney-client privilege exception which pertains to communications relating to a crime or fraud [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesAttorney-Client PrivilegeExceptionsEvidencePrivilegesDoctor-Patient PrivilegeScopeHealthcare LawBusiness Administration & OrganizationGeneral Overview



56 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.53

18.53 Criminal Proceedings--Evid Code § 998

[1] Evid Code § 998 Text

■ *Evid Code § 998.*

There is no privilege under this article in a criminal proceeding.

LegH: 1965 ch. 299.

[2] Commission Comment This section restates an exception to the physician-patient privilege that is derived from former *CCP § 1881(4)* [Cal Law Rev Com Comment].

[3] Case Notes

The prosecution's psychiatrist is permitted to testify regarding an interview the psychiatrist had with the defendant [*People v. Bennett* (1976) 60 CA3d 112, 131 CR 305] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesDoctor-Patient PrivilegeExceptionsEvidencePrivilegesPsychotherapist-Patient
PrivilegeExceptionsHealthcare LawBusiness Administration & OrganizationGeneral Overview



57 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.54

18.54 Proceeding for Damages Due to Criminal Conduct of Patient--Evid Code § 999

[1] Evid Code § 999 Text

■ *Evid Code § 999.*

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.

LegH: 1965 ch. 299, 1975 ch. 318.

[2] Case Notes

The scope of this exception includes discovery of plaintiff's medical records which are unrelated to the injuries suffered, when a defendant pleads contributory negligence and the records are relevant to the issue of proximate causation [*Slagle v. Superior Court* (1989) 211 CA3d 1309, 260 CR 122] .

Statute does not apply to conduct of patient which is neither criminal nor wrongful but which is merely the medium by which defendant's tortious act is committed [*Jones v. Superior Court* (1981) 119 CA3d 534, 174 CR 148 (ingestion of DES by plaintiff's mother)].

In an action for damages for intentional infliction of emotional distress, negligent infliction of emotional distress, fraud, and negligence, based on a wife's contraction of HIV from her husband, the *Evid Code § 999* exception to the physician-patient privilege applied to patient records no earlier than a date six months prior to the husband's last negative HIV test, which was the last period during which he might have been incubating the virus without testing positive for it [*John B. v. Superior Court* (2006) 38 C4th 1177, 1202, 45 CR3d 316, 137 P3d 153] .

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressPotential PlaintiffsTortsNegligenceDefensesContributory NegligenceProcedureGeneral

Overview



58 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.55

18.55 Communication Between Parties Claiming Through Deceased Patient--Evid Code § 1000

[1] Evid Code § 1000 Text

■ *Evid Code § 1000.*

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 transactions.

LegH: 1965 ch. 299.



59 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.56

18.56 Communication in Issue of Breach of Duty Arising out of Physician-Patient Relationship--Evid Code § 1001

[1] Evid Code § 1001 Text

■ *Evid Code § 1001.*

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.

LegH: 1965 ch. 299.

[2] Case Notes

No reasonable expectation of privacy can be asserted to preclude disclosure of a patient's medical records, by a health care provider who is accused of malpractice, to the attorney retained to defend that malpractice claim [*California Consumer Health Care Council v. Kaiser Foundation Health Plan, Inc. (2006) 142 CA4th 21, 33, 47 CR3d 593*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawBusiness Administration & OrganizationPatient ConfidentialityBreachTortsMalpractice & Professional LiabilityAttorneysTortsMalpractice & Professional LiabilityHealthcare Providers



60 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.57

18.57 Communication Concerning Intention of Deceased Patient with Respect to Writing Affecting Property Interest--Evid Code § 1002

[1] Evid Code § 1002 Text

■ *Evid Code § 1002.*

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.

LegH: 1965 ch. 299.



61 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.58

18.58 Communication Concerning Validity of Deed Executed by Deceased Patient--Evid Code § 1003

[1] Evid Code § 1003 Text

■ *Evid Code § 1003.*

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.

LegH: 1965 ch. 299.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsEnforceability



62 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.59

18.59 No Privilege in Proceedings to Commit Patient Due to Alleged Condition--Evid Code § 1004

[1] Evid Code § 1004 Text

■ *Evid Code § 1004.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Since the proceedings are conducted for the benefit of the patient, he should not have a privilege to withhold evidence that the court needs in order to act properly for his welfare [Cal Law Rev Com Comment].

If a patient receives medical treatment for a non-narcotic illness during a narcotic addiction commitment proceeding, his confidential communications to a physician during the course of that treatment are not protected by the privilege [*People v. Lipscomb* (1968) 263 CA2d 59, 69 CR 127] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral Overview



63 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.60

18.60 Proceedings to Establish Patient's Competence--Evid Code § 1005

[1] Evid Code § 1005 Text

■ *Evid Code § 1005.*

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

LegH: 1965 ch. 299.

[2] Commission Comments

When a patient places his mental condition in issue by instituting a proceeding to establish his competence, he should not be permitted to withhold the most vital evidence relating thereto [Cal Law Rev Com Comment].



64 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.61

18.61 Information to Public Office by Physician or Patient--Evid Code § 1006

[1] Evid Code § 1006 Text

■ *Evid Code § 1006.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

No valid purpose is served by preventing the use of relevant information when the law requiring the information to be reported to a public office does not restrict disclosure [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentGeneral Overview



65 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.62

18.62 Proceeding by Public Entity to Determine Condition of Right, Authority, Privilege--Evid Code § 1007

[1] Evid Code § 1007 Text

■ *Evid Code § 1007.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section modifies prior law and provides that the privilege may not be claimed in those administrative proceedings that are comparable to criminal proceedings (i.e., proceedings brought for the purpose of imposing discipline of some sort) [Leg Com Comment].



66 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.63

18.63 Psychotherapist Defined--Evid Code § 1010

[1] Evid Code § 1010 Text

■ *Evid Code § 1010.*

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*.

LegH: 1965 ch. 299, 1967 ch. 1677, 1970 chs. 1396, 1397, 1972 ch. 888, 1974 ch. 546, 1983 ch. 928, 1987 ch. 724, 1988 ch. 488, 1989 ch. 1104, 1990 ch. 662, 1992 ch. 308, 1994 ch. 1270, 2001 chs. 142, 420.

[2] Legislative Note

The Legislature finds and declares that registered nurses who have a master's of science degree in psychiatric mental health nursing are an important resource for providing psychotherapeutic services to individuals, groups, and families throughout California, and particularly to impoverished, minority, and other underserved populations. These master's-level psychiatric mental health nurses have been eligible for private insurance reimbursement since 1982. They are currently providing psychotherapeutic services in a wide range of clinical settings, including hospitals, clinics, and private practices. However, they are not included within the current legal definition of "psychotherapist" for purposes of the patient-psychotherapist evidentiary privilege. Because of this, their patients' communications are not privileged, and these patients are thus treated differently from patients served by other psychotherapists. This creates difficulties for these patients in accessing the care provided by these competent and duly licensed mental health professionals.

In order for patients served by master's-level psychiatric mental health nurses to be treated under the law on the same basis as other patients, it is necessary to identify these providers as "psychotherapists" for purposes of the patient-psychotherapist privilege [Leg Com Comment 1992 ch. 308].

[3] Case Notes

A licensed clinical social worker is considered a "psychotherapist" under *Evid Code § 1010(c)* [*Ewing v. Northridge Hospital Medical Center* (2004) 120 CA4th 1289, 16 CR3d 591 (psychotherapist's duty to warn others of threat)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersGeneral OverviewEvidencePrivilegesGeneral OverviewInsurance LawIndustry
RegulationInsurance Company OperationsPersonal & Public InformationCommunity Data



67 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.64

18.64 Privilege-Educational Psychologist-Patient--Evid Code § 1010.5

[1] Evid Code § 1010.5 Text

■ *Evid Code § 1010.5.*

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.

LegH: 1985 ch. 545.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesPsychotherapist-Patient PrivilegeScope



68 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.65

18.65 Patient Defined--Evid Code § 1011

[1] Evid Code § 1011 Text

■ *Evid Code § 1011.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comment

Section 1011 is comparable to Section 911 (physician-patient privilege) except that the definition of "patient" in Section 1011 includes not only persons seeking diagnosis or treatment of a mental or emotional condition but also persons who submit to examination for purposes of psychiatric or psychological research [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesDoctor-Patient PrivilegeElementsEvidencePrivilegesDoctor-Patient PrivilegeExceptionsHealthcare
LawBusiness Administration & OrganizationGeneral Overview



69 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.66

18.66 Confidential Communication Between Patient and Psychotherapist--Evid Code § 1012

[1] Evid Code § 1012 Text

■ *Evid Code § 1012.*

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.

LegH: 1965 ch. 299, 1967 ch. 650, 1970 chs. 1396, 1397.

[2] Commission Comment

Communications made in the course of joint therapy (marriage counseling, family counseling, and other forms of group therapy) are within the privilege 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" [Cal Law Rev Com Comment].

[3] Case Notes

Letter from priest's superior to priest's psychotherapist, containing background on priest for purposes of treatment, was protected by psychotherapist-client privilege [*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 455, 32 CR3d 209] .

Trial court reasonably limited disclosure of otherwise privileged psychotherapist-patient communications to probation officer and court for purposes of assessing rehabilitation during probation [*In re Christopher M.* (2005) 127 CA4th 684, 696, 26 CR3d 61] .

Privilege continues after the termination of the psychotherapist/patient relationship; however, the privilege does not apply to communications made to former psychotherapist after the termination of the relationship [*Poliak v. Board of Psychology* (1996) 55 CA4th 342, 63 CR2d 866] .

The court may admit statements of a mentally disordered sex offender made to psychiatric technicians at the hospital. The psychotherapist-patient privilege is not absolute and must yield to the extent to which disclosure is essential to avert dangers to others. The protective privilege ends where the public peril begins [*People v. Henderson* (1981) 117 CA3d 740, 172 CR 858 (statements to therapists that violence stimulates him sexually); *People v. Lakey* (1980) 102 CA3d 962, 162 CR 653] .

Communications made by patients to persons reasonably necessary to transmit information to the psychologist or psychiatrist in their treatment of the patient come within the privilege [*In re Pedro M.* (2000) 81 CA4th 550, 96 CR2d 839 (involving juvenile court rehabilitation treatment program); *Luhdorff v. Superior Court* (1985) 166 CA3d 485, 212 CR 516 (communications to clinical social worker under supervision of psychologist)].

A statement between a therapist and third persons may be a confidential patient communication, and hence privileged, if it assists the therapist in the diagnosis, treatment, or cure of a patient's mental or emotional illness. Similarly, information is considered a confidential communication between patient and psychotherapist, even if it is shared in the presence of third persons, such as participants in group or joint counseling, or marriage and family counseling, so long as the information is disclosed in confidence and in an effort to accomplish the purpose of the patient's therapy. 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 [*Ewing v. Goldstein* (2004) 120 CA4th 807, 15 CR3d 864] .

Statements that are not made in the course of psychological treatment, evaluation, or diagnosis are not privileged [*People v. Maury* (2003) 30 C4th 342, 133 CR2d 561, 68 P3d 1 , (defendant's non-custodial informational interview with psychologist from Department of Corrections was not privileged)].

The patient's motive for participating in psychotherapy is immaterial to determining whether the psychotherapist-patient privilege attaches [*Story v. Superior Court* (2003) 109 CA4th 1007, 135 CR2d 532 (fact that defendant participated in psychotherapy as condition of probation did not bar application of psychotherapist-patient privilege in sex offender case); *Menendez v. Superior Court* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

The psychotherapist-patient privilege protects a child's confidential communications and details of his or her therapy in a juvenile dependency context, but does not preclude the therapist from giving circumscribed information to accomplish the information-gathering goal of therapy [*In re Mark L.* (2001) 94 CA4th 573, 114 CR2d 499 (trial court had erred in precluding testimony from the therapist of a child in protective custody regarding the child's therapeutic progress)].

Therapist's opinion that crime victim suffers from severe emotional problems is a "diagnosis" within the meaning of *Evid Code* § 1012 and therefore subject to the psychotherapist-patient privilege [*People v. Castro* (1994) 30 CA4th 390, 35 CR2d 839] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeExceptionsEvidencePrivilegesPsychotherapist-Patient PrivilegeScopeFamily LawChild CustodyGeneral Overview



70 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.67

18.67 Holder of Privilege--Evid Code § 1013

[1] Evid Code § 1013 Text

- *Evid Code § 1013.*

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.**

LegH: 1965 ch. 299.

[2] Case Notes

The statutory privilege established in *Evid Code § 1014* is a privilege of the patient, not of the psychotherapist [*In re Lifschutz* (1970) 2 C3d 415, 85 CR 829, 467 P2d 557] .

The mother of the decedent in a wrongful death case was not the "holder of the privilege" because she could not show that she was the decedent's "personal representative" [*Boling v. Superior Court* (1980) 105 CA3d 430, 164 CR 432 (privilege was reserved under *Evid Code § 916*)].

A dependent child's guardian ad litem may be an attorney or a court-appointed special advocate pursuant to *W&I Code § 326.5* [*In re Mark L.* (2001) 94 CA4th 573, 114 CR2d 499 (trial court erred in precluding testimony from the therapist of a child in protective custody regarding the child's therapeutic progress)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewFamily LawChild CustodyGeneral

OverviewFamily LawGuardiansGeneral Overview



71 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.68

18.68 Who May Claim Privilege--Evid Code § 1014

[1] Evid Code § 1014 Text

■ *Evid Code § 1014.*

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.

LegH: 1965 ch. 299, operative January 1, 1967, 1969 ch. 1436, 1972 ch. 1286, 1989 ch. 1104, 1990 ch. 605, 1994 ch. 1010, 2002 ch. 1013.

[2] Legislative Committee Comments

This section creates a new psychotherapist-patient privilege applicable to both psychiatrists and psychologists. Psychiatrists were covered by the physician-patient privilege under prior law; psychologists were covered by a privilege stated in former *B&P Code § 2904* [Leg Com Comment].

Subject to the statutory exceptions in this article, the psychotherapist-patient privilege applies in both civil and criminal proceedings. Extending the privilege to criminal proceedings is necessary to facilitate psychotherapeutic treatment and research [Leg Com Comment].

There are no exceptions to the psychotherapist-patient privilege in civil actions for damages arising out of the patient's criminal conduct or in certain administrative proceedings. Since the privilege applies in most criminal proceedings, there are no exceptions in other actions involving the patient's criminal conduct [Leg Com Comment].

Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends [Leg Com Comment].

[3] Case Notes

[a] Scope of Privilege

An investigator allegedly misrepresented herself as an associate of a mental health professional who had a close personal relationship with plaintiff in order to obtain an interview with the patient's former foster mother in which she revealed highly private matters regarding plaintiff. Such intentional misrepresentation was particularly serious, and significantly different from the more familiar practice of a news reporter or investigator in shading or withholding information regarding his or her motives when interviewing a potential news source. Even if the patient's relationship with the psychiatrist was not one that would bring disclosed information within an evidentiary privilege [such as under *Evid Code §§ 994, 1014*], the relationship bore a close similarity to such a relationship. Misrepresentations of this nature by either a reporter or an academic investigator could undermine legitimate professional relationships and take advantage of the desire and willingness of relatives and friends to provide assistance to professionals whom they believe will use any personal information that is revealed to help the subject of the inquiry. Because of these special and unusual considerations, such conduct, if proven, could be found "highly offensive" for purposes of the intrusion-into-private-matters tort [*Taus v. Loftus* (2007) 40 C4th 683, 739-740, 54 CR3d 775, 151 P3d 1185] .

Pretrial disclosure of psychotherapist-patient privileged information is no longer warranted [*Mansell v. Otto* (2003) 108 CA4th 265, 133 CR2d 276 (litigation privilege immunized defendants from liability for reading, but not using information from, confidential psychiatric records obtained under overbroad discovery order); *People v. Hammon* (1997) 15 C4th 1117, 65 CR2d 1, 938 P2d 986] .

At trial, if the defendant makes a sufficient showing for the court to conduct an in camera review of the records, the court is to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve [*People v. Hammon* (1997) 15 C4th 1117, 65 CR2d 1, 938 P2d 986] .

The dominant purpose test can be used to defeat a claim of psychotherapist-patient privilege [*People v. Cabral* (1993) 12 CA4th 820, 15 CR2d 866 (purpose of writing letter to therapist was not to receive treatment)].

Statements by a child to a psychotherapist for a "bonding" study to determine termination of parental rights are not subject to this privilege [*In re Tabatha G.* (1996) 45 CA4th 1159, 53 CR2d 93 (not seeking diagnosis or treatment)].

A psychotherapist's opinion that a victim of a sex crime suffers from "severe emotional problems" is a diagnosis within the meaning of *Evid Code* § 1012 and therefore is subject to the psychotherapist-patient privilege of *Evid Code* § 1014 [*People v. Castro* (1994) 30 CA4th 390, 35 CR2d 839 (psychotherapist's opinion that victim was not telling truth was inadmissible)].

A psychotherapist may not testify as to whether a sex-crime victim is telling the truth on a particular occasion. A rule applicable only to cases involving sex violations permits a trial court, in its discretion, to allow the admission of psychiatric evidence as to the mental and emotional condition of a victim for the purpose of impeaching her credibility, i.e., to inform the jury of the effect of a medical condition on the victim's ability to tell the truth [*People v. Castro* (1994) 30 CA4th 390, 35 CR2d 839 (psychotherapist was not in any better position to evaluate victim's credibility than were the jurors)].

A psychotherapist is not immune from liability when he or she voluntarily discloses information in judicial proceeding without complying with the requirements for claiming the privilege [*Cutter v. Brownbridge* (1986) 183 CA3d 836, 228 CR 545] .

The exception to the physician-patient privilege under *Evid Code* § 999 does not apply to the psychotherapist-patient privilege so as to permit disclosure in an identical situation of the same type of communication by a patient to his psychotherapist, rather than to his physician [*City of Alhambra v. Superior Court* (1980) 110 CA3d 513, 168 CR 49] .

A party is not required to answer an interrogatory as to whether he had previously received psychiatric treatment. Although the nature of the information sought by the interrogatories, other than the nature of any psychiatric treatment he received, might be regarded as outside the privilege, the information was within the privilege because its disclosure of necessity would also have resulted in the disclosure of the nature of any psychiatric condition for which he had been treated [*City of Alhambra v. Superior Court* (1980) 110 CA3d 513, 168 CR 49] .

In a proceeding arising when a natural mother refused to consent to adoption, adoption center personnel were found to have violated their obligation to their patients by releasing forms signed by the natural mother and by agreeing to testify on behalf of the prospective adoptive parents [*In re Timothy W.* (1990) 223 CA3d 437, 272 CR 906 (forms signed by natural mother authorizing the release of reports prepared by therapists at an adoption center did not waive the psychotherapist-patient privilege)].

Records concerning psychiatric or psychological treatment of police officers are presumptively privileged under *Evid Code* § 1014 [*Lemelle v. Superior Court* (1978) 77 CA3d 148, 143 CR 450 (accused's motion for discovery of psychiatric records properly denied)].

The right of a party to an existing or prospective lawsuit to invade the psychotherapist-patient privilege is limited to cases in which something more than mere speculation supports the invasion [*Grey v. Superior Court* (1976) 62 CA3d 698, 133 CR 318 (speculation by insurer that automobile death was suicide)].

Without proof that student interns were working under the supervision of a licensee to whom the privilege attaches, statements made to the student interns are not privileged [*People v. Gomez* (1982) 134 CA3d 874, 185 CR 155] .

A licensed clinical social worker's testimony is not privileged under the psychiatrists' or psychologists' privilege [*People v. Battaglia* (1984) 156 CA3d 1058, 203 CR 370] .

Dangerous statements unprivileged when made may not become privileged by the time of trial on the theory that the danger is past. This section categorically provides that there is "no privilege" as to certain communications [*People v. Gomez* (1982) 134 CA3d 874, 185 CR 155 (defendant had killed object of death threats)].

Psychotherapist-patient privilege applied to communications made by patients during therapy session, even though session took place under condition of threat [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

A communication between a patient and his or her therapist's staff or professional associates is presumed to be privileged if the communication occurs in order to further the therapeutic relationship [*Ewing v. Goldstein* (2004) 120 CA4th 807, 15 CR3d 864] .

Privilege can cover communications that were not confidential, but made in confidence [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

Privilege is not negated when eavesdropper overheard some of the communications [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

Audio-recording therapy sessions did not cause communication to lose confidential status [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

[b] Constitutional Issues

The trial court erroneously admitted damaging testimony from defendant's psychiatrist, in violation of defendant's constitutional right to privacy, while simultaneously preventing testimony from defendant's expert medical witness about the effects of a bipolar manic episode, relevant to the question whether defendant actually had the mental state required for a first degree murder conviction. The cumulative effect of these errors violated defendant's due process rights and rendered his trial unfair [*Parle v. Runnels* (9th Cir 2007) 505 F3d 922, 930 (affirming grant of habeas relief)].

The passage of Proposition 115's language that the people of the State of California have a right to due process of law (*Cal Const, art I, § 29*) did not affect the psychotherapist-patient privilege [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

The court in *Hammon* disapproved several prior cases asserting a *Sixth Amendment* right to pretrial discovery of this information (*People v. Reber* (1986) 177 CA3d 523, 223 CR 139 , *People v. Dancer* (1996) 45 CA4th 1677, 53 CR2d 282 , *People v. Boyette* (1988) 201 CA3d 1527, 247 CR 795 , *People v. Pack* (1988) 201 CA3d 679, 248 CR 240 , *People v. Caplan* (1987) 193 CA3d 543, 238 CR 478). The court's ruling is based on a plurality opinion of the US Supreme Court (*Pennsylvania v. Ritchie* (1987) 480 US 39, 480 US 39, 107 S Ct 989, 94 L Ed2d 40) that the right to confrontation is a trial right, and does not apply to pretrial disclosure of any and all information. The state court has determined that the court may have insufficient information at the pretrial stage to engage in the balancing inquiry to disclose the records. Also, the information sought may be brought out at trial from other sources, foregoing the need for pretrial disclosure. Recognizing the patient's constitutional and statutory right to privacy, the serious risk of unnecessarily disclosing privileged information outweighs the defendant's need for pretrial discovery [*People v. Hammon* (1997) 15 C4th 1117, 65 CR2d 1, 938 P2d 986] .

Because the patient's privilege has a constitutional component, the balancing test is heavily weighted toward the privacy interest; disclosure must promote a compelling state interest and in the least restrictive means possible [*Scull v. Superior Court* (1989) 206 CA3d 784, 254 CR 24] .

A psychiatrist is barred from invoking the privilege in criminal proceedings pending against him for Medi-Cal fraud and grand theft because it would have the effect of excluding evidence tending to incriminate him [*Reynaud v. Superior Court* (1982) 138 CA3d 1, 187 CR 660 (these circumstances release him from *Evid Code § 1015* duty)].

[c] Holder of Privilege

The term "personal representative of the patient" when the patient is deceased is not expressly defined, but pertinent historical sources support the conclusion that the Legislature intended the term to mean the patient's "executor" or "administrator" [*Boling v. Superior Court* (1980) 105 CA3d 430, 164 CR 432] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights General Overview Insurance Law Motor Vehicle
Insurance Obligations Disclosure Torts Procedure Discovery



72 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.69

18.69 Repealed--Evid Code § 1014.5

Enacted 1979. Repealed 1994 ch. 1270.



73 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.70

18.70 Psychotherapist's Obligation to Claim Privilege--Evid Code § 1015

[1] Evid Code § 1015 Text

■ *Evid Code § 1015.*

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.

LegH: 1965 ch. 299.

[2] Statutory References

Certified psychologist, secret communications confidential (*B&P Code § 2960(g)*).

Physician, secret communications confidential (*B&P Code § 2379*).

[3] Case Notes

Disclosure of the identity of a psychotherapist's patient reveals the confidential information that the patient has mental or emotional problems and therefore violates the psychotherapist-patient privilege [*Smith v. Superior Court* (1981) 118 CA3d 136, 173 CR 145 (court may not order therapist in dissolution to list names of patients and amounts paid)].

The right to privacy is not absolute; it may yield in the furtherance of compelling state interests. The state's interest in facilitating the ascertainment of truth in connection with legal proceedings is substantial enough to compel disclosure of a great variety of confidential material [*County of Alameda v. Superior Court* (1987) 194 CA3d 254, 239 CR 400] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentGeneral Overview



74 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.71

18.71 Condition of Patient--Evid Code § 1016

[1] Evid Code § 1016 Text

■ *Evid Code § 1016.*

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 Section 377 of the Code of Civil Procedure for damages for the injury or death of the patient.**

LegH: 1965 ch. 299.

[2] Case Notes

Under *Evid Code § 1016*, disclosure can be compelled only with respect to those mental conditions the patient-litigant has disclosed by bringing an action in which they are in issue; communications that are not directly relevant to those specific conditions do not fall within the section's exception and therefore remain privileged [*In re Lifschutz* (1970) 2 C3d 415, 85 CR 829, 467 P2d 557 (plaintiff's aggressive tendencies held not relevant to the mental and emotional distress issue he tendered in action for physical assault)].

Exception authorizes disclosure of otherwise privileged matters bearing directly upon emotional or mental condition voluntarily disclosed by patient [*People v. Mickle* (1991) 54 C3d 140, 284 CR 511, 814 P2d 290] .

When defendant's counsel stated that if plaintiff took witness stand, he would cross-examine plaintiff as to whether

plaintiff made a diagnosis of defendant, this placed defendant's mental state at issue, thus waiving the physician-patient privilege [*People v. Wharton* (1991) 53 C3d 522, 280 CR 631, 809 P2d 290] .

The mere commencement of an action for the wrongful death of a patient does not operate as an "automatic waiver" of the privilege [*Boling v. Superior Court* (1980) 105 CA3d 430, 164 CR 432] .

In a juvenile dependency action, a child who was allegedly molested by his father did not tender his mental condition by complaining of his molestation [*In re Daniel C.H.* (1990) 220 CA3d 814, 269 CR 624] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesDoctor-Patient PrivilegeElementsEvidencePrivilegesDoctor-Patient PrivilegeWaiverHealthcare
LawBusiness Administration & OrganizationGeneral Overview



75 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.72

18.72 Psychotherapist Appointed by Court--Application--Evid Code § 1017

[1] Evid Code § 1017 Text

■ *Evid Code § 1017.*

(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.

LegH: 1965 ch. 299, 1967 ch. 650, 1987 ch. 687.

[2] Commission Comments

It would be inappropriate to have the privilege apply if, as is most often the case, the court appoints the psychotherapist for the purpose of having the psychotherapist testify concerning his conclusions as to the patient's condition [Cal Law Rev Com Comment].

On the other hand, it is essential that the privilege apply where the court appoints the psychotherapist for the purpose of providing the criminal defendant's lawyer with information needed to plead or defend the case [Cal Law Rev Com Comment].

If a criminal defendant determines not to tender the issue of his mental or emotional condition (e.g., if he withdraws an insanity plea prior to trial), the privilege applies [Cal Law Rev Com Comment].

Violation of the constitutional right to counsel (i.e., to the presence of counsel during a psychiatric examination) may require the exclusion of evidence that comes within the provisions of this section [Cal Law Rev Com Comment].

The attorney-client privilege may provide protection in some cases that come within the provisions of this section or other exceptions to the psychotherapist-patient privilege [Cal Law Rev Com Comment].

If a criminal defendant determines to tender the issue of his mental or emotional condition, the exceptions provided in Sections 1016 and 1023 make the privilege inapplicable [Cal Law Rev Com Comment].

[3] Case Notes

Court rejects petitioner's argument that if he had been financially able to afford the services of a private psychiatrist he could have preliminarily determined the advisability of a plea of insanity and at the same time prevented, pursuant to the lawyer-client privilege, the disclosure of any of his statements to the psychiatrist [*In re Spencer* (1965) 63 C2d 400, 46 CR 753, 406 P2d 33] .

A defendant who waived his *Evid Code* § 1017 psychotherapist-patient privilege under *Evid Code* § 912 could not claim report was protected under other privileges [*People v. Combs* (2004) 34 C4th 821, 22 CR3d 61, 101 P3d 1007 ; *People v. Vaughn* (1968) 262 CA2d 42, 68 CR 366] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Preliminary Proceedings Entry of Pleas Changes & Withdrawals Criminal Law & Procedure Guilty Pleas Changes & Withdrawals Evidence Privileges Psychotherapist-Patient Privilege General Overview



76 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.73

18.73 No Privilege if Psychotherapist's Services Were Obtained to Aid in Crime or Tort--Evid Code § 1018

[1] Evid Code § 1018 Text

■ *Evid Code § 1018.*

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.

LegH: 1965 ch. 299.



77 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.74

18.74 Communication Between Parties Claiming Through Deceased Patient--Evid Code § 1019

[1] Evid Code § 1019 Text

■ *Evid Code § 1019.*

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.

LegH: 1965 ch. 299.



78 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.75

18.75 Communication in Issue of Breach of Duty Arising out of Psychotherapist-Patient Relation--Evid Code § 1020

[1] Evid Code § 1020 Text

■ *Evid Code § 1020.*

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.

LegH: 1965 ch. 299.



79 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.76

18.76 Communication Concerning Intention of Deceased Patient in Writing Affecting Interest--Evid Code § 1021

[1] Evid Code § 1021 Text

■ *Evid Code § 1021.*

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.

LegH: 1965 ch. 299.



80 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.77

18.77 Communication Concerning Validity of Deed Executed by Deceased Patient--Evid Code § 1022

[1] Evid Code § 1022 Text

■ *Evid Code § 1022.*

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.

LegH: 1965 ch. 299.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsEnforceability



81 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.78

18.78 Proceeding in Criminal Action to Determine Sanity of Defendant--Evid Code § 1023

[1] Evid Code § 1023 Text

■ *Evid Code § 1023.*

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.

LegH: 1985 ch. 299.

[2] Commission Comments

This section appears technically redundant because the more general language of Section 1016 probably encompasses this situation [Cal Law Rev Com Comment].

This section is included in addition to Section 1016 to make it clear that the psychotherapist-patient privilege does not apply when the defendant raises the issue of his sanity at the time of trial [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesPsychotherapist-Patient PrivilegeExceptions



82 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.79

18.79 Patient Adjudged Dangerous--Evid Code § 1024

[1] Evid Code § 1024 Text

■ *Evid Code § 1024.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Although this exception might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger [Cal Law Rev Com Comment].

This section provides a narrower exception to the psychotherapist-patient privilege than the comparable exceptions provided by Section 982 (privilege for confidential marital communications) and Section 1004 (physician-patient privilege) [Cal Law Rev Com Comment].

[3] Case Notes

[a] Therapist's Duty

When a therapist knows that a patient is likely to injure another and the identity of the likely victim is known or readily discoverable by the therapist, the therapist must use reasonable care to prevent the patient from causing the intended injury. Such care includes, at least, informing the proper authorities and warning the likely victim. The therapist's obligations to the patient, however, require that the therapist not disclose a confidence unless such disclosure is necessary to avert dangers to others [*Tarasoff v. Regents of University of California* (1976) 17 C3d 425, 131 CR 14, 551 P2d 334 ; *Ewing v. Goldstein* (2004) 120 CA4th 807, 15 CR3d 864 (therapist received communication from

patient's father of serious threat of physical violence); *People v. Gomez* (1982) 134 CA3d 874, 185 CR 155 (death threats reported by interns with Family Court Services)].

If a psychologist reasonably believes that a patient is dangerous to another person, the psychologist has a duty to warn the intended victim. This is a narrow exception to the psychotherapist-patient privilege, and the psychologist may be required to testify against the patient in a criminal trial [*People v. Felix* (2001) 92 CA4th 905, 112 CR2d 311 (insufficient evidence to support defendant's conviction for making a terrorist threat against his ex-girlfriend to his psychotherapist because the state could not adequately prove the factual setting of defendant's remarks)].

Dangerous patient exception applied to audio tape containing psychotherapist notes of his session with patients which gave him reasonable cause to believe that patient was dangerous to himself and two women [*Menendez v. Superior Court of Los Angeles County* (1992) 3 C4th 435, 11 CR2d 92, 834 P2d 786] .

A psychiatrist is required to disclose the contents of a confidential communication from a patient only where the risk to be prevented thereby is the danger of violent assault, and not where the risk of harm is self-inflicted harm or mere property damage [*Bellah v. Greenson* (1978) 81 CA3d 614, 146 CR 535] .

If a psychotherapist reports that a patient made a threat to a third person, without a hearing to establish the context of the patient's statements, a conviction on appeal may be reversed for insufficient evidence [*People v. Felix* (2001) 92 CA4th 905, 112 CR2d 311 (insufficient evidence to support defendant's conviction for making a terrorist threat against his ex-girlfriend to his psychotherapist because the state could not adequately prove the factual setting of defendant's remarks)].

Privilege does not protect substance of the psychotherapist's warning so as to preclude its admission [*People v. Wharton* (1991) 53 C3d 522, 280 CR 631, 809 P2d 290] .

Although a literal reading of *Evid Code* § 1024 would limit its provisions to a prospective application, there is authority for a retrospective application as well. If the preliminary facts upon which the section rests were present at a time prior to the injury complained of, *Evid Code* § 1024 prevents any privilege from attaching, and the psychiatric records are subject to discovery [*Tarasoff v. Regents of University of California* (1976) 17 C3d 425, 131 CR 14, 551 P2d 334 (duty of care arises when, pursuant to standards of the profession, a therapist should determine that patient presents a danger); *Mavroudis v. Superior Court* (1980) 102 CA3d 594, 162 CR 724 (action for injuries inflicted by mental patient); *People v. Hopkins* (1975) 44 CA3d 669, 119 CR 61 (confession to psychiatrist of crimes committed earlier in the day)].

In an appropriate case, where defendant seeks peace officer records pursuant to *Evid Code* § 1043, an officer's interest in the privacy of psychological opinions regarding that officer's propensity for violence must give way to the defendant's need for information relevant to an issue in his case [*People v. Memro* (1985) 38 C3d 658, 214 CR 832, 700 P2d 446 (officers allegedly obtained confessions by coercion)].

In a weapons forfeiture proceeding under *W&I Code* § 8102, a psychiatrist may testify that the defendant suffered major depression with psychotic symptoms during his or her confinement pursuant to *W&I Code* § 5150. Under *Evid Code* § 1024, information obtained on the question of endangerment during *W&I Code* § 5150 treatment and evaluation is admissible because it is necessary to prevent the threatened danger [*People v. One Ruger*.22- *People* (2000) 84 CA4th 310, 100 CR2d 780] .

In a personal injury action against a trolley company, a trolley operator employed by the company testified at her deposition that she was being treated by a psychiatrist at the time of the accident and was taking three prescription medications. The operator was entitled to prevent the disclosure of any confidential communications she had with her psychiatrist, other than those that fell within the dangerous patient exception. Nothing in her testimony could be

construed as disclosing any significant part of her communications with her psychiatrist; moreover, neither the operator's workers' compensation claims nor any disclosure of confidential communication information that occurred in the course of those proceedings would support access to the confidential communications [*San Diego Trolley, Inc. v. Superior Court* (2001) 87 CA4th 1083, 105 CR2d 476] .

The privilege is waived whenever there is a danger to "the person or property of another." There is no requirement that the endangered person or property be specifically identified [*In re Kevin F.* (1989) 213 CA3d 178, 261 CR 413 (confession of minor committed to a residential care facility that he had set fire to a residence while people were inside established that he was a danger to the staff, residents, and property of the facility, as well as a potential danger to persons and property at his future placement)].

[b] Child Abuse Reporting Act

The disclosure requirement of the Child Abuse Reporting Act, *Pen Code § 11166*, is a permissible intrusion upon the right to privacy. To protect the patient's right of privacy, the psychotherapist should warn the patient of his or her statutory duty to testify against the patient regarding instances of child abuse [*People v. John B.* (1987) 192 CA3d 1073, 237 CR 659 ; *People v. Younghanz* (1984) 156 CA3d 811, 202 CR 907] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectTortsTransportation TortsGeneral Overview



83 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.80

18.80 Proceeding to Establish Patient's Competence--Evid Code § 1025

[1] Evid Code § 1025 Text

■ *Evid Code § 1025.*

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

LegH: 1965 ch. 299.



84 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.81

18.81 Information to Public Office Required of Psychotherapist or Patient if Open to Public--Evid Code § 1026

[1] Evid Code § 1026 Text

■ *Evid Code § 1026.*

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.

LegH: 1965 ch. 299.



85 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.82

18.82 Additional Circumstances for No Privilege--Evid Code § 1027

[1] Evid Code § 1027 Text

■ *Evid Code § 1027.*

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.**

LegH: 1970 chs. 1396, 1397, 1990 ch. 216.

[2] Commission Comments

This exception is necessary to permit court disclosure of communications to a psychotherapist by a child who has been the victim of a crime (such as child abuse) in a proceeding in which the commission of such crime is a subject of inquiry [Cal Law Rev Com Comment].

Although this exception might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a victim of a crime and that disclosure of the communication would be in the best interest of the child [Cal Law Rev Com Comment].

[3] Case Notes

In an action to remove a child from her mother's custody, a four-year-old child's privilege is inapplicable to exclude statements she made during counseling sessions she attended with her mother after the child had been sexually assaulted by the man with whom her mother was living [*In re Courtney S.* (1982) 130 CA3d 567, 181 CR 843] .

The exception to the psychotherapist-patient privilege provided by *Evid Code § 1027* is inapplicable when the

psychotherapist does not believe that the patient is the victim of a crime because the psychotherapist believes the patient is not telling the truth [*People v. Castro* (1994) 30 CA4th 390, 35 CR2d 839 (psychotherapist's opinion that victim was not telling truth was inadmissible)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeExceptionsEvidencePrivilegesPsychotherapist-Patient
PrivilegeScope



86 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.83

18.83 Repealed--Evid Code § 1028

Enacted 1970. Repealed 1985 ch. 1077.



87 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.84

18.84 "Member of the Clergy" Defined--Evid Code § 1030

[1] Evid Code § 1030 Text

■ *Evid Code § 1030.*

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.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 806.



88 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.85

18.85 "Penitent" Defined--Evid Code § 1031

[1] Evid Code § 1031 Text

■ *Evid Code § 1031.*

As used in this article, "penitent" means a person who has made a penitential communication to a member of the clergy.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 806.

[2] Case Notes

The penitent is not required to be a member of any particular church or of the faith of the clergy member to whom he or she makes the penitential communication [Doe 2 v. *Superior Court* (2005) 132 CA4th 1504, 1517, 34 CR3d 458] .



89 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.86

18.86 "Penitential Communication" Defined--Evid Code § 1032

[1] Evid Code § 1032 Text

■ *Evid Code § 1032.*

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 the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 806.

[2] Commission Comment

This section extends the scope of privileged communications from "confessions" to a broader range of penitential communications [Cal Law Rev Com Comment].

[3] Case Notes

In clergy sex abuse case, trial court applied incorrect legal standard regarding matters protected by clergy's privilege; order vacated and matter remanded with guidance [Doe 2 v. *Superior Court* (2005) 132 CA4th 1504, 1516 n12, 34 CR3d 458] .

The existence of a protective order is irrelevant to the question whether communications are penitential. If the privilege applies, a court cannot compel disclosure, regardless whether a protective order was imposed [Doe 2 v. *Superior Court* (2005) 132 CA4th 1504, 1517, 34 CR3d 458] .

Even if third parties are not physically present at the time of the communication, the privilege may still be inapplicable if the penitent did not intend the contents of the communication to be kept in confidence [Doe 2 v. *Superior Court* (2005) 132 CA4th 1504, 1518, 34 CR3d 458] .

There is no California requirement that, in order to be privileged under the clergy-penitent privilege, a communication must have as its purpose the confession of a flawed act to receive religious consolation and guidance in return [Doe 2 v. *Superior Court* (2005) 132 CA4th 1504, 1518-1519, 34 CR3d 458 (noting that many states protect any confidential communication made to a member of the clergy in his or her professional character, while other states require that the communication be confessional)].

The penitential privilege did not apply to almost all communications made during the Archdiocese's "troubled-priest interventions." The record demonstrated the participants knew any communications likely were to be shared with more than one person. Under the Archdiocese's declared policy, priests experiencing psychological and sexual problems were encouraged to discuss those problems with the Archbishop and his surrogate, the Vicar for Clergy. Furthermore, the subpoenaed documents themselves amply demonstrated that communications to and from the individual priests were routinely shared by a cardinal, whoever happened to be the current Vicar for Clergy, and sometimes other Archdiocese employees [*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 CA4th 417, 444-445, 32 CR3d 209 (prosecution met burden of rebutting *Evid Code* § 917's presumption of confidentiality)].

Privilege not applicable where defendant did not seek absolution from clergyman regarding embezzlement from church, requested help in stopping payment on checks, and consented to disclosure of her statements to lay church wardens [*People v. Edwards* (1988) 203 CA3d 1358, 248 CR 53] .

In determining whether a person who listened to defendant's confession is a clergyman, courts must consider the threshold question: What is the nature of the function being performed by the person who received the statement? [*People v. Thompson* (1982) 133 CA3d 419, 184 CR 72 (scientologist hired to increase sales; not an ordained "auditor" (minister))].

There is no counselor-counselee privilege in the *Evid Code* or case law [*People v. Thompson* (1982) 133 CA3d 419, 184 CR 72] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesClergy CommunicationsElementsEvidencePrivilegesClergy CommunicationsScope



90 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.87

18.87 Penitent's Privilege--Evid Code § 1033

[1] Evid Code § 1033 Text

■ *Evid Code § 1033.*

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.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 806.

[2] Commission Comment

This section is broader than the clergyman-penitent privilege provided in former *Code of Civil Procedure* section 1881, subdivision (3). The more liberal definition of penitential communication, incorporated herein, protects a wide range of such communications. Furthermore, the penitent can now prevent third persons, such as eavesdroppers, from disclosing the content of the penitential communication [Cal Law Rev Com Comment].

[3] Case Notes

The penitent is not required to be a member of any particular church nor of the faith of the clergy member to whom he or she makes the penitential communication [*Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1517, 34 CR3d 458].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesIllegal EavesdroppingGeneral
OverviewEvidencePrivilegesClergy CommunicationsScope



91 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.88

18.88 Member of the Clergy's Privilege--Evid Code § 1034

[1] Evid Code § 1034 Text

■ *Evid Code § 1034.*

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.

LegH: 1965 ch. 299, operative January 1, 1967, 2002 ch. 806.

[2] Commission Comments

This section modifies prior law by providing that a clergyman may elect whether or not to exercise the clergyman penitent privilege in a given situation [see Cal Law Rev Com Comment].

At least one underlying reason for granting a clergyman the traditional priest-penitent privilege is that the law will not compel a clergyman to violate, nor punish him for refusing to violate, the tenets of his church that require him to maintain secrecy as to confidential statements made to him in the course of his religious duties [Cal Law Rev Com Comment].

This section provides the clergyman with a privilege in his own right [Cal Law Rev Com Comment].

The clergyman may claim or waive the privilege in the exercise of his own discretion. The extent to which he should keep secret or reveal penitential communications is best left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member [Cal Law Rev Com Comment].

The clergyman may claim the privilege even if the penitent has waived the privilege granted him by Section 1033. The clergyman, however, may reveal the penitential communication if he fails to claim the privilege and the patient is deceased, incompetent, absent, or has failed to claim the privilege [see Cal Law Rev Com Comment].

[3] Case Notes

If the trial court rejects the church's clergy-penitent privilege assertion regarding the communications by third parties to a pastor, these third parties must be formally notified of the proceedings and afforded a fair opportunity to assert their privacy interests by objecting to the disclosure, in whole or in part, or asserting possible alternative ways to protect their privacy rights. Such notices should not be sent out before a final ruling has been made regarding the church's clergy-penitent privilege contention. If there is a final ruling to the effect that the privilege applies, that ruling will obviate the need to send out notices to the third parties [*Doe 2 v. Superior Court* (2005) 132 CA4th 1504, 1521, 34 CR3d 458 & n14].

The existence of a broad statutory privilege in clergymen does not deny psychotherapists the equal protection of the laws; it cannot be said the legislature acted irrationally in granting the privilege to clergymen and not to psychotherapists in view of the fact that toleration of religious beliefs and practices forms the basis for this privilege [*In re Lifschutz* (1970) 2 C3d 415, 85 CR 829, 467 P2d 557] .

Legal Topics:

For related research and practice materials, see the following legal topics:
 EvidencePrivilegesClergy CommunicationsElementsEvidencePrivilegesClergy
 CommunicationsScopeEvidencePrivilegesClergy CommunicationsWaiver



92 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.89

18.89 Victim Defined--Evid Code § 1035

[1] Evid Code § 1035 Text

■ *Evid Code § 1035.*

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.

LegH: 1980 ch. 917, 2006 ch. 689.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of AdultsGeneral Overview



93 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.90

18.90 Sexual Assault Victim Counselor-Requirements--Evid Code § 1035.2

[1] Evid Code § 1035.2 Text

■ *Evid Code § 1035.2.*

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) Role playing.

LegH: 1980 ch. 917, 1983 chs. 580, 1072, 1990 ch. 1342, 2006 ch. 689.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultRapeGeneral Overview



94 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.91

18.91 Confidential Communication Between Victim and Counselor--Evid Code § 1035.4

[1] Evid Code § 1035.4 Text

■ *Evid Code § 1035.4.*

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.**

LegH: 1980 ch. 917, 1983 ch. 1072.

[2] Case Notes

If information given to sexual assault counselor is relevant evidence of facts material to criminal or child abuse proceeding, trial court may compel disclosure [*People v. Gilbert* (1992) 5 CA4th 1372, 7 CR2d 660] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Discovery & Inspection
Discovery by Government
Appellate Review & Judicial Discretion
Family Law
Family Protection & Welfare
Children
Abuse, Endangerment & Neglect
Family Law
Family Protection & Welfare
Children
Proceedings



95 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.92

18.92 Holder of Privilege-Victim or Victim's Relation--Evid Code § 1035.6

[1] Evid Code § 1035.6 Text

■ *Evid Code § 1035.6.*

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.**

LegH: 1980 ch. 917.



96 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.93

18.93 Exercise of Privilege--Evid Code § 1035.8

[1] Evid Code § 1035.8 Text

■ *Evid Code § 1035.8.*

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 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.**

LegH: 1980 ch. 917, 2006 ch. 689.

[2] Case Notes

The purpose of the privilege is to protect confidences of one who consults a sexual assault victim counselor for the purpose of securing advice or assistance concerning mental, physical, or emotional conditions caused by sexual assault [*People v. Gilbert* (1992) 5 CA4th 1372, 7 CR2d 660] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of AdultsGeneral Overview



97 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.94

18.94 Counselor's Privilege--Evid Code § 1036

[1] Evid Code § 1036 Text

■ *Evid Code § 1036.*

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.

LegH: 1980 ch. 917, 2006 ch. 689.



98 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.95

18.95 Sexual Assault Defined--Evid Code § 1036.2

[1] Evid Code § 1036.2 Text

■ *Evid Code § 1036.2.*

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.**

LegH: 1980 ch. 917, 1988 ch. 102, 2001 ch. 854.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultRapeElements



99 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.96

18.96 Victim Defined--Evid Code § 1037

[1] Evid Code § 1037 Text

■ *Evid Code § 1037.*

As used in this article, "victim" means any person who suffers domestic violence, as defined in Section 1037.7.

LegH: 1986 ch. 854.



100 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.97

18.97 Domestic Violence Counselor-Requirements--Evid Code § 1037.1

[1] Evid Code § 1037.1 Text

■ *Evid Code § 1037.1.*

(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.

LegH: 1986 ch. 854, 1990 ch. 1342; 2007 ch. 206.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral

OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeReports PrivilegeFamily LawFamily

Protection & WelfareChildrenAbuse, Endangerment & Neglect



101 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.98

18.98 Confidential Communication Between Victim and Counselor--Evid Code § 1037.2

[1] Evid Code § 1037.2 Text

■ *Evid Code § 1037.2.*

(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.

LegH: 1986 ch. 854; 2007 ch. 206.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral

OverviewEvidencePrivilegesGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment
& Neglect



102 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.99

18.99 Construction--Evid Code § 1037.3

[1] Evid Code § 1037.3 Text

■ *Evid Code § 1037.3.*

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.

LegH: 1986 ch. 854.



103 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.100

18.100 Holder of Privilege--Evid Code § 1037.4

[1] Evid Code § 1037.4 Text

■ *Evid Code § 1037.4.*

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.**

LegH: 1986 ch. 854; 2007 ch. 206.



104 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.101

18.101 Exercise of Privilege--Evid Code § 1037.5

[1] Evid Code § 1037.5 Text

■ *Evid Code § 1037.5.*

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.**

LegH: 1986 ch. 854; 2007 ch. 206.



105 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.102

18.102 Counselor's Privilege--Evid Code § 1037.6

[1] Evid Code § 1037.6 Text

■ *Evid Code § 1037.6.*

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.

LegH: 1986 ch. 854.



106 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.103

18.103 Domestic Violence Defined--Evid Code § 1037.7

[1] Evid Code § 1037.7 Text

■ *Evid Code § 1037.7.*

As used in this article, "domestic violence" means "domestic violence" as defined in Section 6211 of the Family Code.

LegH: 1993 ch. 219.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsRulings on Evidence



107 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.104

18.104 Information Victim of Limitations on Confidentiality of Communications--Evid Code § 1037.8

[1] Evid Code § 1037.8 Text

■ *Evid Code § 1037.8.*

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.

LegH: 2002 ch. 629.



108 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.105

18.105 Right to Prevent Disclosure of Confidential Communication Between Victim and Caseworker; Who May Claim Privilege; Notice to Victim--Evid Code § 1038

[1] Evid Code § 1038 Text

■ *Evid Code § 1038.*

(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.

LegH: 2005 ch. 240.

[2] Legislative Note

Nothing in this act shall be construed as prohibiting or precluding prosecution under any other provision of law or to prevent punishment pursuant to any other provision of law that imposes a greater or more severe punishment than provided for in this act.



109 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.106

18.106 When Court May Compel Disclosure; Ruling on Claim of Privilege--Evid Code § 1038.1

[1] Evid Code § 1038.1 Text

■ *Evid Code § 1038.1.*

(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.

LegH: 2005 ch. 240.

[2] Legislative Note

Nothing in this act shall be construed as prohibiting or precluding prosecution under any other provision of law or to prevent punishment pursuant to any other provision of law that imposes a greater or more severe punishment than provided for in this act.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesGeneral Overview



110 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.107

18.107 Definitions--Evid Code § 1038.2

[1] Evid Code § 1038.2 Text

■ *Evid Code § 1038.2.*

(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.

LegH: 2005 ch. 240.

[2] Legislative Note

Nothing in this act shall be construed as prohibiting or precluding prosecution under any other provision of law or to prevent punishment pursuant to any other provision of law that imposes a greater or more severe punishment than provided for in this act.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeScopePublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview



111 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.108

18.108 Official Information Defined--Evid Code § 1040

[1] Evid Code § 1040 Text

■ *Evid Code § 1040.*

(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 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.

LegH: 1965 ch. 299, 1984 ch. 1127.

[2] Statutory References

Income tax returns confidential [R&T Code § 19281 et seq.].

Conciliation proceeding matters confidential [*CCP § 1747*].

[3] Legislative Committee Comment

This section complements existing statutes protecting the confidentiality of specific types of governmental information and superseded former *CCP § 1881(5)*, which prohibited the disclosure of any official information if such disclosure would be adverse to the public interest [see Leg Com Comment].

The privilege is granted to enable the government to protect its secrets [Leg Com Comment].

[4] Case Notes

[a] Scope of Privilege

Evid Code § 1040 represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. It protects the nonpublic records of the Commission on Judicial Performance, which are not subject to a *Pitchess* motion or subpoena duces tecum. Thus, the trial court erred in granting defendant's *Pitchess* motion and conducting in camera review of another judge's confidential statements to the Commission in response to defendant's complaint [*Commission on Judicial Performance v. Superior Court (Davidson) (2007) 156 CA4th 617, 67 CR3d 434* (prosecution for possessing forged driver's license)].

This privilege applies to information a public employee acquires in confidence [*People v. Roberts (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274* (defense knew of information; therefore, it was no longer confidential)].

Statutory privilege permitting public entities to refuse to divulge official information when the need to maintain secrecy is greater than the need for disclosure is exclusive means by which public entity may assert claim of governmental privilege based upon necessity for secrecy [*Pitchess v. Superior Court of Los Angeles County (1974) 11 C3d 531, 113 CR 897, 522 P2d 305*] .

Veh Code § 20012 had been held to prohibit disclosure under this section; however, the California Supreme Court held that the Legislature did not intend *Veh Code § 20012* to preclude the state from releasing information generated from confidential accident reports when that disclosure does not reveal the identities or compromise the privacy interests of the reporting parties [*Davies v. Superior Court (1984) 36 C3d 291, 204 CR 154, 682 P2d 349*] .

Because it would deprive the state of an important investigatory tool, an expert witness is not required to disclose the formula for determining whether an automobile vehicle information number has been altered since the vehicle left the manufacturer [*People v. Marghzar (1987) 192 CA3d 1129, 239 CR 130*] .

In an administrative action against a real estate broker for alleged irregularities with trust accounts, following but not proceeding from an official audit, the administrative law judge ordered partial disclosure of official audit manuals. On appeal, the trial court carefully balanced the public's need for confidentiality with the broker's need for disclosure before denying access to official audit manuals. The trial court found that confidentiality would protect the Department of Real Estate's ability to investigate and would thus advance the public interest, and also found that the broker did not need the manuals for his defense [*Suarez v. Office of Administrative Hearings (2004) 123 CA4th 1191, 20 CR3d 618*] .

The Public Records Act does not create an absolute privilege as to official information. The Supreme Court held that *Evid Code § 1040* represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. Further, *Gov Code § 6254(f)*, a part of the California Public Records Act, does not provide a statutory basis for the absolute privilege of *Evid Code § 1040(b)(1)*, since by its own terms the Act does not affect the rights of litigants under the laws of discovery [*Shepard v. Superior Court (1976) 17 C3d 107, 130 CR 257,*

550 P2d 161 (district attorney's records); *Dominguez v. Superior Court* (1980) 101 CA3d 6, 161 CR 407 (city records on retired policeman who committed murder)].

Official information is absolutely privileged if its disclosure is forbidden by either a federal or state statute [*Richards v. Superior Court* (1968) 258 CA2d 635, 65 CR 917 (UI Code §§ 2111, 2714)].

If official information is conditionally privileged the judge must weigh the consequences to the public of disclosure and the consequences to the litigant of nondisclosure [*Chronicle Pub. Co. v. Superior Court* (1960) 54 C2d 548, 7 CR 109, 354 P2d 637 (*Board of Governors of State*); *Marylander v. Superior Court* (2000) 81 CA4th 1119, 97 CR2d 439 ; *Terzian v. Superior Court* (1970) 10 CA3d 286, 88 CR 806 (county welfare); *City Council of Santa Monica v. Superior Court* (1962) 204 CA2d 68, 21 CR 896 (communications between citizens and investigators)].

In a dependency hearing, a father's risk of permanently losing his child was an important liberty interest that weighed heavily against the risk that disclosure would compromise the investigation. Therefore, the juvenile court was required to examine the investigative files in camera and carefully weigh the parties' respective, colliding interests in disclosure and confidentiality as to each item the father sought to discover, before ruling on the applicability of the conditional privilege to that item [*Michael P. v. Superior Court* (2001) 92 CA4th 1036, 113 CR2d 11 (juvenile court abused its discretion in not holding in camera hearing regarding disclosure of government's investigatory materials in dependency action)].

Evid Code § 1040 is a rule excluding the use of privileged information. It does not allow dismissal of a civil action on the grounds of threatened disclosure of local state secrets [*Rubin v. City of Los Angeles* (1987) 190 CA3d 560, 235 CR 516] .

The government has a privilege to refuse to disclose the exact location of a surveillance site if the public interest in preserving the confidentiality of that information outweighs the need for disclosure [*People v. Haider* (1995) 34 CA4th 661, 40 CR2d 369] .

It is error for the trial court, on an examination of police reports in camera, to assume the reports are not discoverable because they tend to prove that complaints of excessive force by police officers were unfounded. The fact that the complaints are unfounded would be a factor which the court could weigh on deciding whether the public interest favored disclosure if the prosecution asserts the privilege against disclosure [*Saulter v. Municipal Court* (1977) 75 CA3d 231, 142 CR 266] .

Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential. The contents of those files sought in civil discovery must remain confidential so long as the need for confidentiality outweighs the benefits of disclosure [*People v. Jackson* (2003) 110 CA4th 280, 1 CR3d 561 ("official information" privilege applicable to ongoing investigations, and victims' right to privacy, weighed heavily against disclosure of files regarding similar, uncharged crimes as to which defendant claimed no alibis); *County of Orange v. Superior Court* (2000) 79 CA4th 759, 94 CR2d 261] .

The trial court must weigh the necessity for disclosure against the necessity for preserving confidentiality before making an order concerning disclosure. The court should summarize its findings on the record or in the order [*City of Azusa v. Superior Court* (1987) 191 CA3d 693, 236 CR 621 (record doesn't show weight court assigned these competing factors or if it considered them at all)].

One of the purposes of the in camera inspection of privileged records is to balance the competing interests of a necessity for preserving confidentiality and a necessity for disclosure in the interest of justice [*Davis v. City of Sacramento* (1994) 24 CA4th 393, 29 CR2d 232 ; *City of Santa Cruz v. Municipal Court* (1989) 49 C3d 74, 260 CR 520, 776 P2d 222] .

When the public interest securing information necessitates the free intergovernmental communication of such information on a privileged, confidential basis, disclosure of information so secured is against the public interest [*Terzian v. Superior Court* (1970) 10 CA3d 286, 88 CR 806 (county welfare department adoptive placement records); *Chronicle Pub. Co. v. Superior Court* (1960) 54 C2d 548, 7 CR 109, 354 P2d 637 (State Bar disciplinary proceeding records); *City & County of San Francisco v. Superior Court of San Francisco* (1951) 38 C2d 156, 238 P2d 581 (municipal civil service commission wage parity records)].

Since *Evid Code* § 1040 is restrictive of express legislative policy and general inspection statutes, it should be strictly construed [*Gallagher v. Boller* (1964) 231 CA2d 482, 41 CR 880 ; *Samish v. Superior Court of Sacramento County* (1938) 28 CA2d 685, 83 P2d 305 (assertion of privilege may lead to suppression of truth and defeat of justice)].

Information sought by a citizens' assistant, appointed pursuant to a city charter, is not exempt from disclosure under the Public Records Act. The assistant is clothed with official dignity and prestige comparable to that of other city officials and his official acts are those of the city itself [*Parrott v. Rogers* (1980) 103 CA3d 377, 163 CR 75 (information sought by citizens' assistant relating to a complaining citizen's city job application)].

Plaintiffs in a medical malpractice action may not subpoena an investigator for the Department of Health Services to obtain expert opinions based on hospital peer review committee records, i.e., opinions based on "official information" within the meaning of *Evid Code* § 1040. The necessity of preserving the confidentiality of peer review committee records outweighs the necessity of disclosure in the interest of justice [*Fox v. Kramer* (2000) 22 C4th 531, 93 CR2d 497, 994 P2d 343] .

Aid to Families With Dependent Children (AFDC) records are not privileged against disclosure in favor of the county asserting the privilege. AFDC laws authorizing disclosure preclude the existence of any public interest against disclosure [*County of Nevada v. Kinicki* (1980) 106 CA3d 357, 165 CR 57] .

Probation file is a confidential record that defendant cannot inspect [*McGuire v. Superior Court (San Francisco County Probation Department)* (1993) 12 CA4th 1685, 16 CR2d 726] .

Evid Code § 1040 inapplicable in proceedings on a petition by a newspaper for disclosure of CPS records protected by *W&I Code* § 10850 [*McClatchy Newspaper, Inc. v. Fresno County Dept. of Social Services* (1992) 8 CA4th 855, 10 CR2d 504 (disallowed even where child was deceased)].

[b] Holder of Privilege

Because *Evid Code* § 1040 represents the exclusive means by which a public entity may assert a claim of a confidential governmental privilege, it follows that a private person asserting a claim of privilege for official information must do so pursuant to this code section, unless another means is statutorily provided [*In re Lynna B.* (1979) 92 CA3d 682, 155 CR 256] .

The privilege can be invoked by the public entity or its authorized representative; it cannot be invoked by the informant [*Chronicle Pub. Co. v. Superior Court* (1960) 54 C2d 548, 7 CR 109, 354 P2d 637 (*Richards v. Superior Court of Los Angeles County* (1968) 258 CA2d 635, 65 CR 917 (*Department of Employment*); *Markwell v. Sykes* (1959) 173 CA2d 642, 343 P2d 769 (public welfare commission))].

[c] Burden to Establish Privilege

The burden of demonstrating the need for nondisclosure under evidentiary privilege for official information acquired in confidence is on the agency claiming the right to withhold information [*CBS, Inc. v. Block* (1986) 42 C3d 646, 230

CR 362, 725 P2d 470 (public interest weighs heavily in favor of disclosure of information contained in application for licenses to possess concealed weapon)].

In an in camera hearing pursuant to *Evid Code §§ 915(b) and 1040*, a court reporter should be present to transcribe the proceedings because the defendants have the affirmative duty to provide an adequate record in a writ proceeding to contest an adverse discovery ruling [*People v. Hertz (1980) 103 CA3d 770, 163 CR 233* (charges dismissed where no reporter present at in camera hearing)].

In a criminal trial, an in camera hearing regarding disclosure of the identity of the prosecution's percipient witnesses who are not confidential informants, is improper unless the prosecutor explains in open court why the official privilege applies, or declares that it cannot do so without betraying the privilege. If that showing is made, and the trial court needs the information to evaluate the privilege claim, an in camera hearing is appropriate [*Torres v. Superior Court (2000) 80 CA4th 867, 95 CR2d 686*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law
Governmental Information
General Overview
Criminal Law & Procedure
Accusatory Instruments
General Overview
Evidence
Privileges
General Overview



112 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.109

18.109 Privilege Relating to Identity of Informer--Evid Code § 1041

[1] Evid Code § 1041 Text

■ *Evid Code § 1041.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is derived from former *CCP § 1881(5)*, which prohibited the disclosure of the identity of an informer if such disclosure would be adverse to the public interest [Cal Law Rev Com Comment].

This privilege may be claimed under the same conditions as the official information privilege may be claimed, except that it does not apply if a person is called as a witness and asked if he is the informer [Cal Law Rev Com Comment].

[3] Case Notes

The purpose of the privilege is the furtherance of crime detection and the protection of the public interest in effective law enforcement [*People v. Lara* (1967) 253 CA2d 600, 61 CR 303] .

The privilege provided in *Evid Code § 1041* is one that protects the confidentiality of the identity of the informant, not necessarily the information that the informant gives the police [*People v. Otte* (1989) 214 CA3d 1522, 263 CR 393] .

A true informant simply points the finger of suspicion toward a person who has violated the law. If he is not a material witness on the issue of guilt, his identity is not necessary to the defendant's case, and the privilege against disclosure properly applies [*People v. Garcia* (1967) 67 C2d 830, 64 CR 110, 434 P2d 366 (information that may exonerate defendant is material); *People v. McShann* (1958) 50 C2d 802, 330 P2d 33 (if he is a material witness, his identity is relevant); *People v. Sanders* (1967) 250 CA2d 123, 58 CR 259 (court can admit evidence without revealing identification)].

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 identity [*People v. Borunda* (1974) 11 C3d 523, 113 CR 825, 522 P2d 1] .

To compel disclosure of the informant's identity, the defendant must demonstrate a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt, which might result in defendant's exoneration [*Honore v. Superior Court* (1969) 70 C2d 162, 74 CR 233, 449 P2d 169 (information must be material on issue of guilt); *People v. Garcia* (1967) 67 C2d 830, 64 CR 110 (material information)].

Confidential informant's in camera testimony is required to determine whether to disclose informant's identity [*People v. Ruiz* (1992) 3 CA4th 1251, 5 CR2d 122] .

Speculation may properly play a part in the application of a standard that is couched in terms of reasonable "possibility" that the undisclosed informant could give evidence that "might" result in the defendant's exoneration [*People v. Viramontes* (1978) 85 CA3d 585, 149 CR 607 ; *Williams v. Superior Court* (1974) 38 CA3d 412, 112 CR 485] .

If the legality of an arrest is in issue and if there was reasonable cause for the arrest aside from the informant's information, the identity of the informant is immaterial and the privilege properly applies [*People v. Williams* (1958) 51 C2d 355, 333 P2d 19 (testimony as to defendant's identity material); *Priestly v. Superior Court* (1958) 50 C2d 812, 330 P2d 39 (identity must be disclosed if there is no other competent evidence)].

Proposition 115, the initiative measure known as the Crime Victims Justice Reform Act, was adopted by California voters at the June 5, 1990, Primary Election. The stated purpose of the act is to adopt "comprehensive reforms ... needed in order to restore balance and fairness to our criminal justice system." In order to facilitate these purposes, the initiative made changes both to the California Constitution and to statutory law dealing with criminal behavior and the conduct of trials. Proposition 115 adds to article I of the California Constitution, *section 30(c)*, that provides "discovery in criminal cases shall be reciprocal in nature" as prescribed by statute. The initiative also adds a chapter to *Pen Code § 1054 et seq.*

, which sets forth the materials and information the prosecution and defense must jointly disclose, such as the names, addresses, and statements of intended witnesses. This reciprocal discovery scheme was upheld by the *California Court of Appeal, Third Appellate District, in Meeks v. Superior Court of Sacramento County (1991) 230 CA3d 698, 281 CR 796*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Voting Rights Voting Rights Act General Overview Criminal Law & Procedure Discovery & Inspection Discovery by Defendant Informants Privilege Governments Legislation Initiative & Referendum



113 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.110

18.110 Criminal Proceedings-Finding Fact Adverse to Public Entity-Search Validity-in Camera Hearings--Evid Code § 1042

[1] Evid Code § 1042 Text

■ *Evid Code § 1042.*

(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.

LegH: 1965 chs. 299, 937, 1969 ch. 1412.

[2] Legislative Committee Comments

This section provides special rules regarding the consequences of the prosecution's invoking the official information privilege or the informer privilege in a criminal proceeding [Leg Com Comment].

If the privileged information is material to the issue of the defendant's guilt or innocence, the court must dismiss the case if the public entity does not reveal the information [Leg Com Comment].

Evid Code § 1042(b) does not affect the rule that a defendant is entitled to know the identity of an informer in a case where the informer is a material witness with respect to facts directly relating to the defendant's guilt [Leg Com Comment].

[3] Case Notes

When the prosecution asserted the privilege of nondisclosure of confidential official information (*Evid Code § 1040*), the court erred by not giving an admonition that additional benefits were received by witness [*People v. Roberts* (1992) 2 CA4th 271, 6 CR2d 276, 826 P2d 274 (tattoo removal)].

A probable cause determination for the execution of a search warrant affidavit that has been edited to delete information about a confidential informant should be based on the original affidavit, rather than on the one edited [*People v. Greenstreet* (1990) 218 CA3d 1516, 267 CR 377 (identity of informant need not be revealed to establish legality of search or admissibility of evidence; it is only sealing of entire affidavit that violates due process and right to assistance of counsel)].

When the material facts relied upon by the prosecution to establish probable cause for a search warrant cannot be revealed without revealing the name of an informant, the defendant is entitled to the material facts at a hearing challenging the search warrant [*People v. Hobbs* (1991) 23 CA4th 427, 286 CR 135] .



Strategic Point:

Courts have routinely relied on the in camera procedure described in the *Hobbs* decision to handle documents in criminal cases involving the use of confidential informants [*People v. Estrada* (2003) 105 CA4th 783, 790-792, 129 CR2d 589] . In addition, the right to due process of law prevents a law enforcement agency, or its officers, from retaining court documents simply because the agency prefers to maintain custody of documents relating to the identity of a confidential informant [*People v. Galland* (2007) 146 CA4th 277, 287, 52 CR3d 799] .

In a grand theft automobile proceeding, the fact that, without an in camera hearing under *Evid Code* § 915, a special agent of the National Automobile Theft Bureau testified to the vehicle identification number but also asserted the *Evid Code* § 1040 privilege in refusing to reveal the number's secret location on the car, did not deny the defendant the due process requirements reflected in *Evid Code* § 1042, where, as an alternative to *Evid Code* § 915, for ruling on the claim of privilege, the trial court appointed the expert special agent and conducted the very kind of examination the defendant's counsel sought to make [*In re David W.* (1976) 62 CA3d 840, 133 CR 342] .

When an informant did not testify under oath at the first in camera hearing, it was error to admit the informant's testimony at a subsequent hearing because it was not "evidence" under *Evid Code* §§ 140, 710 [*People v. Lee* (1985) 164 CA3d 830, 210 CR 799] .

Evid Code § 1042(c), providing that the reliability of confidential information must be established on evidence given in open court, applies to a search or arrest made on probable cause without a warrant. Where a search is made pursuant to a warrant, the procedures for testing an informant's reliability in an in camera hearing of *Evid Code* § 1042(b) apply [*People v. Flannery* (1985) 164 CA3d 1112, 210 CR 899 (*Evid Code* § 1042(c) does not apply when search is pursuant to warrant)].

If the trial court declines to exercise its contempt powers, or if the exercise proves ineffective to bring about sufficient compliance with a discovery order made after a claim of privilege has been overruled, the charges to which the material sought to be discovered pertains must be dismissed [*Dell M. v. Superior Court* (1977) 70 CA3d 782, 144 CR 418 (where county sheriff and city police acted in concert, both charges must be dismissed)].

It is error under *Evid Code* § 1042 not to conduct a proper hearing before upholding the "surveillance location" privilege under *Evid Code* § 1040 [*People v. Montgomery* (1988) 205 CA3d 1011, 252 CR 779] .

To avoid the sanctions of *Evid Code* § 1042(a) in cases involving the informer privilege, the prosecution must disclose the informant's "identity," not merely his name, but all pertinent information that might assist the defense in locating him [*Eleazer v. Superior Court* (1970) 1 C3d 847, 83 CR 586, 464 P2d 42 ; *People v. Diaz* (1959) 174 CA2d 799, 345 P2d 370 (address, physical description)].

When invoking the official information privilege results in depriving the defendant of the fundamental right to cross-examination on a material issue, an adverse finding is mandated by *Evid Code* § 1042 [*Hines v. Superior Court* (1988) 203 CA3d 1231, 251 CR 28] .

An adverse finding based on a claim of privilege is required only if the privileged information is material [*In re Sergio M.* (1993) 13 CA4th 809, 16 CR2d 701 (surveillance location not material)].

Evid Code § 1042(d) does not require the presence of the confidential informant at the in camera hearing [*People v. Alderrou* (1987) 191 CA3d 1074, 236 CR 740] .

The affidavit of an attorney for a party made on information and belief cannot, as a matter of law, be construed to be evidence. Therefore, such an affidavit cannot constitute the requisite factual foundation for the prima facie showing mandated on the issue of disclosure of a confidential informant's identity under *Evid Code* § 1042(d) [*People v. Oppel* (1990) 222 CA3d 1146, 272 CR 340] .

The court is to exercise its discretion as to the admission of information received from an informant only after it has first determined that the informant "is not a material witness to the guilt or innocence of the accused" [*People v. Garcia* (1967) 67 C2d 830, 64 CR 110 (burden of proof is on defendant to show material witness); *People v. Avila* (1967) 253 CA2d 308, 61 CR 441 (person with evidence on entrapment is material witness)].

Evid Code § 1042(c) is not applicable if the only evidence of the reliability of the informer or credibility of the informer's information is the officer's opinion that it is reliable, without any showing of the underlying circumstances or any factual proof in court as to reliability and credibility [*People v. Johnson* (1968) 68 C2d 646, 68 CR 599, 441 P2d 111] .

Evid Code § 1042(d) does not require that the defendant at the evidentiary hearing present evidence in support of his or her request for the disclosure of the informant's identity [*People v. Johnson* (1970) 13 CA3d 742, 92 CR 105] .

Although Proposition 8 (*Cal Const, art I, § 28(d)*) mandates California courts to apply federal exclusionary rules to determine the admissibility of illegally obtained evidence, it does not require application of federal standards governing discovery procedures. In matters of criminal discovery, state law provides the applicable standards [*People v. Lutzenberger* (1990) 50 C3d 1, 265 CR 690, 784 P2d 633 (defendant's motion for discovery of police records to challenge veracity of affidavit (based on statements from unidentified informant) supporting search warrant was properly denied for failure to raise any doubt regarding the truthfulness of the warrant affidavit)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Agents Distinguished Special Agents Criminal Law & Procedure Discovery & Inspection General Overview Evidence Privileges Government Privileges Official Information Privilege Informer Privilege



114 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.111

18.111 Investigation of Citizens' Complaints--Discovery or Disclosure of Peace or Custodial Officer Personnel Records--Evid Code § 1043

[1] Evid Code § 1043 Text

■ *Evid Code § 1043.*

(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.

LegH: 1978 ch. 630, 1989 ch. 693, 2002 ch. 391.

[2] Case Notes

[a] *Pitchess*

Evid Code §§ 1043 and 1045 codify the California Supreme Court's decision in *Pitchess v. Superior Court* (1974) 11 C3d 531, 113 CR 897, 522 P2d 305 and allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. The good cause requirement embodies a relatively low threshold for discovery and the supporting declaration may include allegations based on information and belief. Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense [*Evid Code* § 1045(b)]. The statutory scheme balances two directly conflicting interests: the peace officer's claim to confidentiality and the defendant's compelling interest in all information pertinent to the defense [*People v. Samuels* (2005) 36 C4th 96, 109, 30 CR3d 105, 113 P3d 1125 (no error in trial court's refusal to grant access to records)].

To establish good cause for discovery of police personnel records under *Evid Code* § 1043, the defense must show materiality to the pending action by setting forth a specific factual scenario that establishes a plausible factual foundation for the alleged officer misconduct [*Warrick v. Superior Court* (2005) 35 C4th 1011, 1019, 29 CR3d 2, 112 P3d 2 (defendant met standard; matter remanded for determination of relevance under *Evid Code* § 1045); *Garcia v. Superior Court* (2007) 42 C4th 63, 70-71, 63 CR3d 948, 163 P3d 939; *Hurd v. Superior Court* (2006) 144 CA4th 1100, 1111-1112, 50 CR3d 893] .

A plausible scenario of officer misconduct is one that might or could have occurred. A plausible scenario presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing puts the court on notice that the specified officer misconduct will likely be an issue at trial. Once that burden is met, the defendant has shown sufficient materiality to satisfy *Evid Code* § 1043 [*Warrick v. Superior Court* (2005) 35 C4th 1011, 1026, 29 CR3d 2, 112 P3d 2] .

Evid Code § 1043(a) specifies that Pitchess motions must be filed in conformity with *CCP* § 1005, which states written notice must be given 16 court days before the hearing (with different days' notice for mail or other service). *California Rule of Court 4.111*, on the other hand, only states motions must be served and filed at least 10 calendar days prior to the hearing date. These provisions discuss the required written notice of a hearing. However, none purports to state when a Pitchess motion must be heard or how far before the trial date a Pitchess motion should be heard. More specifically, none of these provisions requires a Pitchess motion to be both filed and heard 30 days before trial. In contrast with the Compton court's apparent policy or practice of requiring all motions to be both filed and heard 30 days before trial, *California Rule of Court 4.112* would seemingly permit the hearing of Pitchess motions as close to the trial date as the day before. A local policy or practice that has the effect of automatically cutting off a defendant's right to file and have hearings on motions at the 30-day mark before trial is inconsistent with the California Rules of Court and therefore invalid [*Hall v. Superior Court* (2005) 133 CA4th 908, 917-918, 35 CR3d 206] .

Discovery of police officer personnel records is for the purpose of facilitating the ascertainment of the facts and assuring a fair trial. The required showing of good cause is satisfied by general allegations establishing some cause for discovery other than simply a desire to have the benefit of all of the state's information [*Pitchess v. Superior Court of Los Angeles County* (1974) 11 C3d 531, 113 CR 897, 522 P2d 305 (such a discovery motion is known as a *Pitchess* motion)].

Evid Code § 1043(b)(3) must be construed in the light of *Evid Code* § 1045(a). Any other construction would very significantly "affect the right of access" by requiring an affidavit on personal knowledge even in a case where the defendant, being the only one able to make such an affidavit, would be compelled to surrender some part of the

constitutional protections against self-incrimination [*People v. Municipal Court (Hayden)* (1980) 102 CA3d 181, 162 CR 347] .

Counsel's signature on a declaration accompanying defendant's motion for discovery of peace officer personnel records is sufficient; there is no statutory requirement of a personal affidavit on the part of the accused [*Abatti v. Superior Court* (2003) 112 CA4th 39, 4 CR3d 767 (no requirement that affidavit be made on personal knowledge of defendant); *Brant v. Superior Court* (2003) 108 CA4th 100, 132 CR2d 783 (in prosecution for possession of drugs discovered during traffic stop, trial court erred in denying *Pitchess* motion); *People v. Memro* (1985) 38 C3d 658, 214 CR 832, 700 P2d 446] .

The People must comply with all procedures of *Evid Code* § 1043 when prosecuting a defendant who was not employed as a police officer at the time the crime was allegedly committed [*People v. Superior Court (Gremminger)* (1997) 58 CA4th 397, 67 CR2d 910 (DA could not invoke *Pen Code* § 832.7 exception against former police officer accused of shooting shoplifter)].

In the context of a marital dissolution action, it is not necessary to follow the *Pitchess* procedure when seeking records concerning an officer's salary and other benefits [*City of Los Angeles v. Superior Court* (2003) 111 CA4th 883, 895-897, 3 CR3d 915] . However, there is no explicit statutory exception to the *Pitchess* procedure, and there is no need to harmonize its provisions with those of the Family Code, when personnel records are sought that do not directly relate to compensation and benefits. Therefore, the *Pitchess* procedure applies when a divorcing spouse seeks information concerning complaints against an officer that may be relevant to child custody issues [*Slayton v. Superior Court* (2006) 146 CA4th 55, 61, 52 CR3d 731] .

The five-year limitation of *Evid Code* § 1045 for disclosure of complaints or the exclusion of conclusions of investigations of those complaints in police officer records is not an absolute bar to information sought in older police officer records [*Abatti v. Superior Court* (2003) 112 CA4th 39, 4 CR3d 767] .

While the custodian of records need not always produce the entire personnel file at issue in response to a *Pitchess* motion, the custodian should be prepared to state in chambers and for the record what other documents not presented to the court were included in the complete file and why they were deemed irrelevant. A court reporter should be present to document the in camera proceedings. Further, if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of *Evid Code* §§ 1043 and 1045 that the locus of decision making was to be the trial court, not the prosecution or the custodian of records [*People v. Mooc* (2001) 26 C4th 1216, 114 CR2d 482, 36 P3d 21 (trial court properly conducted in camera review of records provided, but erred in failing to make any record of what files, records, or documents had been provided, thus denying defendant opportunity for meaningful appellate review; court of appeal should have remanded case to trial court)].

In a criminal prosecution in which the defendant sought to discover the personnel records of seven police officers and filed an affidavit in support of his motion pursuant to *Evid Code* § 1043, the trial court erred in refusing to allow the city attorney, who represented the police department, to review the supporting affidavit. Although a defendant's right to confidentiality must be protected, in *Evid Code* § 1043 proceedings the question whether the defendant has shown good cause should be, whenever possible, tested by the adversary process [*City of Los Angeles v. Superior Court* (2002) 96 CA4th 255, 116 CR2d 807 (trial court refused to allow city attorney to review affidavit on grounds that it would jeopardize defendant's defense and right to fair trial by revealing his trial strategy, but city attorney's office was not agency "prosecuting" defendant)].

A showing of good cause requires a 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 committed in connection with defendant [*People v. Jordan* (2003) 108 CA4th 349, 133 CR2d 434 (defense complaints about peace officer witnesses advanced at unrelated criminal trials may provide corroboration for request for discovery

under *Pitchess* in appropriate case, although normally such complaints do not seem trustworthy); California Highway Patrol v. Superior Court (2000) CA4th 1010, 84 CA4th 1010, 101 CR2d 379 (error to order discovery regarding problem police report because defendant did not make requisite showing of good cause; documentation of past officer misconduct was not relevant because it was not similar to the charged misconduct)].

A showing of good cause must be based on a discovery request that is tailored to the specific officer misconduct that is alleged. Only documentation of past officer misconduct that is similar to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery [California Highway Patrol v. Superior Court (2000) CA4th 1010, 84 CA4th 1010, 101 CR2d 379 (error to order discovery regarding problem police report because defendant did not make the requisite showing of good cause; documentation of past officer misconduct was not relevant because it was not similar to the charged misconduct)].

Peace officer's personnel records are privileged despite availability of information from other sources [*Hackett v. Superior Court (Glin)* (1993) 13 CA4th 96, 16 CR2d 405 (interrogatories requesting home address, phone, place of birth, driver's license, and educational background)].

Information from peace officers' personnel records may not be obtained through other means of discovery. *Evid Code* §§ 1040-1047 take precedence over the general discovery rules outlined in the CCP. *Evid Code* § 1043 is the exclusive method for obtaining peace officers' personnel records and the information contained in such records. Peace officers may not be asked to orally give their disciplinary history from their personal recollection [*Davis v. City of Sacramento* (1994) 26 CA4th 393, 29 CR2d 232] .

Birthdates and Social Security numbers are personal data for which discovery must be attempted via the *Pitchess* process [*Garden Grove Police Department v. Superior Court* (2001) 89 CA4th 430, 107 CR2d 642 (trial court should have required defendant to comply with *Pitchess* process despite defendant's claim that he was not seeking confidential information but only the officers' birth dates from their personnel files)].

In support of defendant's contention that his confession had been coerced, discovery of police records on the theory that officers acted in conformity with custom or habit, or to show motive, intent, or plan is supported by *Evid Code* §§ 1105 and 1101(b). The defendant is not barred by the psychotherapist privilege from obtaining information concerning officer's propensity toward violence [*People v. Memro* (1985) 38 C3d 658, 214 CR 832, 700 P2d 446] .

Once a *Pitchess* motion has been granted, the materiality of the information has been established. If the petitioner is unable to effectively investigate the matter further before trial because a deputy refuses to cooperate with the petitioner's investigator, this establishes good cause for release of the deputy's statements. The practice of disclosing only the name of the complainant and contact information must yield to the requirement of providing sufficient information to prepare for a fair trial [*Alvarez v. Superior Court* (2004) 117 CA4th 1107, 12 CR3d 252] .

Because a *Pitchess* motion is grounded in *Evid Code* § 1043, it comes within the ambit of "other express statutory provisions" and therefore remains operative [*Albritton v. Superior Court* (1990) 225 CA3d 961, 275 CR 314 (assault with a deadly weapon on a police officer)].

There is no statutory remedy for violation of disclosure procedures set forth in the statutory scheme that includes *Evid Code* §§ 1043 and 1046 [*Rosales v. City of Los Angeles* (2000) 82 CA4th 419, 98 CR2d 144 (police officer had no remedy for wrongful disclosure of his personnel files in action against city based on his alleged conduct against plaintiff)].

A person whose records are arguably subject to disclosure has only a limited or conditional privilege in the records [*Rosales v. City of Los Angeles* (2000) 82 CA4th 419, 98 CR2d 144 (police officer had no remedy for wrongful disclosure of his personnel files in action against city based on his alleged conduct against plaintiff)].

The protections of *Evid Code § 1043* are not limited to the circumstance of a criminal defendant seeking discovery of a police witness's file. Information properly obtained from personnel files under another statute may not be made public or published in a proceeding without a judicial determination of admissibility, relevance, and the need for a protective order [*Fagan v. Superior Court* (2003) 111 CA4th 607, 4 CR3d 239 (prosecutor properly obtained urinalysis test results from policemen's personnel files under *Pen Code § 832.7(a)*, but information must remain confidential pending *Evid Code § 1043* determination)].

[b] Notice

When counsel wishes to file a *Pitchess* affidavit under seal, counsel should give "proper and timely notice" of the privilege claim and provide the court with the affidavit the defense seeks to file under seal, along with a proposed redacted version that is also served on opposing counsel. The trial court must then conduct an in camera hearing on the request to file under seal. At that hearing, counsel should explain how the information proposed for redaction would risk disclosure of privileged material if revealed, and demonstrate why that information is required to support the motion. Opposing counsel should have an opportunity to propound questions for the trial court to ask in camera. If the court concludes that parts of the affidavit do pose a risk of revealing privileged information, and that filing under seal is the only feasible way to protect that required information, the court may allow the affidavit to be so filed [*Garcia v. Superior Court* (2007) 42 C4th 63, 71-72, 63 CR3d 948, 163 P3d 939] .

A motion for production of peace officer personnel records should not be granted when the peace officers have not been notified of the motion [*Abatti v. Superior Court* (2003) 112 CA4th 39, 4 CR3d 767 ; *City and County of San Francisco v. Superior Court* (1993) 21 CA4th 1031, 27 CR2d 201] .

[c] In Camera Inspection

Failure to conduct in camera inspection after requirements of *Evid Code § 1043* are met is an abuse of discretion [*People v. Gill* (1997) 60 CA4th 743, 70 CR2d 369 (good cause shown by assertion officer planted evidence)].

Once the moving party has made a showing of good cause for disclosure of peace officer personnel records, the trial court proceeds to an in chambers examination of the records to determine whether they have any relevance to the issues presented in the proceedings. Therefore, the trial court's decision to release information requires a finding of relevance [*Briley v. Superior Court* (2004) 124 CA4th 1223, 22 CR 3d. 240 (court limited to determining relevance and materiality for disclosure of witness statements generated as result of citizen complaint of brutality); *California Highway Patrol v. Superior Court* (2000) 84 CA4th 1010, 101 CR2d 379 (error to order discovery regarding problem police report because defendant did not make requisite showing of good cause; documentation of past officer misconduct was not relevant because it was not similar to charged misconduct)].

An overwhelming majority of the courts of appeal have permitted discovery of peace officer personnel records based on affidavits containing averments on information and belief. *Evid Code § 1043* does not require the affiant to demonstrate personal knowledge of either the material facts or the particular items sought in order to establish good cause under the statute. The relatively low threshold for showing good cause under *Evid Code § 1043* is tempered by the specific exclusions, in camera review procedures, and exacting standards for disclosure under *Evid Code § 1035* [*City of Santa Cruz v. Municipal Court* (1989) 49 C3d 74, 260 CR 520, 776 P2d 222 (person charged with resisting arrest could discover police records regarding use of excessive force by arresting officers on basis of affidavit alleging information and belief that officers had used such force in past)].

[d] Constitutionality

The constitutionality of Proposition 115 was challenged before the *California Supreme Court* in *Raven v. Deukmejian*

(1990) 52 C3d 336, 276 CR 326, 801 P2d 1077 . Though the act's effort to amend the California Constitution to limit a criminal accused's rights to those afforded by the United States Constitution was struck down in that case, its remaining provisions were found severable from the invalid portion and may properly be given effect. The express statutory discovery authorized by *Evid Code* §§ 1043-1045 was not abrogated by the Crime Victims Justice Reform Act [*People v. Gutierrez* (2003) 112 CA4th 1463, 6 CR3d 138 (defendant's statutory *Pitchess* rights do not infringe due process rights or violate *Brady v. Maryland*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional LawAmendment ProcessCriminal Law & ProcedureAppealsGeneral

OverviewGovernmentsLegislationStatutory Remedies & Rights



115 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.112

18.112 Restrictions on Access to Medical History--Evid Code § 1044

[1] Evid Code § 1044 Text

■ *Evid Code § 1044.*

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.

LegH: 1978 ch. 630.



116 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.113

18.113 Peace or Custodial Officer Records-Matters Included and Excluded from Disclosure--Evid Code § 1045

[1] Evid Code § 1045 Text

■ *Evid Code § 1045.*

(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.

LegH: 1978 ch. 630, 1982 ch. 946, 2002 ch. 391.

[2] Case Notes

[a] Due Process

Just as due process does not prohibit a law enforcement agency from destroying records of citizen complaints that are more than five years old and whose exculpatory value to a specific case is not readily apparent, *Evid Code* § 1045(b)(1)'s five-year limitation on court-ordered discovery of such complaints does not, on its face, violate due process [*City of Los Angeles v. Superior Court* (2002) 29 C4th 1, 124 CR2d 202, 52 P3d 129 (court did not suggest that prosecutor who discovers facts underlying old complaint of officer misconduct, records of which have been destroyed, has no Brady disclosure obligation; regardless of whether records have been destroyed, prosecutor still has duty to seek and assess such information and to disclose it if it is constitutionally material); *People v. Jackson* (1996) 13 C4th 1164, 56 CR2d 49, 920 P2d 1254 (defendant could show no bad faith in destruction of material after five years)].

In a criminal proceeding, *Evid Code* § 1045 balances the peace officer's right to confidentiality of personnel records with the defendant's right to information pertaining to the peace officer's veracity. The legislature intended to restrict use of information disclosed pursuant to a *Pitchess* motion to the proceeding in which it was sought, after a hearing making a specific determination of relevance [*Alford v. Superior Court* (2003) 29 C4th 1033, 130 CR2d 672, 63 P3d 228 (lower court correctly limited use of *Pitchess* discovery to present proceeding)].

The prosecutor is entitled to notice of the date and place of hearing on the defendant's *Pitchess* motion and may attend to be available to answer the court's questions. However, the prosecutor has no standing at that proceeding to argue the prosecutorial viewpoint and is not entitled to see the information obtained without a separate motion and hearing [*Alford v. Superior Court* (2003) 29 C4th 1033, 130 CR2d 672, 63 P3d 228 (lower court erred in requiring defense to share with prosecutor the information discovered); *Abatti v. Superior Court* (2003) 112 CA4th 39, 4 CR3d 767 (prosecutor properly appeared in hybrid *Brady/Pitchess* proceedings where court sought prosecutor's input and defendant did not object)].

[b] In Camera Hearing

If evidence produced by the prosecution in camera does not eliminate the uncertainty and "guessing game" quality of the determination and the reasonable possibility that non-disclosure will deprive defendant of possibly exonerating evidence has not been dispelled, disclosure or dismissal is required [*People v. Coleman* (1977) 72 CA3d 287, 139 CR 908] .

When the trial court makes a ruling in favor of the state on the issue of materiality and the appellate court reverses, on remand the state may request a *Evid Code* § 1042 in camera hearing. This situation is distinguishable from *People v. Viramontes* (1978) 85 CA3d 585, 149 CR 607 , in which the trial court ruled against the state on the materiality issue and dismissed the prosecution. In affirming that dismissal without remand, the appellate court held that the state could not raise the issue of the absence of an in camera hearing when they had failed to raise the issue of a privilege after the ruling on materiality [*In re Tracy J.* (1979) 94 CA3d 472, 156 CR 512] .

[c] Scope

Pursuant to *Evid Code* § 1045(e), the court may enter a protective order concerning the use of the information obtained.

The information ordered produced may not be provided to the prosecution in the action, absent a separate *Pitchess* proceeding by the prosecution, nor may that information be used for any proceeding other than the one in which it was ordered disclosed [*Becerrada v. Superior Court* (2005) 131 CA4th 409, 414, 31 CR3d 735 (denying petition for writ of mandate to disclose police officer personnel records)].

In the narrow situation when defense counsel obtains the name of a complainant from a law enforcement officer's file via a *Pitchess* motion, and counsel's investigator then learns additional relevant information, defense counsel may use that derivative information in a second case only after the second defendant's *Pitchess* motion is granted and the complainant's name is officially disclosed to the second defendant [*Chambers v. Superior Court* (2007) 42 C4th 673, 681-682, 68 CR3d 43, 170 P3d 617] .

Peace officer names, employing departments, and dates of employment are not "peace officer personnel records" exempted from discovery by the Public Records Act [Govt C § 6254(k)] and *Evid Code* § 1045(e) [*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 C4th 278, 303, 64 CR3d 661, 165 P3d 462 ; but see opinions of Kennard, concurring and dissenting; Chin, dissenting].

Evid Code §§ 1043 and 1045 do not limit discovery of confidential information from police officer personnel files to the types of information mentioned in the statutes or to the facts embraced by *Pitchess* (altercations between police officers and arrestees), because the government cannot invoke the privilege to withhold evidence relevant to a defense. The privilege protecting the privacy of police officers does not, as a matter of law, prevent disclosure of the fact of prior law enforcement employment within the parameters of *Evid Code* §§ 1043 and 1045 [*Fletcher v. Superior Court* (2002) 100 CA4th 386, 123 CR2d 99] .

Evid Code § 1045 is applicable to juvenile proceedings because the same considerations that operate to protect the confidentiality of peace officer personnel records from disclosure in the adult context similarly govern their disclosure in delinquency cases [*City of San Jose v. Superior Court* (1993) 5 C4th 47, 19 CR2d 73, 850 P2d 621] .

Disclosure of discipline imposed is required. The exception for conclusions of an officer does not exclude the disclosure of discipline imposed which is explicitly required to be disclosed by the statute [*City of San Jose v. Superior Court* (1993) 5 C4th 47, 19 CR2d 73, 850 P2d 621] .

The records must be relevant to the current action [*People v. Samayoa* (1997) 15 C4th 795, 64 CR2d 400, 938 P2d 2 (trial courts granted wide discretion; records denied); *People v. Jackson* (1996) 13 C4th 1164, 56 CR2d 49, 920 P2d 1254 (no abuse of discretion in denying discovery after hearing when police file held no citizen complaint relevant to claim of coerced confession)].

The threshold for discovery under *Evid Code* §§ 1043 and 1045 is relatively low. All the law requires to show good cause to permit such discovery is the materiality of the information to the subject matter of the pending litigation and a reasonable belief that the governmental agency has the type of information requested. In consideration of a petition for the disclosure of verbatim peace officer and civilian witness statements gathered during an internal affairs investigation of a complaint of police brutality, the police maintained that the verbatim statements of the witnesses were essential to them as exculpatory evidence and for purposes of impeachment and cross-examination at the time of trial. The trial court abused its discretion in refusing to grant this motion [*Briley v. Superior Court* (2004) 124 CA4th 1223, 22 CR3d 240] .

Evid Code § 1045(a) is expansive but subject to the exceptions of *Evid Code* § 1045(b) and (c). The superior court was required to order disclosure of the internal affairs report after redacting the portions reflecting the investigating officer's analysis and conclusions, since neither the petitioner nor the trial court could suggest anything in the officer's subjective impressions of the facts found during the investigation that would be admissible at trial or lead to the discovery of admissible evidence [*Haggerty v. Superior Court* (2004) 117 CA4th 1079, 12 CR3d 467] .

Although a peace officer's payroll records are "personnel records" subject to the discovery requirements of *Evid Code* §§ 1043 and 1045, this discovery procedure does not apply in family law proceedings such as a marital dissolution [*City of Los Angeles v. Superior Court (2003) 111 CA4th 883, 3 CR3d 915*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Civil Procedure Remedies Writs Common Law Writs Mandamus Legal Ethics Prosecutorial Conduct



117 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.114

18.114 Disclosure in Actions Alleging Excessive Force by Peace or Custodial Officer--Contents of Motion--Evid Code § 1046

[1] Evid Code § 1046 Text

■ *Evid Code § 1046.*

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.

LegH: 1985 ch. 539, 2002 ch. 391.

[2] Case Notes

There is no statutory remedy for violation of disclosure procedures set forth in the statutory scheme that includes *Evid Code §§ 1043 and 1046* [*Rosales v. City of Los Angeles* (2000) 82 CA4th 419, 98 CR2d 144 (police officer had no remedy for wrongful disclosure of his personnel files in action against city based on his alleged conduct against plaintiff)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice Power



118 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.115

18.115 Records of Peace or Custodial Officers Not Present During Arrest, Prior to Time of Booking, or At Time Conduct Alleged to Have Occurred--Evid Code § 1047

[1] Evid Code § 1047 Text

■ *Evid Code § 1047.*

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.

LegH: 1985 ch. 539, 2002 ch. 391.

[2] Case Notes

Evid Code § 1047 applies to civil proceedings, not just criminal prosecutions where there has been an arrest. Further, the section applies to personnel records of retired peace officers functioning as expert witnesses. Thus, in a civil action where an expert witness is a retired police officer, and where he was not present during the incident giving rise to the litigation, discovery of his police department personnel records is prohibited by *Evid Code § 1047*. Also, even if such a witness waives his privacy rights, the privilege against disclosure of official police records is held by the police department as well, not just by the individual involved, and there may be no disclosure if the police department does not waive its privilege [*Davis v. City of Sacramento (1994)* 26 CA4th 393, 29 CR2d 232 (wrongful death action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsCriminal TrialsTortsProcedureDiscovery



119 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.116

18.116 Secret Ballot Vote--Evid Code § 1050

[1] Evid Code § 1050 Text

■ *Evid Code § 1050.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is derived from *Cal Const, art II, § 5*, and is consistent with prior decisional law [Cal Law Rev Com Comment].



120 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.117

18.117 Trade Secret--Evid Code § 1060

[1] Evid Code § 1060 Text

■ *Evid Code § 1060.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This privilege is granted so that secret information essential to the continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure [Cal Law Rev Com Comment].

The privilege prevents the use of the witness's duty to testify as the means for injuring an otherwise profitable business where more important interests will not be jeopardized [Cal Law Rev Com Comment].

If disclosure of trade secrets is essential to reveal unfair competition, fraud, or improper use of dangerous material, the privilege should not be recognized; recognition of the privilege in such cases would permit the wrongdoer to withhold his wrongful conduct from legal scrutiny [Cal Law Rev Com Comment].

The privilege exists only if its application will not tend to conceal fraud or otherwise work injustice [Cal Law Rev Com Comment].

[3] Case Notes

If it could be established that defendant's fax database identified all or many individual members of the class whom plaintiff was otherwise reasonably unable to identify, the trial court on remand could consider whether, in light of defendant's conduct, it would "work injustice" to allow defendant to maintain the secrecy of that database. If the court feels it necessary to maintain the secrecy of the fax database, and there are no means by which it can be disclosed to

plaintiff without violating its secrecy, the court should consider whether to order defendant to provide notice by telephone facsimile to the persons whose numbers are in the fax database if that could be done without disclosure of the database to plaintiff, and would be relatively easy and less expensive than alternative forms of notice. Defendant could be ordered to provide notice in this manner even if the court did not believe defendant contributed to the difficulty in identifying the class and should not bear any portion of the cost of notice [*Hypertouch, Inc. v. Superior Court* (2005) 128 CA4th 1527, 1555, 27 CR3d 839] .

Insurers may invoke the trade secret privilege of *Evid Code* § 1060 in response to a request for information in a public rate hearing established by Proposition 103, pursuant to *Ins Code* § 1861.08, after they have already submitted trade secret information to the Commissioner pursuant to regulation [*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 C4th 1029, 12 CR3d 343, 88 P3d 71] .

Allowance of trade secret privilege may not be deemed to "work injustice" within the meaning of *Evid Code* § 1060 unless it tends to conceal fraud or otherwise work injustice [*Bridgestone-Firestone, Inc. v. Superior Court of Alameda County* (1992) 7 CA4th 1384, 9 CR2d 709] .

Party claiming privilege has the burden of establishing its existence [*Bridgestone-Firestone, Inc. v. Superior Court of Alameda County* (1992) 7 CA4th 1384, 9 CR2d 709] .

The trade secret privilege is subject to a fraud or injustice exception [*State Farm Fire and Casualty Co. v. Superior Court (Taylor)* (1997) 54 CA4th 625, 62 CR2d 438 (software disclosed extensive fraud in denying earthquake claims)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesTrade SecretsElementsEvidencePrivilegesTrade SecretsExceptionsEvidencePrivilegesTrade SecretsScope



121 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.118

18.118 Definitions; Protective Orders--Evid Code § 1061

[1] Evid Code § 1061 Text

■ *Evid Code § 1061.*

(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.

LegH: 1990 chs. 149, 714, 2002 ch. 784.

[2] Commission Comment

Former *Evid Code* § 1061(d) is deleted to reflect unification of the municipal and superior courts pursuant to *Cal Const, art VI, § 5(e)*. On unification of the municipal and superior courts in a county, preexisting records of the municipal court automatically become records of the superior court. *Cal Const, art VI, § 23(c)(3)*; *Gov Code* § 70212(c) [Cal Law Rev Com Comment].

[3] Case Notes

The issue of what is a trade secret is for the court to decide [*Stadish v. Superior Court* (1999) 71 CA4th 1130, 84 CR2d 350 (error to delegate trade secret determination to parties)].

If the court decides that documents sought are relevant to public health, the court must consider the public interest in determining whether good cause exists for a protective order [*Stadish v. Superior Court* (1999) 71 CA4th 1130, 84 CR2d 350 (alleged toxic chemicals in vicinity of residences)].

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLegislationEffect & OperationProspective OperationLabor & Employment LawWrongful TerminationBreach of ContractFor Cause StandardTrade Secrets LawGeneral Overview



122 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.119

18.119 Protection of Trade Secrets-Closed Proceedings--Evid Code § 1062

[1] Evid Code § 1062 Text

■ *Evid Code § 1062.*

(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.

LegH: 1990 chs. 149, 714.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Eyewitness Identification Fair Identification Requirement Trade Secrets Law Civil Actions In Camera Inspections Trade Secrets Law Misappropriation Actions General Overview



123 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.120

18.120 Procedure for Requesting Articles be Sealed--Evid Code § 1063

[1] Evid Code § 1063 Text

■ *Evid Code § 1063.*

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.

LegH: 1990 ch. 714.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments Courts Court Records Trade Secrets Law Civil Actions Discovery Trade Secrets Law Civil Actions In Camera Inspections



124 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
H. Privileges (Evid Code §§ 900-1070)
Chapter 18 Privileges Evidence Code §§ 900-1070

1-18 California Courtroom Evidence 18.121

18.121 Privilege of Newsman--Evid Code § 1070

[1] Evid Code § 1070 Text

● ***Evid Code § 1070.***

(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.

LegH: 1965 ch. 299, 1971 ch. 1717, 1972 ch. 1431, 1974 chs. 1323, 1456.

[2] Legislative Committee Comment

This section provides an immunity from being adjudged in contempt; it does not create a privilege. The section does not prevent the use of other sanctions for refusal of a newsperson to permit discovery when he is a party to a civil proceeding [Leg Com Comment].

[a] Legislative Notes

This change, made by the 1974 Legislature (ch. 1456), extends the privilege to persons employed by a magazine or other periodical publication both as to refusing to identify the source of information and any unpublished information found or written for possible communication with the public. It adds subdivision (c), which further describes "unpublished information" following extensive state and national litigation on such notebooks of reporters or other unused materials.

In 1980, by constitutional amendment, provisions virtually identical to this section were added to *Cal Const, art I, § 2*. This elevated the newsperson's protection to the constitutional level.

[3] Case Notes

[a] Scope of Privilege

An online website is a "periodical publication" entitled to the protection of the newspaper shield law [*O'Grady v. Superior Court* (2006) 139 CA4th 1423, 1461-1463, 44 CR3d 72] .

The protection provided under the shield law is not contingent on a showing that a newsperson's unpublished information was obtained in confidence. The law's definition of "unpublished information" includes a newsperson's nonconfidential, eyewitness observations of an occurrence in a public place [*Delaney v. Superior Court* (1990) 50 C3d 785, 268 CR 753, 789 P2d 934] .

The statute's protection extends to unpublished information or materials that could or would confirm or amplify published materials because the published materials are "related to" or "based upon" the unpublished source materials [*Miller v. Superior Court of San Joaquin County* (1999) 21 C4th 883, 89 CR2d 834, 986 P2d 170 (reaffirming *Delaney*); *Playboy Enterprises, Inc. v. Superior Court* (1984) 154 CA3d 14, 201 CR 207] .

The Newspapers Shield Law also encompasses the writer's position as a freelance writer even before he entered into publication agreements with two magazines [*People v. Von Villas* (1992) 10 CA4th 201, 13 CR2d 62] .

In a civil action, a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources (based on *US Const, amend 1* and *Cal Const, art I, § 2(a)*). The scope of such a privilege depends on: (1) the nature of the litigation and whether the reporter is a party; (2) the relevance of the information sought to the cause of action of the plaintiff; (3) whether or not plaintiff has exhausted all alternative sources before attempting this method of obtaining the needed information; (4) the importance, in the court's consideration, of protecting confidentiality in the case at hand; and (5) the making by the plaintiff of a prima facie showing that the alleged defamatory statements are false before requiring disclosure [*Mitchell v. Superior Court* (1984) 37 C3d 268, 208 CR 152, 690 P2d 625 (generally, disclosure is appropriate in civil cases)]. The approach taken in *Mitchell*, however, is not entirely appropriate in a criminal proceeding. A newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right. A contrary determination would violate the supremacy clauses of the federal and state Constitutions.

The *Delaney* balancing test is not applicable when the state is the party seeking to compel a newsperson's disclosure [*Miller v. Superior Court of San Joaquin County* (1999) 21 C4th 883, 89 CR2d 834, 986 P2d 170 (the state has no federal constitutional right to a fair trial; since the newsperson's shield law is a state constitutional provision, Proposition 115's right of the state to due process does not trump a competing constitutional provision)].

The shield law does not provide a sweeping privilege against disclosure but merely an immunity from contempt for

failure to disclose. Therefore, the argument that *Evid Code § 1070* prohibits a discovery order requiring disclosure of a reporter's notes is without merit [*KSDO v. Superior Court* (1982) 136 CA3d 375, 186 CR 211] .

The protective scope afforded by *Evid Code § 1070* and *Cal Const, art I, § 2* extends to interests of a nonparty publisher whose unpublished information is sought in discovery by civil litigants. The *KSDO* case is distinguished because the newsperson was a party to the action, and the newsperson relied on the *First Amendment* rather than the direct and specific protection from disclosure afforded by *Cal Const, art I, § 2* [*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 CA3d 14, 201 CR 207 (rejected *KSDO* court's dictum that nonparty newsperson might be compelled to disclose to accommodate litigant's interest in discovery)].

Evid Code § 1070 and *Cal Const, art I, § 2(b)* give a nonparty witnesses virtually absolute protection against compelled disclosure of sources because finding such a witness in contempt is generally the only effective remedy against him or her. There are sanctions other than contempt that apply to parties who refuse to disclose, against which *Evid Code § 1070* offers no protection [*Mitchell v. Superior Court* (1984) 37 C3d 268, 208 CR 152, 690 P2d 625] .

The Shield Law protects all unpublished information, even information that could or would confirm or amplify the published information derived from it, and even if the source is identified [*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 CA3d 14, 23, 201 CR 207] .

In an action by a sports coach for damages for wrongful termination and defamation, plaintiff claimed that executives of the university leaked false and defamatory reasons for his termination to journalists who published the comments as attributed to confidential sources. Plaintiff obtained in deposition a high-level university employee's statement that one journalist had identified the second journalist's source as the defendant executive, who allegedly confirmed the causes of plaintiff's termination in an "off the record" conversation with the second journalist. This statement was not hearsay, because it was offered to prove waiver of the privilege; however, it could not constitute waiver by the second journalist. The reporters could not be compelled to reveal their sources [*McGarry v. University of San Diego* (2007) 154 CA4th 97, 64 CR3d 467] .

Submitting material for in camera review is not a waiver of the privilege [*SCI-Sacramento, Inc. v. Superior Court* (1997) 54 CA4th 654, 62 CR2d 868 (no waiver when videotape submitted for in camera review, even when defense counsel present during review)].

When a criminal defense witness claims protection under the newsmen's shield law on cross-examination, the People may move to strike the testimony given on direct, even though it did not consist of "unpublished information" protected by the shield law, unless the defendant can show that exclusion would deprive him or her of a federal constitutional right to a fair trial and that right transcends the witness's under the shield law. If the direct testimony stands, the newsperson may be held in contempt of court for refusing to respond to proper cross-examination seeking information that would otherwise be protected under the shield law [*Fost v. Superior Court* (2000) 80 CA4th 724, 95 CR2d 620] .

[b] Due Process

The newsmen's shield law must yield to a criminal defendant's right to a fair trial when the refusal to disclose would unduly infringe on that right, but the defendant must make a threshold showing of a reasonable possibility that the information is material and not mere speculation [*People v. Sanchez* (1995) 12 C4th 1, 47 CR2d 843, 906 P2d 1129 (defendant's showing too speculative)].

To overcome a newsmen's claim of immunity under the shield law, a criminal defendant must show a reasonable possibility that the evidence sought to be discovered will materially assist his or her defense. Once this threshold showing is made, the trial court must then consider the importance of protecting the unpublished information by applying a four-part balancing test. The court must consider: (1) whether the information is confidential or sensitive; (2)

the interests sought to be protected by the shield law; (3) the importance of the information to the criminal defendant; and (4) whether there is an alternative source. In light of a defendant's constitutional right to a fair trial, however, whether an alternative source requirement applies will depend on the facts of each case [*Delaney v. Superior Court* (1990) 50 C3d 785, 268 CR 753, 789 P2d 934 (compelled disclosure of information was proper; need for reporters' testimony concerning their eyewitness observations of events leading to defendant's arrest outweighed their claim of immunity under shield law); *People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554, 73 P3d 433 (defendant was not entitled access to reporter's notes allegedly containing statements supporting defense of being "chronic false confessor," since other strong evidence connected him to murder)].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Criminal Law & ProcedureEyewitness IdentificationGeneral OverviewEducation
 LawAthleticsCoachesEvidencePrivilegesJournalist's PrivilegeGeneral Overview



125 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.syn

§ 19.syn Synopsis to Chapter 19: Character, Habit, and Custom Evidence Code §§ 1100-1109

19.01 Evidence to Prove Character or Trait of Character--Evid Code § 1100

[1] Evid Code § 1100 Text

[2] Commission Comments

[3] Case Notes

19.02 Evidence to Prove Conduct on Specific Occasion--Evid Code § 1101

[1] Evid Code § 1101 Text

[2] Legislative Note

[3] Commission Comments

[4] Case Notes

[a] Victims' Bill of Rights

[b] Civil Cases

[i] Generally

[ii] Character of a Parent

[c] Criminal Cases

[i] Generally

[ii] Procedure and Burden of Proof

[iii] Other Crimes Evidence as a Defense

[iv] Penalty Phase Use of Other Crimes Evidence

[v] Permissible Uses of Other Crimes Evidence

[A] Common Design or Plan

[B] Identity

[C] Knowledge

[D] Motive

[E] Evidence of Intent Admissible

[F] Evidence of Intent Inadmissible

[G] Means

[d] Standard on Appeal

19.03 Evidence of Character by Criminal Defendant--Evid Code § 1102

[1] Evid Code § 1102 Text

[2] Commission Comments

[3] Case Notes

19.04 Character Evidence of Crime Victim--Admissibility--Evid Code § 1103

[1] Evid Code § 1103 Text

[2] Commission Comments

[3] Case Notes

19.05 Evidence of Care or Skill to Prove Conduct--Evid Code § 1104

[1] Evid Code § 1104 Text

[2] Commission Comments

[3] Case Note

19.06 Habit, Custom to Prove Conduct on Specific Occasion--Evid Code § 1105

[1] Evid Code § 1105 Text

[2] Commission Comments

[3] Case Notes

19.07 Evidence of Plaintiff's Sexual Conduct--Evid Code § 1106

[1] Evid Code § 1106 Text

[2] Case Notes

19.08 Expert Witness Testimony on Intimate Partner Battering and its Effects--Evid Code § 1107

[1] Evid Code § 1107 Text

[2] Legislative Note

[3] Case Notes

[a] To Explain Victim's Recant

[b] Necessity of Evidence of Prior Incidents

19.09 Criminal Action for Sexual Offense-Evidence of Commission of Other Sexual Offense Not Inadmissible Except as Specified--Evid Code § 1108

[1] Evid Code § 1108 Text

[2] Case Notes

[a] Constitutionality

[b] Jury Instructions

[c] Importance of Timing of Other Sexual Offenses

[d] Patient-Psychotherapist Privilege

19.10 Criminal Action for Domestic Violence, Abuse of Elder or Dependent Person, or Child Abuse-Evidence of Commission Not Inadmissible Except as Specified--Evid Code § 1109

[1] Evid Code § 1109 Text

[2] Case Notes

[a] Criminal Cases

[b] Constitutionality



126 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 1100 through 1109* concerning the admission of evidence of other acts, character evidence, evidence of habit or custom, and evidence of other events related to cases of sexual offenses and domestic abuse.



Cross References:

Further discussion of character evidence, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 5, Limitations on Credibility Evidence, Ch. 6, Limitations on Evidence That Is Relevant to the Merits of the Case (Matthew Bender).

Discussion of questioning witnesses on specific topics, see Matthew Bender(R) *Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, Questioning Witnesses and Objections.



127 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.01

19.01 Evidence to Prove Character or Trait of Character--Evid Code § 1100

[1] Evid Code § 1100 Text

■ *Evid Code § 1100.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Except for statutory exceptions, any evidence relevant to proving character is admissible [Cal Law Rev Com Comment].

Evidence of a person's character or a trait of his character is relevant in three situations [Cal Law Rev Com Comment]:

1. When offered on the issue of his credibility as a witness.
2. When offered as circumstantial evidence of his conduct in conformity with such character or trait of character.
3. When his character or a trait of his character is an ultimate fact in dispute in the action.

Whereas the Code restricts the use of character evidence in categories (1) and (2) above, *Evid Code § 1100* applies without restriction in category (3) [Cal Law Rev Com Comment].

[3] Case Notes

Prior instances of conduct and opinion of a witness can both serve to show character and be admissible under *Evid Code § 1100* [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164] .

Pugh held a managerial position in the company, thus his ability to work well with the company president and other administrative staff was crucial. Specific acts of misconduct were therefore admissible to show Pugh's unfitness or incompetency [Pugh v. See's *Candies, Inc.* (1988) 203 CA3d 743, 250 CR 195] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceRelevanceGeneral Overview



128 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.02

19.02 Evidence to Prove Conduct on Specific Occasion--Evid Code § 1101

[1] Evid Code § 1101 Text

■ *Evid Code § 1101.*

(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.

LegH: 1965 ch. 299, 1986 ch. 1432, 1995 ch. 439, 1996 ch. 261.

[2] Legislative Note

It is the intent of the Legislature in enacting this act [which, in part, amended this section] to clarify the holding in *People v. Tassell*, 36 C3d 77, to the extent an inference can be drawn from that holding that evidence of another act is ipso facto inadmissible or irrelevant to the issue of a defendant's reasonable and good faith belief that the victim consented, by rejecting that inference and making it clear that that evidence can be relevant on that issue in a particular case, depending upon the circumstances there present.

[3] Commission Comments

Evid Code § 1101 is concerned with evidence of a person's character (i.e., his propensity or disposition to engage in a

certain type of conduct) that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion [Cal Law Rev Com Comment].

Evidence of character to prove conduct in a civil case is excluded for the following reasons [Cal Law Rev Com Comment]:

1. Character evidence is of slight probative value and may be very prejudicial.
2. Character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters.
3. Introduction of character evidence may result in confusion of issues and require extended collateral inquiry.



Timing: Objection to uncharged crimes must be made at trial or issue is waived for appellate review [*People v. Champion* (1995) 9 C4th 879, 39 CR2d 547, 891 P2d 93] .



Strategic Point: When evidence of other crimes relevant only to a special circumstance of the

charged crime is introduced at trial, it should be accompanied by a jury instruction limiting its use [*People v. Bigelow* (1984) 37 C3d 731, 209 CR 328, 691 P2d 994 (special circumstance of murder)].

[4] Case Notes

[a] Victims' Bill of Rights

The truth-in-evidence provision of The Victims' *Bill of Rights* [Cal Const, art I, § 28, subd. (d)] expressly preserves Evid Code §§ 325, 782, and 1103. By retaining *Evid Code* § 1103, Section 1101 is also retained since the former states that it is an exception to the latter. It would be contradictory to retain the exception and eliminate the general rule [*People v. Perkins* (1984) 159 CA3d 646, 205 CR 625] .

Cal Const, art I, § 28(d), empowers the Legislature to enact superseding legislation by statute. In 1986, the Legislature, by over a two-third's vote, reenacted *Evid Code* § 1101, limiting the preemptive effect of the Truth in Evidence provisions of the Victims' *Bill of Rights*. Therefore, Section 1101 is not abrogated by the Victims' *Bill of Rights* [*People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757 ; *People v. Scott* (1987) 194 CA3d 550, 239 CR 588 ; *People v. Stern* (2003) 111 CA4th 283, 3 CR3d 479 (admission of evidence of uncharged stabbing for purpose of corroborating witness was proper under *Cal Const, art I, § 28*)].

Cal Const, art I, § 28(d) of the did not abrogate the rule that every conviction must be supported by some proof of the corpus delicti, aside from or in addition to a defendant's incriminating statements. However, the independent evidence may be circumstantial, and need only be a slight or prima facie showing permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554 (evidence sufficient to show corpus delicti of attempted murder in penalty phase of capital case)].

[b] Civil Cases

[i] Generally

In an action to determine disability and bad faith breach of covenant of good faith and fair dealing by an insurer, evidence that insurer temporarily terminated policy benefits was admissible to meet claim that insurer had not intended to commit wrong and to confirm that it was insurer's practice to stop disability payments to see if policyholder would complain [*Pistorius v. Prudential Ins. Co. of America* (1981) 123 CA3d 541, 176 CR 660 (Evid Code § 1101(b) applies)].

Evidence of defendant's threat of violence against plaintiff coupled with evidence of actual incidents of violence is relevant to establish the validity of plaintiff's fear for her own security and defendant's intent to carry out his threats [*Alderson v. Alderson* (1986) 180 CA3d 450, 225 CR 610] .

Evidence of a third party's reputation for violence may be admissible to prove defendant's state of mind [*People v. Minifie* (1996) 13 C4th 1055, 56 CR2d 133 (court erred in excluding third party's reputation for violence where evidence central to defendant's self-defense claim)].

Evidence of a defendant's vulgarity and sexually obnoxious remarks to persons other than the plaintiff is generally inadmissible [*Brown v. Smith* (1997) 55 CA4th 767, 64 CR2d 301 (sexual harassment by landlord)].

In a fraud case, a prior misdemeanor was admissible to prove the required element of knowledge and to impeach credibility [*Nelson v. Gaunt* (1981) 125 CA3d 623, 178 CR 167 (fraudulently administered silicone injections; prior arrest for use of silicone)].

Evidence of unrelated facts brought to the attention of the defendant (e.g., defects in the manufacturing process not related to the defect in issue) cannot be used to show knowledge of the fact in question (e.g., use of defective materials, omission of parts or knowledge of the defect) [*Marocco v. Ford Motor Co.* (1970) 7 CA3d 84, 86 CR 526 (defects in automobile not involving mechanism in issue)].

[ii] Character of a Parent

A psychiatric test score indicating that a person had personality traits commonly found in fathers who sexually abuse their children is an exotic form of character evidence that is inadmissible in a civil action [*In re Cheryl H.* (1984) 153 CA3d 1098, 200 CR 789 (child custody)].

When character evidence is used not to prove a charge of past conduct but to assist the trier of fact in determining a father's predisposition toward future sexual abuse of his minor child, it is admissible in a dependency action [*Matter of Dorothy Jean I.* (1984) 162 CA3d 1154, 209 CR 5] .

While expert psychological testimony is inadmissible under *Evidence Code* section 1101 in a juvenile dependency proceeding to prove a charge of past sexual abuse by a father, such evidence may be admissible in a proper case at a jurisdictional hearing on the issue of the parent's mental condition [*In re Mark C.* (1992) 7 CA4th 433, 8 CR2d 856 (father failed to make proper offer of proof, thus exclusion of proposed testimony was proper)].

California law allows prosecution to introduce expert testimony and evidence related to prior injuries in order to prove "battered child syndrome" [*Estelle v. McGuire* (1991) 502 US 62, 112 S Ct 475, 116 L Ed2d 385] .

[c] Criminal Cases

[i] Generally

To be admissible, other-crimes evidence must be relevant to a material fact, and its admission must not be precluded by

any rule or policy requiring the exclusion of relevant evidence [*People v. Rogers* (2006) 39 C4th 826, 852, 48 CR3d 1, 141 P3d 135 (holding that evidence of crimes was sufficiently similar to be admissible on matter of identity and intent)].

The general rule against evidence of a person's character or a trait of his character as circumstantial evidence of conduct in conformity with that character or trait is founded not on lack of relevance but on extrinsic policies relating to prejudice, the potential for the jury to be distracted and base its decision on the parties' characters themselves, and the potential for confusion of the issues and extended inquiry into collateral matters [*People v. Demetrulias* (2006) 39 C4th 1, 21, 45 CR3d 407, 137 P3d 229 (evidence of uncharged robbery properly admitted in prosecution for similar robbery the same night)].

The prior offense must (1) be offered to prove a material fact in dispute, (2) tend to prove the material fact, that is, be relevant, and (3) not be cumulative nor have more prejudicial impact than probative value (see *Evid Code* § 352) [*People v. Brandon* (1995) 32 CA4th 1033, 38 CR2d 751 ; *People v. Simon* (1986) 184 CA3d 125, 228 CR 855 (uncharged acts must be relevant and not merely cumulative); *People v. Salazar* (1983) 144 CA3d 799, 193 CR 1 (similar "date-rapes"); *People v. Thompson* (1980) 27 C3d 303, 165 CR 289, 611 P2d 883] .

The probative value of other crimes evidence consists of their degree of distinctiveness which raises an inference of identity. "The strength of the inference in any case depends on two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks" [*Williams v. Superior Court* (1984) 36 C3d 441, 204 CR 700, 683 P2d 699 (two shootings have little similarity; they both may have been gang related); *Coleman v. Superior Court* (1981) 116 CA3d 129, 172 CR 86 (other sex crimes lacked admissible degree of distinctiveness)].

When evidence of prior conduct (e.g., criminal offenses) is relevant only to character (e.g., criminal disposition), it will not be admitted [*People v. Roldan* (2005) 35 C4th 646, 705, 27 CR3d 360, 110 P3d 289 , *cert denied* 546 US 986 (such evidence is highly inflammatory); *People v. Chacon* (1968) 69 C2d 765, 73 CR 10, 447 P2d 106 (prior conviction was element of the offense charged); *People v. Luparello* (1986) 187 CA3d 410, 231 CR 832 (prosecutor improperly attempted to introduce evidence that defendant once belonged to a street gang); *People v. Walkey* (1986) 177 CA3d 268, 223 CR 132 (expert testimony about "battering parent syndrome" deemed impermissible character evidence); *People v. Perez* (1981) 114 CA3d 470, 170 CR 619 (gang membership, shooting incident, not logically relevant to a material issue)].

Such relevant evidence is excluded because its probative value is outweighed by its prejudicial effect, in that it may bear too strongly on the jury's view of the present charge or permit the jury to use it as a justification for condemnation irrespective of guilt. In addition, the accused should not be forced to defend himself against acts for which he has not been charged [*People v. Deeney* (1983) 145 CA3d 647, 193 CR 608 (prior wife abuse, where wife died from brain hemorrhage); *People v. Sam* (1969) 71 C2d 194, 77 CR 804, 454 P2d 700 (testimony of previous kicking of people should have been excluded as more prejudicial than probative)].

Assuming that defendant preserved his *Evid Code* § 1101 objection and that the challenged statement was inadmissible as an opinion about his own character for violence when intoxicated, its admission did not cause a miscarriage of justice or render defendant's trial so fundamentally unfair as to constitute a deprivation of due process. Defendant's frank and unsolicited personal evaluation of his own character was far more reliable than typical character evidence. The prosecution's use of defendant's freely offered assessment of his own weakness did not offend fundamental notions of fair trial. Nor, given the other strong evidence against defendant, was a different verdict reasonably probable, had this statement been redacted [*People v. Holloway* (2004) 33 C4th 96, 14 CR3d 212, 91 P3d 164] .

Defendant's plea of not guilty puts the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of

proof [*People v. Daniels* (1991) 52 C3d 815, 277 CR 122, 802 P2d 906 (defendant offered no concession that limited issues); *People v. Rodriguez* (1986) 42 C3d 730, 230 CR 667, 726 P2d 113 (defendant did not isolate issue of identity, via alibi, until after close of prosecution's case-in-chief)].

When the prior misconduct and charged offense involve the same perpetrator and same victim, a broader range of evidence may be presented to show motive, intent, and identity [*People v. Linkenauger* (1995) 32 CA4th 1603, 38 CR2d 868 (evidence of marital discord and prior assaults tended to show intent to murder wife)].

When evidence may be relevant to show a prior criminal relationship existed between co-defendants, the trial court must examine its admissibility with care and extreme caution because of the possibility of substantial prejudice [*People v. Holt* (1984) 37 C3d 436, 208 CR 547, 690 P2d 1207 (defense never placed relationship in issue)].

Evidence cannot be rationally labeled prejudicial when the allegedly prejudicial inferences concerning character are remote and speculative [*People v. Martinez* (1980) 106 CA3d 524, 165 CR 160 (statement by defendant that he could get stolen articles back does not impute character trait of dealing with thieves)].

Evidence of defendant's prior use of martial arts to beat up others was admissible in trial for murder where defendant used martial arts tonfa and a wooden dowel to prove fact other than disposition to commit such acts [*People v. Noguera* (1992) 4 C4th 599, 15 CR2d 400, 842 P2d 1160] .

[ii] Procedure and Burden of Proof

Evidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis. Since prejudicial effect is inherent in such evidence, uncharged offenses are admissible only if they have substantial probative value [*People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757 ; *People v. Smallwood* (1986) 42 C3d 415, 228 CR 913, 722 P2d 197] .

The least degree of similarity between the uncharged act and the charged offense is required in order to prove intent. A greater degree of similarity is required in order to prove the existence of a common design or plan. The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity [*People v. Kelly* (2007) 42 C4th 763, 783-785, 68 CR3d 531, 171 P.3d 548 (in murder prosecution, trial court properly admitted evidence of uncharged crimes as evidence of common design to lure women to defendant's apartment to rob and rape them)].

The trial court determines whether the probative value of the evidence is outweighed by its prejudicial effect and admits it (under this section) or excludes it (under *Evid Code*, § 352) accordingly [*People v. Epps* (1981) 122 CA3d 691, 176 CR 332 (prior dissimilar sexual annoyance); *People v. Archerd* (1970) 3 C3d 615, 91 CR 397, 477 P2d 421 (three prior murders); *People v. Sam* (1969) 71 C2d 194, 77 CR 804, 454 P2d 700 (previous kicking of people)].

For the purpose of admitting evidence under *Evidence Code* section 1101, subdivision (b), the offered evidence must tend to logically, naturally, and by reasonable inference prove the issue upon which it is offered [*People v. Evers* (1992) 10 CA4th 588, 12 CR2d 637] .

The admissibility of evidence of crimes other than those charged depends on three principal factors [*People v. Tassell* (1984) 36 C3d 77, 201 CR 567, 679 P2d 1 ; *People v. Poon* (1982) 125 CA3d 55, 178 CR 375 (assault of young girls would have been admissible in separate rape actions had the rape actions been severed); *People v. Thompson* (1980) 27 C3d 303, 165 CR 289, 611 P2d 883 (evidence of subsequent robbery inadmissible to prove intent to steal at time charged offenses committed)]:

- (1) The materiality of the facts sought to be proved or disproved;

(2) The tendency of the uncharged crime to prove or disprove the material fact; and

(3) The existence of any rule or policy requiring the exclusion of relevant evidence. In order to satisfy the requirement of materiality for the admission of evidence of other crimes against a defendant, the facts sought to be proved may be either ultimate facts or intermediate facts from which the ultimate facts may be presumed or inferred.

Uncharged offenses must be proved by a preponderance of the evidence for the jury to consider them [People v. Carpenter (1997) 15 C4th 312, 63 CR2d 1 (rejecting reasonable doubt and clear and convincing standards); People v. Singh (1995) 37 CA4th 1343, 44 CR2d 644] .

The court need not make a preliminary finding that the government has proved the similar act by a preponderance of the evidence if there is sufficient evidence to support a finding by the jury that the defendant committed the act [Huddleston v. United States (1988) 485 US 681, 108 S Ct 1496, 99 L Ed2d 771 (in prosecution for unlawfully selling blank video tapes, court allowed evidence that defendant had sold large quantities of televisions at suspiciously low prices)].

The possibility of severing relevant from irrelevant portions of the evidence should be considered in order to protect the defendant against reference to other crimes where that evidence does not tend to establish facts that pertain to the proof of the crime charged [People v. Perkins (1970) 7 CA3d 593, 86 CR 585 (prior conviction)].

[iii] Other Crimes Evidence as a Defense

Evid Code § 1101 does not apply only to exclude inculpatory evidence of other crimes committed by a defendant; it applies to any person [People v. Davis (1995) 10 C4th 463, 41 CR2d 826 (evidence of other crimes committed by third person, proffered to show culpability of third person for charged offense, properly excluded as showing only propensity to commit crime)].

[iv] Penalty Phase Use of Other Crimes Evidence

Evidence of other crimes is not inadmissible per se in a penalty phase of a trial. Admission of evidence of other violent crimes on which defendant was neither charged nor convicted (allowed under Pen Code § 190.3(b)) does not violate defendant's due process right [People v. Balderas (1985) 41 C3d 144, 222 CR 184, 711 P2d 480] .

[v] Permissible Uses of Other Crimes Evidence

[A] Common Design or Plan

In a multiple-murder prosecution, the trial court did not abuse its discretion in permitting a witness to testify that defendant had stared at her and followed her home from a nearby store the day before one of the murders. This testimony provided evidence of defendant's "other act" that was relevant to issues apart from his character or disposition, namely identity and common scheme or plan. There was evidence that defendant had followed other victims--including witnesses who testified at trial--to their homes during the middle of the day. Two of the victims were murdered in their apartments in the same complex where this witness resided and at the same time of day, within a short time of this witness's incident, and a third victim was murdered in an adjacent complex. There was evidence that two of the murder victims both had been followed home by a young man of defendant's race. The witness was of a similar age and belonged to the same race and gender as all the murder victims and most of the burglary or attempted burglary victims. The trial court properly could find that the similarity of the incident to the evidence of defendant's stalking behavior in many other instances provided evidence of a common scheme or plan. Nor was the evidence of the incident more prejudicial than probative [People v. Prince (2007) 40 C4th 1179, 1271-1272, 57 CR3d 543, 156 P3d 1015 , cert den 2008 US LEXIS 301] .

To be relevant as a common design or plan, evidence of uncharged misconduct must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. The common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. The evidence that defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that defendant committed the charged offense pursuant to the same design or plan that defendant used in committing the uncharged acts [*People v. Catlin* (2001) 26 C4th 81, 109 CR2d 31, 26 P3d 357 (trial court did not abuse its discretion in admitting evidence regarding the murder of defendant's fifth wife, because the charged and uncharged crimes bore a number of highly distinctive marks; each victim was a close female relative, defendant stood to gain financially in each case, and the cause of death in each case was the same type of poisoning); *People v. Kraft* (2000) 23 C4th 978, 99 CR2d 1, 5 P3d 68, *rhq denied*, (2000), *cert denied sub nom.* 532 US 908 (analysis under § 1101(b) for purposes of determining propriety of joinder of multiple murder counts based on their similarity); *People v. Kipp* (1998) 18 C4th 349, 75 CR2d 716 (uncharged rape and murder to show common plan in rape and murder prosecution); *People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757 (overruling *People v. Tassell* (1984) 36 C3d 77, 201 CR 567, 679 P2d 1 and *People v. Ogunmola* (1985) 39 C3d 120, 215 CR 855, 701 P2d 1173); *People v. Branch* (2001) 91 CA4th 274, 109 CR2d 870 (in a prosecution for sex offenses with a minor, testimony by defendant's adult stepdaughter about sexual acts many years earlier was admissible because it was relevant to establish a common plan or scheme and was relevant to prove lack of mistake or accident on defendant's part when he touched the victim)].

Evidence of design or plan is relevant where the act is undetermined. If it is beyond dispute that the alleged offense occurred, evidence of uncharged acts to prove common design or plan would be merely cumulative, and the prejudicial effect of such evidence would outweigh its probative value [*People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757] .

The test for admissibility is whether the other offenses offered to prove such scheme or plan are sufficiently similar and possess a sufficiently high degree of common features with the act charged that they warrant the inference that if the defendant committed the other acts, he committed the act charged [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554 (in penalty phase of capital trial, jury was entitled to consider evidence that, in all three murders, defendant was motivated by financial gain and immediately set out to create false alibi); *People v. Huber* (1986) 181 CA3d 601, 227 CR 113 (distinctive similarity test met where all three sets of crimes attended by burglary and oral copulation); *People v. Love* (1980) 111 CA3d Supp 1, 168 CR 591 (similar offenses must have distinctive marks that distinguish them from factors always present in same type of crime--here, prostitution); *People v. Thomas* (1978) 20 C3d 457, 143 CR 215 (prior must be nonremote, similar offense committed on similar victim); *People v. Ward* (1968) 266 CA2d 241, 72 CR 46 (subsequent murder)].

When the prosecution attempts to show a consistent *modus operandi*, there must be common marks or identifiers which support the strong inference that the current crime bears the defendant's signature. Where the pattern of conduct shown by the prior crimes is inconsistent and not distinctive, admission of such evidence is error [*People v. Bradford* (1997) 15 C4th 1229, 65 CR2d 145 (type of victim, method of murder, location, and time supported admission as *modus operandi*); *People v. Alcala* (1984) 36 C3d 604, 205 CR 775, 685 P2d 1126 (inconsistencies in locale of crimes, type of victim, and use of photography as a lure)].

The "shared marks" between the current murder and defendant's prior robbery consisting of the fact that the crimes occurred in the same area of the city and that a firearm was used were so indistinctive as to have virtually no probative value [*People v. Harvey* (1984) 163 CA3d 90, 208 CR 910] .

The fact that both crimes were committed by two men is not sufficient as criminal signature and prior conviction should not have been admitted [*People v. Felix* (1993) 14 CA4th 997, 18 CR2d 113] .

Prior acts with the same and similar victims under nearly identical circumstances are admissible. Evidence of similar offenses by a defendant that shows a common design or plan can be admitted not only to show identity or intent, but also to show a clear connection between the charged and uncharged offenses. These connections may give rise to a logical inference that if the defendant is guilty of one offense, he is also guilty of the other [*People v. Haslouer* (1978) 79 CA3d 818, 145 CR 234] .

The circumstance that the uncharged offense occurred after the charged offense does not lessen its relevance in demonstrating the existence of a common design or plan [*People v. Balcom* (1994) 7 C4th 414, 27 CR2d 666, 867 P2d 777 (evidence of a subsequent similar attack held admissible)].

In most sex offense cases there are sound reasons of policy and logic for viewing a common scheme or plan as the basis for admissibility. The offense almost always occurs in private. The only direct witnesses are the prosecuting witness and the defendant. Although circumstantial evidence supplies occasional corroboration, conviction usually hinges upon the credibility of the prosecuting witness. Since the defendant is entitled to an instruction telling the jury to view the prosecuting witness's testimony with caution, evidence of similar offenses becomes relevant because it is necessary [*People v. Jackson* (1980) 110 CA3d 560, 167 CR 915 (similar, nonremote prior sex offenses to corroborate victim's testimony on intent); *People v. Van De Water* (1980) 108 CA3d 166, 166 CR 321 (evidence of prior sex acts with girls other than victim admissible if not too remote and not with persons similar to victim)].

Examples--Common Plan or Scheme Has Several Meanings

- Single continuing conception or plot [*People v. Ogunmola* (1985) 39 C3d 120, 215 CR 855, 701 P2d 1173 (overruled by *People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757); *People v. Tassell* (1984) 36 C3d 77, 201 CR 567, 679 P2d 1 (overruled by *People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757); *People v. Garnica* (1981) 121 CA3d 727, 175 CR 521 (uncharged attempted murder a week before subject homicide)].

- Characteristic method (i.e., modus operandi) [*People v. Barney* (1983) 143 CA3d 490, 192 CR 172 (modus operandi may be used to support credibility of sex crime witness); *People v. Green* (1983) 146 CA3d 369, 194 CR 128 (prior uncharged gasoline-type arson fire admissible); *People v. Johnson* (1981) 123 CA3d 106, 176 CR 390 (in theft and passing bad checks case, credit cards in four names and checks were admissible); *People v. Ing* (1967) 65 C2d 603, 55 CR 902, 422 P2d 590 (prior rapes)].

- Defendant's disposition toward the victim [*People v. Garrett* (1994) 30 CA4th 962, 36 CR2d 33 (wife's fear of defendant, her knowledge of his prior conviction for manslaughter, and that he had beaten her on several occasions); *People v. Stewart* (1986) 181 CA3d 300, 226 CR 252 (photographs of defendant and victim showing prior incestuous conduct)].

- Design [*People v. Duncan* (1981) 115 CA3d 418, 171 CR 406 (design to prevent arrest); *People v. Peete* (1946) 28 C2d 306, 169 P2d 924 (previous murder)].

[B] Identity

To be admissible on the issue of identity, an uncharged crime must be highly similar to the charged offenses, so similar as to serve as a signature or fingerprint. Defendant's previous possession of a gun, even a similar gun, was not so distinctive on these facts as to serve as a signature or a fingerprint supporting a conclusion that because he had committed the earlier offense he must have committed the one for which he was on trial. However, admission of the testimony was clearly harmless beyond a reasonable doubt because a police officer testified that he saw defendant shoot

two of the victims [*People v. Barnwell* (2007) 41 C4th 1038, 1056-1057, 63 CR 3d 82, 162 P3d 596] .

Proof of identity requires the greatest degree of similarity between the uncharged act and the charged crime. In order to be admissible to prove identity, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The characteristics must be so unusual and distinctive as to be like a signature. Evidence of identity is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator [*People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186 (no prejudice from admission of evidence offered to prove identity that was also properly offered to prove intent); *People v. Stanley* (2006) 39 C4th 913, 934, 47 CR3d 420, 140 P3d 736 (more than sufficient similarity between robbery murder, robbery with attempted murder, and uncharged robberies to prove identity, means, and plan); *People v. Kipp* (1998) 18 C4th 349, 75 CR2d 716 (uncharged rape and murder to show identity in rape and murder prosecution); *People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757] .

Trial court did not abuse its discretion in ruling jury could legitimately infer from evidence of 1983 crimes that same person committed 1987 crimes, in light of distinctiveness and similarity of shared characteristics [*People v. Gray* (2005) 37 C4th 168, 203, 33 CR3d 451 ; *People v. Roldan* (2005) 35 C4th 646, 705, 27 CR3d 360, 110 P3d 289 (prosecution for robbery)].

Strength of inference in any case depends on degree of distinctiveness of individual shared marks, and number of minimally distinctive shared marks [*People v. Carter* (2005) 36 C4th 1114, 1148, 32 CR3d 759, 117 P3d 476] .

When evidence of prior conduct is admitted to prove identity, it is probative only to the extent that distinctive common marks give logical force to the inference of identity [*People v. Erving* (1998) 63 CA4th 652, 73 CR2d 815 (evidence of nearly 40 fires set in defendant's childhood residences and surrounding neighborhood admissible to show identity of arsonist); *People v. Sequeria* (1981) 126 CA3d 1, 179 CR 249 (prior robbery); *People v. Elder* (1969) 274 CA2d 381, 79 CR 466 (prior burglary)].

Defendant's solicitation of murder of witness was highly probative of defendant's consciousness of guilt, which in turn was probative of his identity as perpetrator of the charged offenses [*People v. Wilson* (1992) 3 C4th 926, 13 CR2d 259, 838 P2d 1212] .

Testimony that defendant picked up a blonde prostitute and paid her to orally copulate him while two women he was riding with watched was relevant to show conduct of defendant in common with the behavior of a murderer of prostitutes [*People v. Clark* (1992) 3 C4th 41, 10 CR2d 554, 833 P2d 561 ; *People v. Diaz* (1992) 3 C4th 495, 11 CR2d 353, 834 P2d 1171 (evidence of uncharged criminal activity admissible to prove identity on the basis of similarity to the charged offense)].

Defendant's attempt, a week after a double murder, to kill a witness to whom he had admitted those murders was probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses [*People v. Harrison* (2005) 35 C4th 208, 230, 25 CR3d 224, 106 P3d 895 , cert den *Harrison v. California* 2005 U.S. LEXIS 6432] .

When offered to show that certain injuries are the result of child abuse, rather than accident, evidence of prior injuries are relevant even though it does not purport to prove identity of person who inflicted injuries [*Estelle v. McGuire* (1991) 502 US 62, 112 S Ct 475, 116 L Ed2d 385] .

An admission that is made in part in the form of a threat need not be independently admissible as proof of identity under *Evid Code* § 1101(b) in order to qualify for use at trial. To prove identity under *Evid Code* § 1101(b), the act must contain distinctive characteristics that are so unusual as to be like a signature. Admissions that tend to prove that the declarant committed a charged offense are not offered as other crimes evidence, but instead are offered simply as

statements made by a defendant that in and of themselves tend to prove that defendant committed a charged offense. These statements are admissible to prove the identity of the perpetrator regardless of whether they demonstrate "distinctive characteristics" akin to a signature [*People v. Robinson (2000) 85 CA4th 434, 102 CR2d 179* (no error to admit defendant's former girlfriend's testimony about defendant's threats made to that girlfriend days after victim's body was recovered)].

[C] Knowledge

It is not necessary to prove that defendant committed a prior crime; presence at the earlier scene was relevant to establish familiarity with an illegal drug [*People v. Goodall (1982) 131 CA3d 129, 182 CR 243* (watched another pour PCP down the drain)].

Defendant's statement that he had used heroin before was relevant to establish that defendant had knowledge of the nature of the substance alleged to be in his possession [*People v. Thornton (2000) 85 CA4th 44, 101 CR2d 824*].

In a prosecution for vehicular homicide not involving alcohol, trial court properly admitted evidence of defendant's prior drunk driving arrests and participation in educational program to prove defendant's knowledge of consequences of reckless operation of motor vehicle [*People v. Ortiz (2003) 109 CA4th 104, 134 CR2d 467*].

In a prosecution for drug offenses, the prosecution may introduce evidence of a prior uncharged drug arrest to show knowledge of drugs, even if the earlier search was improper, when (1) the police agencies were separate, (2) there was no showing of collusion between them, and (3) a substantial amount of time elapsed between the two incidents [*People v. Beuer (2000) 77 CA4th 1433, 92 CR2d 572*].

[D] Motive

Evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable. Motive is not a matter whose existence the prosecution must prove or whose nonexistence the defense must establish. Nonetheless, proof of the presence of motive is material as evidence tending to refute or support the presumption of innocence [*People v. Roldan (2005) 35 C4th 646, 707, 27 CR3d 360, 110 P3d 289*, cert denied, *Roldan v. California* 546 US 986, 126 S Ct 570, 163 L Ed2d 477 (in robbery prosecution, no error in admission of evidence of prior robbery)].

When the commission of a criminal act is a disputed issue, evidence of motive may become relevant to that issue. Motive is itself a state-of-mind or state-of-emotion issue. Motive is an idea, belief, or emotion that impels or incites one to act in accordance with his state of mind or emotion. Thus evidence that defendant committed an uncharged offense, offered to prove motive, meets the test of relevancy by virtue of the circumstantial evidence reasoning process that accepts as valid the principle that one tends to act in accordance with his state of mind or emotion [*People v. Pic'l (1981) 114 CA3d 824, 171 CR 106*, overruled on other grounds, in *People v. Kimble (1988) 44 C3d 480, 244 CR 148*].

When the uncharged offenses indicate the emotion of sexual passion toward a particular person, the statutory exclusion is inapplicable because the evidence tends to prove that the defendant would act to realize his desire [*People v. Barney (1983) 143 CA3d 490, 192 CR 172* (evidence is not dependent upon defendant's bad character or disposition to do bad acts)].

Evidence of criminal purposes of a gang is relevant to prove motive for a specific shooting [*People v. Williams (1997) 16 C4th 153, 66 CR2d 123*, (victim wearing opposing gang's colors in conflict area); *People v. Dominguez (1981) 121 CA3d 481, 175 CR 445*].

When the prosecution seeks to prove that a killing was premeditated and the defense asserts self-defense, evidence of defendant's motive tending to establish his or her state of mind satisfies the materiality requirement [*People v. Pertsoni* (1985) 172 CA3d 369, 218 CR 350 (uncharged incident where defendant shot at Yugoslav official admissible as evidence of motive)].

In prosecution for murder with special circumstances, evidence of prior prison term served for attempted rape was properly admitted to show motive of avoiding having to return to prison and was not precluded by *Evid Code* § 1101 [*People v. Heishman* (1988) 45 C3d 147, 246 CR 673] .

After establishing that a debtor-creditor relationship existed between the defendant and the victim, evidence that there were debts in arrears was relevant to show defendant's motive for murdering his creditor. The relevance outweighed the risk of undue prejudice [*People v. Edelbacher* (1989) 47 C3d 983, 254 CR 586] .

Evidence of robberies would be relevant and admissible to show motive and intent to commit at time of attempted murders by firing on police in order to avoid going back to prison for robberies defendant knew he was under investigation for [*People v. Daly* (1992) 8 CA4th 47, 10 CR2d 21] .

In a gang-related murder prosecution, the trial court did not abuse its discretion in permitting the prosecution to introduce evidence that defendant was involved in another drive-by shooting about five years earlier. The prior incident, which was also gang-related, was relevant to prove defendant's intent and motive, and the prejudicial effect of the evidence did not substantially outweigh its probative value [*People v. Zepeda* (2001) 87 CA4th 1183, 105 CR2d 187] .

Evidence that defendant previously pointed a gun at a person other than the victim is inadmissible in a murder trial to prove the defendant's motive and intent in killing the victim, but is admissible, if at all, only to rebut the defendant's claim of self-defense [*People v. Simon* (1986) 184 CA3d 125, 228 CR 855] .

[E] Evidence of Intent Admissible

Proof of intent requires the least degree of similarity between the uncharged act and the charged crime. In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance [*People v. Demetrulias* (2006) 39 C4th 1, 45 CR3d 407, 137 P3d 229 (evidence of uncharged robbery properly admitted in prosecution for similar robbery the same night); *People v. Burnett* (2003) 110 CA4th 868, 2 CR3d 120 (evidence that defendant previously killed a dog was properly admissible in trial for animal cruelty where defendant raised issue of intent by claiming accident as a defense); *People v. Kipp* (1998) 18 C4th 349, 75 CR2d 716 (uncharged rape and murder to show intent in rape and murder prosecution); *People v. Ewoldt* (1994) 7 C4th 380, 27 CR2d 646, 867 P2d 757 ; *People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186 (defendant's prior use of "good Samaritan ploy" to rob and attempt to kidnap stranded female motorist was sufficiently similar to his later conduct against murder victim to support the inference that he harbored similar intent to rob victim); *People v. Gilbert* (1992) 5 CA4th 1372, 7 CR2d 660 ; *People v. Cole* (2004) 33 C4th 1158, 17 CR3d 532] .

If defendant intended permanently to deprive prior victim of his money, jury legitimately could infer he harbored same intent toward present victim; although defendant argued intent to deprive was not in issue, it nevertheless was part of prosecution's burden to prove that intent [*People v. Roldan* (2005) 35 C4th 646, 707, 27 CR3d 360, 110 P3d 289 , cert den *Roldan v. California* 2005 U.S. LEXIS 8008] .

When a defendant does not concede the issue of intent at trial, all elements of the crime are placed in issue by a plea of not guilty, and other crimes' evidence is admissible to prove intent [*People v. Brandon* (1995) 32 CA4th 1033, 38 CR2d 751 (intent to rob)].

In a prosecution for murder, robbery, and burglary, the trial court did not abuse its discretion in admitting evidence of

uncharged robberies, because these incidents, although not particularly distinctive, were sufficiently similar to the charged offense to support an inference that defendant harbored the same intent in both instances--that is, to forcibly obtain cash from the victim. Furthermore, this was not a case in which evidence of uncharged crimes was merely cumulative, and the trial court limited any prejudicial effect of the uncharged crimes through its instructions to the jury [*People v. Lewis* (2001) 25 C4th 610, 106 CR2d 629, 22 P3d 392] .

When defendant placed in issue his sincerity to agreement for murder conspiracy, prior conviction for conspiracy to murder was admissible to prove his intent was genuine, and to show intent to kill [*People v. Quartermain* (1997) 16 C4th 600, 66 CR2d 609] .

Evidence of crimes or misconduct committed by a defendant after the charged incident may be relevant. If evidence of an uncharged offense is relevant, there is no distinction between an offense that is prior to and one that is subsequent to the date of the charged offense. If a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults on the same victim, offered on disputed issues such as intent, are admissible based solely on the consideration of identical perpetrator and victim. Also, the least degree of similarity between the uncharged act and the charged offense is required to prove intent [*People v. Garcia* (2001) 89 CA4th 1321, 107 CR2d 889 (the trial court properly admitted evidence of defendant's 1996 violation of a restraining order and battery on the victim, because evidence of crimes or misconduct committed after the charged incident may also have relevance)].

[F] Evidence of Intent Inadmissible

Because intent is not an element of the corpus delicti of forcible rape or of oral copulation, where defendant uses consent as a defense, there is no new issue concerning the defendant's intent. This defense only disputes the alleged victim's state of mind. Therefore, evidence of prior uncharged act is only tangentially probative, and it is error to admit them solely to bolster the complaining witness's credibility or to impeach the defendant [*People v. Key* (1984) 153 CA3d 888, 203 CR 144 (possible disagreement with *People v. Salazar* (1983) 144 CA3d 799, 193 CR 1)].

When defendant does not place intent in issue, it is error to admit evidence of other offenses to prove intent. It was also error for the judge not to instruct the jury that the evidence should not be considered as proof of criminal disposition [*People v. Willoughby* (1985) 164 CA3d 1054, 210 CR 880] .

The evidentiary value of uncharged offense evidence is substantial when it logically tends to prove intent to commit the present crime. Where the specific intent to commit the uncharged offense is not established, the danger of undue prejudice is great and the evidence should not be admitted [*People v. Kronemyer* (1987) 189 CA3d 314, 234 CR 442 (in grand theft case it was error to admit evidence of previous endorsement of checks by victim to defendant where the inference of intent to steal was not the only reasonable inference to be drawn)].

[G] Means

When defendant used the same vehicle and gun to commit another crime later the same day, this evidence tends to show that defendant had means necessary to commit the charged crime [*People v. Harris* (1981) 28 C3d 935, 171 CR 679 (murder weapon and car stolen from victims used in bank robbery)].

[d] Standard on Appeal

The appellate court reviews for abuse of discretion a trial court's ruling under *Evid Code* § 1101 [*People v. Roldan* (2005) 35 C4th 646, 705, 27 CR3d 360, 110 P3d 289 ; *People v. Rogers* (2006) 39 C4th 826, 862, 48 CR3d 1, 141 P3d 135] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsGeneral OverviewEvidenceGeneral
OverviewInsurance LawMotor Vehicle InsuranceExclusionsHousehold Members



129 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.03

19.03 Evidence of Character by Criminal Defendant--Evid Code § 1102

[1] Evid Code § 1102 Text

■ *Evid Code § 1102. 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).**

LegH: 1965 ch. 299.

[2] Commission Comments

Under *Evid Code § 1102*, the accused in a criminal case may introduce evidence of his good character to show his innocence of the alleged crime, provided that the character or trait of character to be shown is relevant to the charge made against him [Cal Law Rev Com Comment].

Three kinds of evidence are theoretically permitted to prove character as circumstantial evidence of conduct:

1. evidence as to reputation; or
2. opinion evidence as to character; and
3. evidence of specific acts indicating character.

Thus, under *Evid Code § 1102* the defendant in a criminal case is given the right to introduce character evidence that would be inadmissible in a civil case, the reason being that evidence of the character of the defendant, though weak, may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt. In addition, since his life or liberty is at stake, the defendant should not be deprived of the right to introduce evidence even of such slight probative value [Cal Law Rev Com Comment].

Evid Code §§ 1101 and 1102 make it clear that the prosecution may not, on its own initiative, use character evidence to prove that the defendant had the disposition to commit the crime charged; but, if the defendant first introduces evidence of his good character to show the likelihood of innocence, the prosecution may meet his evidence by introducing evidence of the defendant's bad character to show the likelihood of guilt [Cal Law Rev Com Comment].

[3] Case Notes

Evid Code § 1102 allows an accused to present expert opinion testimony on "lack" of deviance as a relevant character trait in a lewd and lascivious conduct case [*People v. Stoll* (1989) 49 C3d 1136, 265 CR 111, 783 P2d 698] .

"Reputation is not what a character witness may know about defendant. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of him either by the witness or others" [*People v. Felix* (1999) 70 CA4th 426, 82 CR2d 701 (witness's statement that defendant had a reputation as a heroin user inadmissible because based directly on witness's conversation with defendant and personal knowledge concerning defendant's heroin use)].

When a defendant calls character witnesses, the defendant is exposed to the risk of the prosecution subjecting the witnesses on cross-examination to questions that deal with reports or rumors of the defendant's conduct inconsistent with his reputation as testified to by the witnesses [*People v. Kramer* (1968) 259 CA2d 452, 66 CR 638 (reputation as abortionist)].

The court must supervise the cross-examination to prevent the prosecution from either taking random shots at a reputation imprudently exposed or from asking groundless questions to prevent the jury from hearing an improper innuendo [*People v. Eli* (1967) 66 C2d 63, 56 CR 916 (prior misconduct)].

The trial court is vested with the discretion to control the cross-examination and limit the number of witnesses to prevent excesses in efforts to destroy or rehabilitate character evidence. The trial court must employ its discretion scrupulously to prevent cross-examination based on mere fantasy; the cross-examiner must be required to show that the questions are asked in good faith [*People v. Eli* (1967) 66 C2d 63, 56 CR 916 (prior misconduct); *People v. Hurd* (1970) 5 CA3d 865 (prior arrest); *People v. Kramer* (1968) 259 CA2d 452, 66 CR 638 (reputation as abortionist)].

Good faith on the part of the prosecution requires, in addition to factual support, that the question be asked in anticipation of an affirmative response and not simply for the purpose of getting an innuendo before the jury [*People v. Gonzales* (1967) 66 C2d 482, 58 CR 361 (challenge to character witness, accuracy in assessing the defendant's reputation); *People v. Kramer* (1968) 259 CA2d 452, 66 CR 638 (reputation as abortionist)].

To ensure that good faith questions are asked, the trial court should first ascertain, outside the presence of the jury, that the target of the question was an actual event. This principle applies even where the questions challenge the accuracy of the character witness's assessment, as their purpose is preventing the creation through innuendo of facts that cannot be established by proof [*People v. Gonzales* (1967) 66 C2d 482, 58 CR 361 (challenge to character witness, accuracy in assessing the defendant's reputation); *People v. Eli* (1967) 66 C2d 63, 56 CR 916 (prior misconduct); *People v. Kramer* (1968) 259 CA2d 452, 66 CR 638 (reputation as abortionist)].

When the witness bases an opinion on personal acquaintance with defendant and acquaintance with people who knew defendant, the prosecution should be permitted to cross-examine to test the witness's knowledge, including knowledge or lack of knowledge of well-founded rumors of defendant's misconduct inconsistent with the character traits to which he or she testified [*People v. Hurd* (1970) 5 CA3d 865, 85 CR 718 (prior offenses)].

Witnesses expressing an opinion as to the good character of a defendant may be cross-examined as to defendant's prior unprosecuted bad acts even if the witnesses did not have knowledge of the acts. Anticipation of an affirmative response

is required for reputation evidence but not opinion evidence [*People v. Hempstead* (1983) 148 CA3d 949, 196 CR 412 (opinion is a mixture of personal knowledge and knowledge of reputation)].

Evid Code § 1108 permits the prosecution to prove a defendant's sexual propensity through evidence of specific instances of conduct; it does not alter *Evid Code § 1102*'s rule that opinion evidence about a defendant's character is inadmissible unless the defendant first places his or her character in issue [*People v. McFarland* (2000) 78 CA4th 489, 92 CR2d 884] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Trials Examination of Witnesses Cross-Examination Evidence Testimony General Overview



130 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.04

19.04 Character Evidence of Crime Victim--Admissibility--Evid Code § 1103

[1] Evid Code § 1103 Text

■ *Evid Code § 1103.*

(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 sections, 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' 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' 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' 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.

LegH: 1965 ch. 299, 1974 ch. 569 (Robbins Rape Evidence Law renumbered the paragraphs and added subdivision (2) making inadmissible prior sexual conduct of the complaining witness generally), 1981 ch. 726, 1990 ch. 268, 1991 ch. 16 urgency eff. Mar. 18, 1991, 1996 ch. 1075, 1998 ch. 127 (added new subsection (c)(2) pertaining to manner in which the victim was dressed, and renumbered prior (c)(2) to (c)(3), (c)(3) to (c)(4), (c)(4) to (c)(5), and (c)(5) to (c)(6)).

[2] Commission Comments

Under *Evid Code* § 1103, the defendant may introduce evidence of the character of the victim of the crime where the conduct of the victim in conformity with his character would tend to exculpate the defendant; and if the defendant introduces evidence of the bad character of the victim, the prosecution may introduce evidence of the victim's good character [Cal Law Rev Com Comment to *Evid Code* § 1102].

Thus, under Section 1103, the defendant in a criminal case is given the right to introduce character evidence that would be inadmissible in a civil case. The reason for the distinction is that evidence of the character of the victim, though weak, may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt. In addition, since his life or liberty is at stake, the defendant should not be deprived of the right to introduce evidence even of such slight probative value [Cal Law Rev Com Comment to *Evid Code* § 1102].

Three kinds of evidence as to character are permitted to prove character as circumstantial evidence of conduct:

1. Evidence as to reputation.
2. Opinion evidence as to character.
3. Evidence of specific acts indicating character [Cal Law Rev Com Comment].



Timing:

Ex post facto challenge to character evidence under *Evid Code* § 1103 is rejected for failure to object at

trial pursuant to *Evid Code* § 352 [*People v. Hasley* (1993) 12 CA4th 885, 16 CR2d 47] .

[3] Case Notes

On appeal from conviction of murder, expressly leaving open issue of whether *Evid Code* § 1103(c)(1) applies when none of enumerated sex crimes is charged as substantive offense; trial court properly excluded evidence as unduly prejudicial under *Evid Code* § 352 [*People v. Stitely* (2005) 35 C4th 514, 547-548 & n16, 26 CR3d 1, 108 P3d 182] .

Prior false accusation of sexual molestation is relevant to molest victim's credibility, just as prior false accusation of rape is relevant to rape victim's credibility. The conduct being placed before the jury is the making of the false statement, not the sexual conduct that is the content of the statement. The sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility; rather, the jury is asked to draw such an inference from the fact that she stated as true something that was false. Such evidence is admissible under *Evid Code* § 1103(a)(1) as well as other sections [*People v. Franklin* (1994) 25 CA4th 328, 30 CR2d 376] .

Evidence that a victim would falsely accuse someone other than defendant of rape establishes her character trait of threatening to make false allegations of rape, but such evidence is made inadmissible by *Evid Code* § 787 [*People v. Jones* (1984) 155 CA3d 153, 202 CR 162] .

Where the evidence of allegations of a rape victim's alleged prior false accusations has relevancy beyond merely attacking the victim's credibility [*Evid Code* § 787] as a witness but is relevant on the substantive issue of defendant's guilt or innocence, it is admissible under *Evid Code* § 1103 [*People v. Burrell-Hart* (1987) 192 CA3d 593, 237 CR 654 (trial court's error in refusing to admit evidence was harmless)].

An exception to the rape shield laws is when the credibility of the victim is more probative than prejudicial (most often when victim's prior sexual history involves prostitution); however, the rape shield statutes do not permit the trial judge to make a credibility determination at the in camera hearing [*Evid Code* § 782], just an *Evid Code* § 352 analysis [*People v. Chandler* (1997) 56 CA4th 703, 65 CR2d 687 (error to exclude two witnesses regarding victim's past history of trading sex for drugs because witnesses not believable, error harmless)].

In a prosecution for assault with the intent to commit forcible oral copulation, character evidence as to the female victim's aggressive pursuit of male attentions is admissible on the contested issue of whether the victim responded positively to the defendant's sexual advances. The evidence is not barred by *Evid Code* § 1103(2)(a), because the assault was not with the intent to commit rape. It is not error, however, for the trial court to exclude this evidence if its probative value is slight compared to its prejudicial effect [*People v. Covino* (1980) 100 CA3d 660, 161 CR 155] .

In a forcible oral copulation case, denial of a new trial on the ground of newly discovered evidence concerning the habits and credibility of the complainant and her specific false acts was error [*People v. Randle* (1982) 130 CA3d 286, 181 CR 745] .

Evidence of victim's subsequent, as well as prior, acts of violence is relevant to prove victim's violent character at time of the earlier crime. "Character is a more or less permanent quality and we may make inferences from it either forward or backward" (5 Wigmore, Evidence (Chadbourn rev. ed. 1974) § 1618, p. 595.) [*People v. Shoemaker* (1982) 135 CA3d 442, 185 CR 370 (evidence excluded here because more prejudicial than probative)].

The 1982 initiative measure, The Victims' Bill of Rights, Cal Const, art I, § 28(d) expressly states that it does not affect this *Evid Code* § 1103 [*People v. Shoemaker* (1982) 135 CA3d 442, 185 CR 370] .

See also *Pen Code* § 1112, which bars the court from ordering a psychiatric examination of a sexual assault victim for the purpose of assessing the victim's credibility [*People v. Fleming* (1983) 140 CA3d 540, 189 CR 619 (statute does

not deprive defendant of right to compulsory process)].

Solicitation of the act of prostitution is "sexual conduct" within the meaning of *Evid Code* §§ 782 and 1103 [*People v. Casas* (1986) 181 CA3d 889, 226 CR 285] .

Under *Evid Code* § 1103, a defendant cannot introduce evidence of a victim's prior sexual activity based solely on her testimony denying consent. *Evidence Code* section 782 requires a sworn offer of proof [*People v. Rioz* (1984) 161 CA3d 905, 207 CR 903] .

In a murder prosecution, application of *Evid Code* § 1103(b) (admissibility of evidence of defendant's violent acts and reputation for violence where defendant presents such evidence regarding victim) did not violate defendant's constitutional rights [*People v. Blanco* (1992) 10 CA4th 1167, 13 CR2d 176] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals Reviewability Preservation for Review Failure to Object Evidence Procedural Considerations Objections & Offers of Proof Offers of Proof Legal Ethics Prosecutorial Conduct



131 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.05

19.05 Evidence of Care or Skill to Prove Conduct--Evid Code § 1104

[1] Evid Code § 1104 Text

■ *Evid Code § 1104.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, and the like, warrants a fixed exclusionary rule [Cal Law Rev Com Comment].

[3] Case Note

Once an employer has admitted before trial to vicarious liability for its employee's negligence, if proven, the exclusionary rule of *Evid Code § 1104* 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 on a negligent entrustment theory [*Jeld-Wen, Inc. v. Superior Court* (2005) 131 CA4th 853, 870, 32 CR3d 351 (trial court erred in denying motion for summary adjudication as to employer)].

Evidence relating to a general character trait for care or skill, or lack thereof, is clearly distinguishable from that establishing a custom or habit of doing some particular thing in a particular way [*Webb v. Van Noort* (1966) 239 CA2d 472, 48 CR 823 (driving habits of deceased driver)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSummary JudgmentEvidenceCriminal Law & ProcedureSearch & SeizureExclusionary RuleGeneral
OverviewTortsVicarious LiabilityEmployersGeneral Overview



132 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.06

19.06 Habit, Custom to Prove Conduct on Specific Occasion--Evid Code § 1105

[1] Evid Code § 1105 Text

- *Evid Code § 1105.*

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

LegH: 1965 ch. 299.

[2] Commission Comments

Evidence of motive or habits (a regular response to a repeated situation) is admissible even where evidence of a person's character (his general disposition or propensity to engage in a certain type of conduct) is inadmissible [Cal Law Rev Com Comment].

Evid Code § 1105 does not contain the "no eyewitness" limitation, because eyewitnesses can be mistaken or dishonest and the trier of fact should be allowed to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case [Cal Law Rev Com Comment].

[3] Case Notes

When habit evidence is sought to be introduced on the issue of negligence, to be admissible the evidence must be limited to conduct that constitutes a habit (i.e., a person's regular practice of meeting a particular kind of situation with a specific type of conduct), thus indicating that the doing of the act is semi-automatic, and that it must not be too remote in time or space from the time and place of the specified occurrence [*Webb v. Van Noort* (1966) 239 CA2d 472, 48 CR 823 (driving habits of deceased driver); *People v. Webb* (1993) 6 C4th 494, 24 CR2d 779, 862 P2d 779 (evidence of victim's habit of storing household money in baby food jars is admissible when there was ample evidence of repeated instances of similar conduct); *Marshall v. Brown* (1983) 141 CA3d 408, 190 CR 392 (evidence of defendant employer's policy of giving bad recommendations was admissible as habit evidence to prove conduct on a specific occasion)].

Habit evidence may be used to establish lack of negligence [*Dincau v. Tamayose* (1982) 131 CA3d 780, 182 CR 855 (may have incidental effect of impeaching contradictory testimony)].

Evidence that a doctor did not know whether patients' bills were paid, that the doctor left the matter of payment to his staff, and that he never refused to treat a patient because of the inability to pay were admissible to show custom and habit so as to negate allegations that the doctor performed unnecessary surgery to earn medical fees [*Tillery v. Richland* (1984) 158 CA3d 957, 205 CR 191] .

Evidence of murder victim's habit of segregating into an envelope money she wished to spend for a particular purpose was admissible as tending to establish that defendant had robbed her of such an envelope at time of killing [*People v. McPeters* (1992) 2 C4th 1148, 9 CR2d 834, 832 P2d 146] .

Insurance claims files might contain evidence, or contacts leading to evidence, supporting plaintiff's discrimination theory, and thus her bad faith cause of action against insurance company [*Permanent Gen. Assurance Corp. v. Superior Court* (2004) 122 CA4th 1493, 19 CR3d 597] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceRelevanceRoutine PracticesInsurance LawBad Faith & Extracontractual LiabilityGeneral
OverviewTortsNegligenceProofCustomGeneral Overview



133 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.07

19.07 Evidence of Plaintiff's Sexual Conduct--Evid Code § 1106

[1] Evid Code § 1106 Text

■ *Evid Code § 1106.*

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

(b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

(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.

LegH: 1985 ch. 1328.

[2] Case Notes

"Perpetrator," as used *Evid Code § 1106(b)* (excluding evidence of plaintiff's sexual conduct in a civil action for sexual harassment except for "the plaintiff's sexual conduct with the alleged perpetrator"), includes both a named defendant and any other person for whom a plaintiff would hold a named defendant liable. "Sexual conduct" includes all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity [*Rieger v. Arnold* (2002) 104 CA4th 451, 128 CR2d 295 (holding in employee's action alleging sexually harassing hostile work environment that there was adequate admissible evidence to prove that plaintiff did not find her job environment to be hostile)].

Evid Code § 1106 did not apply to medical malpractice action against a psychologist where the complaint alleged sexual contact with a patient [*Patricia C. v. Mark D. (1993) 12 CA4th 1211, 6 CR2d 71*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorFamily LawMarital Duties & RightsCauses of ActionLoss of ConsortiumLabor & Employment LawDiscriminationHarassmentSexual HarassmentGeneral Overview



134 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.08

19.08 Expert Witness Testimony on Intimate Partner Battering and its Effects--Evid Code § 1107

[1] Evid Code § 1107 Text

■ *Evid Code § 1107.*

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, 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 intimate partner battering and its effects 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* and may include acts defined in *Section 242, subdivision (e) of Section 243, Section 262, 273.5, 273.6, 422, or 653m 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 Intimate Partner Battering and Its Effects Section of the Evidence Code.

(f) The changes in this section that become effective on January 1, 2005, are not intended to impact any existing decisional law regarding this section, and that decisional law should apply equally to this section as it refers to "intimate partner battering and its effects" in place of "battered women's syndrome."

LegH: 1991 ch. 812, 1992 ch. 163, operative January 1, 1994, 1993 chs. 219, 589 (ch. 219 prevails; ch. 589 not effective), 2000 ch. 1001, 2004 ch. 609.

[2] Legislative Note

The Legislature does not intend *Evid Code* § 1107 to preclude the admissibility of evidence of battered women's syndrome under other statutory or case law.

LegH: 1991 ch. 812.

[3] Case Notes

Battered women's syndrome is a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives [*People v. Humphrey* (1996) 13 C4th 1073, 56 CR2d 142] .

Evidence of battered women's syndrome for purposes of perfect self-defense is generally relevant to the reasonableness, as well as the subjective existence, of defendant's belief in the need to defend and, to the extent it is relevant, the jury may consider it in deciding both questions (i.e., expert testimony about the syndrome is relevant for both elements of perfect self-defense: (1) the actual subjective belief that the defendant was in imminent danger of death or great bodily injury and the acts were necessary to prevent the injury, and (2) a reasonable person in the same circumstances would have had the same perception and done the same acts). However, the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm [*People v. Humphrey* (1996) 13 C4th 1073, 56 CR2d 142 (disapproving *People v. Aris* (1989) 215 CA3d 1178, 264 CR 167 , and *People v. Day* (1992) 2 CA4th 405, 2 CR2d 916 to the extent they are inconsistent with this conclusion); *People v. Gomez* (1999) 72 CA4th 405, 85 CR2d 101 (error to admit expert testimony of syndrome where, other than present offense, no evidence indicating defendant abused or behaved violently toward victim)].

In the underlying prosecution for aiding, abetting, and felony-murder, the decision of defense counsel not to obtain psychological evaluations of a female criminal defendant, regarding battered woman syndrome (BWS) and potential defenses, constituted an unreasonable limitation of investigation that fell below objective standards of prevailing professional norms and precluded counsel from making a knowledgeable tactical decision regarding those possible defenses [*In re Nourn* (2006) 145 CA4th 820, 856, 52 CR3d 31 (deciding on habeas corpus, that counsel's failure to investigate and present BWS defense was prejudicial)]. *But see contra* 145 CA4th at 862-864 (dissent) ("There is simply no authority for the majority's current expansion of the battered woman syndrome. At the end of their logic, my colleagues have turned the battered woman syndrome, a syndrome with the important functions of explaining self-defense and recantation, into a theory of duress [that] would otherwise not be available in a murder case").

Expert testimony on battered women's syndrome is relevant to a defendant's credibility and is critical in permitting the jury to evaluate a defendant's testimony free of the misperceptions regarding battered women [*People v. Humphrey* (1996) 13 C4th 1073, 56 CR2d 142 ; *People v. Day* (1992) 2 CA4th 405, 2 CR2d 916] .

The enactment of *Evid Code* § 1107 legislatively obviated the need to qualify an expert's testimony about battered women's syndrome under *Kelly* standards for experimental evidence [*People v. Humphrey* (1996) 13 C4th 1073, 56 CR2d 142 (conc. opn. of Brown, J.)].

Evid Code § 1107 does not create an exception to *Pen Code* § 29, which prohibits an expert testifying about a defendant's mental illness, disorder, or defect; an expert is precluded from testifying to ultimate issue of defendant's state of mind at time of offense [*People v. Erickson* (1997) 57 CA4th 1391, 67 CR2d 740] .

The prosecution may properly question an expert about the cycle of domestic violence and the effect on the victim of typical abuser behaviors, when the trial court limits the testimony and cautions the jury in response to objections [*People v. Gadlin* (2000) 78 CA4th 587, 92 CR2d 890 , rev. den. (2000)].

[a] To Explain Victim's Recant

An expert may testify regarding battered women's syndrome to explain or offer a motive for a victim's recanting of statements and inconsistencies in the victim's testimony [*People v. Brown (2004)* 33 C4th 892, 16 CR3d 447, 94 P3d 574 (testimony of expert witness would help trier of fact in case of domestic violence, even though there was only one instance of abuse); *People v. Morgan (1997)* 58 CA4th 1210, 68 CR2d 772 (expert testimony did not go to truth of victim's statements but merely discussed nature of syndrome in general, expert expressed no opinion about the victim, and there was no suggestion that expert had ever spoken with victim or knew any of the facts surrounding the case)].

Expert testimony on battered women's syndrome is properly admitted in a prosecution for assault based on defendant's attack on his live-in girlfriend, even if the victim does not recant at trial [*People v. Gadlin (2000)* 78 CA4th 587, 92 CR2d 890 (syndrome testimony probative regarding victim's recantation of prior incident and her decision to resume relationship with defendant before charged incident)].

[b] Necessity of Evidence of Prior Incidents

In a prosecution for spousal assault, a domestic abuse counselor's testimony concerning battered women's syndrome is admissible, even if there is no evidence of prior incidents of abuse [*People v. Williams (2000)* 78 CA4th 1118, 93 CR2d 356, *but see contra* *People v. Gomez (1999)* 72 CA4th 405, 85 CR2d 101] .

Because in this case the evidence was admissible under *Evid Code* § 801, the court would not reach the question of whether expert testimony about the tendency of domestic violence victims to later deny or minimize abuse is admissible when only one incident of abuse has occurred [*People v. Brown (2004)* 33 C4th 892, 16 CR3d 447, 94 P3d 574] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral
OverviewEvidenceTestimonyGeneral OverviewFamily LawFamily Protection & WelfareGeneral Overview



135 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.09

19.09 Criminal Action for Sexual Offense-Evidence of Commission of Other Sexual Offense Not Inadmissible Except as Specified--Evid Code § 1108

[1] Evid Code § 1108 Text

■ *Evid Code § 1108.*

(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.

LegH: 1995 ch. 439, 2001 ch. 517, 2002 chs. 194, 828.



Strategic Point:

Evidence of another sexual offense must be proved by a preponderance of the evidence [*People v. Fitch* (1997) 55 CA4th 172, 63 CR2d 753] .

[2] Case Notes

The legislative history indicates *Evid Code* § 1108 is intended to assure that the trier of fact is made aware of defendant's other sex offenses in evaluating victim's and defendant's credibility since sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence [*People v. Falsetta* (1999) 21 C4th 903, 89 CR2d 847] .

Court must engage in *Evid Code* § 352 balancing test and consider other sexual offense with such factors as "its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense" [*People v. Reliford* (2003) 29 C4th 1007, 130 CR2d 254 (court must engage in balancing test); *People v. Falsetta* (1999) 21 C4th 903, 89 CR2d 847] .

The precise probative value to be accorded evidence of uncharged sexual misconduct in sex crimes cases will depend on various considerations, such as the frequency of the uncharged acts and their similarity and temporal proximity to the charged acts [*People v. Mabini* (2001) 92 CA4th 654, 112 CR2d 159 (for purposes of extending statute of limitations for child molestation, testimony by a single victim of an uncharged, similar, offense was independent evidence that clearly and convincingly corroborated the victim's allegation)].

When *Evid Code* § 1108 swept away the general prohibition on character evidence set forth in section 1101, it rendered moot the exceptions to that prohibition created by *Evid Code* § 1101(b). Thus, in a sex crime prosecution, the "signature test" (under which the uncharged conduct must be so unusual and distinctive as to be like a signature) is no longer the yardstick for admission of uncharged sexual misconduct to prove identity [*People v. Britt* (2002) 104 CA4th 500, 128 CR2d 290 (rejecting defendant's contention that *Evid Code* § 1108 allows uncharged misconduct evidence only to prove "propensity" not identity)].

Amendment of *Evid Code* § 1108, effective in 2002, to add subdivision (d)(1)(B) including within the definition of

"sexual offense," any conduct proscribed by *Pen Code* § 220, except assault with intent to commit mayhem, only clarified the preexisting statute by explicitly including offenses that previously fell within *Evid Code* § 1108 [*People v. Pierce* (2002) 104 CA4th 893, 128 CR2d 397 (conviction of assault with intent to commit rape is an aggravated form of attempted rape, which before and after the amendment falls within *Evid Code* § 1108)].

In a prosecution for assault and rape of a relative, the prosecution could introduce evidence, under *Evid Code* § 1108, of defendant's prior similar conduct that was a sexual offense, notwithstanding that the prior conduct resulted in a conviction for a crime (unjust imprisonment) that was not a sexual offense [*People v. Lopez* (2007) 156 CA4th 1291, 68 CR3d 376] .

During the penalty phase of a murder trial, the trial court reasonably determined that substantial evidence existed to prove other violent criminal activity by defendant (involving lewd acts committed against another minor), and that this evidence was not unduly prejudicial. A rational trier of fact could have credited the victim's testimony, which generally was detailed, internally consistent, and not in conflict with any other evidence presented, and was sufficient to support a finding beyond a reasonable doubt [*People v. Griffin* (2004) 33 C4th 536, 15 CR3d 743] .

Admitting an incomplete or distorted description of the other sexual offense is reversible error [*People v. Harris* (1998) 60 CA4th 727, 70 CR2d 689 , (high probability of confusion since jury may have speculated why defendant convicted only of burglary and not rape of prior offense)].

Notice of the intent to use other sexual offense need not include "detailed" summary of expected testimony, and prior notice may be discerned from the record of the case [*People v. Soto* (1998) 64 CA4th 966, 75 CR2d 605 (statute only requires notice of statements of witness or summary of expected testimony; defendant on notice use of statements at preliminary hearing)].

A psychiatrist called as an expert witness is precluded from rendering an opinion about the accused's sexual proclivities during the prosecution's case-in-chief, pursuant to *Evid Code* § 1102. Section 1108 does not alter *Evid Code* § 1102 rule that opinion evidence about a defendant's character is inadmissible unless the defendant first places his or her character in issue [*People v. McFarland* (2000) 78 CA4th 489, 92 CR2d 884] .

[a] Constitutionality

Evid Code § 1108 has withstood challenges under due process, equal protection, and ex post facto laws [*Schroeder v. Tilton* (9th Cir 2007) 493 F3d 1083 (ex post facto clause); *People v. Reliford* (2003) 29 C4th 1007, 130 CR2d 254 ; *People v. Falsetta* (1999) 21 C4th 903, 89 CR2d 847 (due process upheld); *People v. Fitch* (1997) 55 CA4th 172, 63 CR2d 753 (not fundamentally unfair to use one sex offense as evidence of disposition to commit a second sex offense, court's use of Section 352 balancing test reduces risk of unfair use of evidence)].

There is a conflict of authorities in sex offense cases arising under *Evid Code* § 1108 over the constitutionality of a guilty verdict returned by a jury instructed with CALJIC No. 2.50.1 and the pre-1999 version of CALJIC No. 2.50.01, which parallels former CALJIC No. 2.50.02. A good discussion of this conflict is presented in *People v. James* (2000) 81 CA4th 1343, 96 CR2d 823 , *rev denied*, (2000) (which opinion was based, however, not on Section 1108, but on Section 1109). This conflict is evidenced in the following cases: *People v. Jeffries* (2000) 83 CA4th 15, 98 CR2d 903 (pre-1999 version of CALJIC No. 2.50.01 adequately conveys People's burden of proof when used with CALJIC Nos. 2.00, 2.01, and 2.50.1; correctness of jury instructions is determined from entire charge of court, not from consideration of parts of instruction or from a particular instruction; case remanded in light of Supreme Court decision on other issues); *People v. Orellano* (2000) 79 CA4th 179, 93 CR2d 866 (trial court may not give jury instruction under pre-1999 CALJIC 2.50.01 (in conjunction with CALJIC 2.50.1 and 2.50.2) that if jury finds defendant had such disposition, they may infer he was likely to commit and did commit current crimes; this instruction would be prejudicially erroneous, even in light of other standard instructions on reasonable doubt).

Evid Code § 1108 is constitutional because the trial court can exclude the evidence if the court believes that its prejudicial nature outweighs its probative value, that its production will consume an undue amount of time, or that it will confuse the issues or mislead the jury [*People v. Frazier* (2001) 89 CA4th 30, 107 CR2d 100 (trial court did not abuse its discretion in admitting evidence of defendant's uncharged sexual misconduct, because it was not unduly prejudicial and did not confuse the jury about the issues)].

[b] Jury Instructions

Defendants may request an instruction based on revised CALJIC No. 2.50.01 (1999) which contains language appropriate for cases involving the admission of disposition evidence [*People v. Reliford* (2003) 29 C4th 1007, 130 CR2d 254 (under CALJIC No. 2.50.01 (2002), evidence of uncharged offense may support inference that defendant had disposition to commit charged offense which, in turn, may support inference that he was likely to and did commit the charged offense); *People v. Falsetta* (1999) 21 C4th 903, 89 CR2d 847 (defendant's proposed instructions too narrow and ambiguous)].

[c] Importance of Timing of Other Sexual Offenses

The remoteness of the prior offense and whether interim offenses occurred are issues to consider before admitting other sexual offense evidence [*People v. Branch* (2001) 91 CA4th 274, 109 CR2d 870 (in a prosecution for sex offenses with a minor, testimony by defendant's adult stepdaughter of prior sexual acts many years earlier was admissible because both the current offenses and the earlier ones were offenses defined as qualifying "sexual offenses" under *Evid Code § 1108(d)*); *People v. Harris* (1998) 60 CA4th 727, 70 CR2d 689 (23-year-old sexual offense with no significant interim offense weighed strongly in favor of exclusion)].

In a prosecution for murder, robbery, and sodomy, the trial court did not abuse its discretion in excluding defendant's relative's juvenile sex offense, which was offered as proof of a propensity to commit the present crimes. The 1973 adjudication was too remote, and the relative was already impeached by two prior crimes of moral turpitude, so the jury was aware of his checkered past [*People v. Abilez* (2007) 41 C4th 472, 502, 61 CR3d 526, 161 P3d 58] .

In a prosecution for various sex offenses involving children, the trial court did not abuse its discretion in admitting evidence of defendant's uncharged sexual misconduct, because it was not unduly prejudicial and did not confuse the jury about the issues. The fact that some of the offenses occurred 15 or 16 years earlier did not make evidence of those offenses irrelevant [*People v. Frazier* (2001) 89 CA4th 30, 107 CR2d 100] .

Evid Code § 1108 does not limit evidence of uncharged sexual offenses to those committed prior to the charged offense [*People v. Medina* (2003) 114 CA4th 897, 8 CR3d 158] .

[d] Patient-Psychotherapist Privilege

When the prosecution seeks records, under *Evid Code § 1108* regarding the defendant's commission of a previous sexual offense, records of psychotherapy that was ordered as a condition of probation are protected by patient-psychotherapist privilege from disclosure [*Story v. Superior Court* (2003) 109 CA4th 1007] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Sentencing Alternatives Probation Conditions Evidence Privileges Psychotherapist-Patient Privilege Elements Governments Legislation Statutes of Limitations General Overview



136 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 19 Character, Habit, and Custom Evidence Code §§ 1100-1109

1-19 California Courtroom Evidence 19.10

19.10 Criminal Action for Domestic Violence, Abuse of Elder or Dependent Person, or Child Abuse-Evidence of Commission Not Inadmissible Except as Specified--Evid Code § 1109

[1] Evid Code § 1109 Text

■ *Evid Code § 1109.*

(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.

LegH: 1996 ch. 261, 1998 ch. 707, 2000 ch. 97, 2004 chs. 116, 823 § 6.5, 2005 ch. 464.

[2] Case Notes

[a] Criminal Cases

Evid Code § 1109 is a limited exception to the general ban (under *Evid Code § 1101*) against using prior acts to infer the defendant's disposition to commit the charged acts, and permits such evidence as the basis for such inference if the defendant is accused of a crime involving domestic violence. In the instant case, to the extent a stalking offense did not require that the threat induced the victim to fear great bodily injury or death, stalking was not a crime of domestic violence (as defined by *Pen Code § 13700*) and therefore the prior violent acts evidence should not have been used by the jury to infer that defendant's disposition made it likely he committed the stalking offense [*People v. Zavala* (2005) 130 CA4th 758, 770, 30 CR3d 398 (trial court erred when it instructed jury on use of prior violent acts evidence, but error was harmless)].

Evid Code § 1108 is a stand-alone statutory exception to the exclusion of propensity evidence mandated by *Evid Code § 1101(a)*. By removing the restriction on character evidence in *Evid Code § 1101*, *Evid Code § 1108* now permits the jury in sex offense cases to consider evidence of prior offenses for any relevant purpose, subject only to the "prejudicial effect versus probative value" weighing process required by *Evid Code § 352* [*People v. Isom* (2006) 145 CA4th 1371, 1379, 52 CR3d 336 (finding no error in admission of prior conviction for sexual offense)].

1998 statutory change to subsection (b) changed notice requirement from 30 days before trial or later for good cause to compliance with *Penal Code section 1054.7* [*People v. Poplar* (1999) 70 CA4th 1129, 83 CR2d 320 (in rape prosecution, rape of a live-in partner is a form of domestic violence, thus § 1109 is applicable; proper to admit evidence that the defendant beat up two prior live-in partners)].

The definition of domestic violence/abuse (reasonable apprehension of imminent serious bodily injury to oneself) encompasses the definition of rape (fear of immediate and unlawful bodily injury to the person). Rape is a higher level of domestic violence, a similar act of control [*People v. Garcia* (2001) 89 CA4th 1321, 107 CR2d 889 (trial court properly admitted evidence of defendant's 1996 violation of restraining order and battery on victim, because evidence of crimes or misconduct committed after charged incident may also have relevance)].

In a prosecution for enhanced aggravated assault under circumstances involving domestic violence under *Pen Code §*

245(a)(1), evidence of other acts of domestic violence by the defendant against the same victim is properly admitted to show that, on the occasion at issue, defendant had the propensity to cause great bodily injury [*People v. Hoover* (2000) 77 CA4th 1020, 92 CR2d 208] .

[b] Constitutionality

Evid Code § 1109(a)(1), which permits the admission of evidence of prior acts of domestic violence, does not violate due process [*People v. Cabrera* (2007) 152 CA4th 695, 61 CR3d 373] .

Evid Code § 1109(a)(2) contains the same procedural safeguards present as *Evid Code* § 1108. The evidence of uncharged acts admissible under *Evid Code* § 1109(a)(2) are limited to those taken against elderly persons, and the trial court has the same discretion under *Evid Code* § 352 to exclude evidence that is unduly prejudicial or time-consuming, or likely to confuse or mislead the jury. In the present case, the prior acts testified to, by prior victims, were both physical assaults with a sexual tone committed on elderly men. They were very similar to the crimes charged in this case and tended to show a propensity to commit such acts. They were no more inflammatory than the acts with which defendant was charged. The trial court did not abuse its discretion in finding that this evidence was not unduly prejudicial. Its admission did not violate defendant's right to due process [*People v. Williams* (2008) 159 CA4th 141, 70 CR3d 845] .

Evid Code § 1109 does not violate due process requirements. The Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of this evidence; and the evidence is still subject to exclusion under *Evid Code* § 352. Moreover, Section 1109 does not lessen the prosecution's burden to prove guilt beyond a reasonable doubt [*People v. Escobar* (2000) 82 CA4th 1085, 98 CR2d 696 ; *Escobar v. California* (2001) 532 US 1053, 121 S.Ct. 2195, 144 L.Ed. 1026 ; *People v. Jennings* (2000) 81 CA4th 1301, 97 CR2d 727 ; *People v. Hoover* (2000) 77 CA4th 1020, 92 CR2d 208 ; *People v. Johnson* (2000) 77 CA4th 410, 91 CR2d 596 ; *People v. Brown* (2000) 77 CA4th 1324, 92 CR2d 433 (admission of prior acts of domestic violence to show propensity does not deprive the defendant of his or her constitutional right to a fair trial under the due process clause, if the trial court balances factors in accordance with *Evid Code* § 352)].

Evid Code § 1109 does not violate equal protection [*People v. Price* (2004) 120 CA4th 224, 15 CR3d 229 , (admitting unavailable spouse's hearsay statements); *People v. Jennings* (2000) 81 CA4th 1301, 1309-1310, 97 CR2d 727] .

Pre-1999 version of CALJIC No. 2.50.01 violated due process by increasing the likelihood that the jury would misuse evidence of prior offenses, allowing conviction based merely on propensity. However, the error is harmless if the reviewing court determines that its effect on the verdict was negligible beyond a reasonable doubt [*People v. James* (2000) 81 CA4th 1343, 96 CR2d 823] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral
OverviewEvidenceGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral Overview



137 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.syn

§ 20.syn Synopsis to Chapter 20: Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

20.01 Mediation Definitions--Evid Code § 1115

[1] Evid Code § 1115 Text

[2] Commission Comments

20.02 Effect of Mediation Chapter on Dispute Resolution Proceedings--Evid Code § 1116

[1] Evid Code § 1116 Text

[2] Commission Comments

20.03 Applicability of Chapter to Mediation--Evid Code § 1117

[1] Evid Code § 1117 Text

[2] Commission Comments

[3] Case Notes

20.04 Oral Agreement--Evid Code § 1118

[1] Evid Code § 1118 Text

[2] Commission Comments

20.05 Admissibility, Discovery, or Disclosure of Evidence; Confidentiality--Evid Code § 1119

[1] Evid Code § 1119 Text

[2] Commission Comments

[3] Case Notes

[a] Exceptions

20.06 Exceptions to Inadmissibility or Protection from Disclosure--Evid Code § 1120

[1] Evid Code § 1120 Text

[2] Commission Comments

[3] Case Notes

20.07 Reports--Evid Code § 1121

[1] Evid Code § 1121 Text

[2] Commission Comments

[3] Case Notes

20.08 Conditions for Admissibility of Communication or Writing--Evid Code § 1122

[1] Evid Code § 1122 Text

[2] Commission Comments

[3] Case Notes

20.09 Admissibility or Disclosure of Written Settlement Agreement--Evid Code § 1123

[1] Evid Code § 1123 Text

[2] Commission Comments

[3] Case Notes

20.10 Admissibility or Disclosure of Oral Agreement--Evid Code § 1124

[1] Evid Code § 1124 Text

[2] Commission Comments

20.11 Conditions Constituting End of Mediation--Evid Code § 1125

[1] Evid Code § 1125 Text

[2] Commission Comments

20.12 Confidentiality After End of Mediation--Evid Code § 1126

[1] Evid Code § 1126 Text

[2] Commission Comments

20.13 Attorney Fees for Compelling Mediator to Testify or Produce Writing--Evid Code § 1127

[1] Evid Code § 1127 Text

[2] Commission Comments

20.14 Reference to Mediation During Subsequent Proceedings--Evid Code § 1128

[1] Evid Code § 1128 Text

[2] Commission Comments

20.15 Evidence Relating to Validity of Verdict--Evid Code § 1150

[1] Evid Code § 1150 Text

[2] References

[3] Case Notes

[a] Presumption of Prejudice/Substantial Likelihood of Bias

[b] Competent Evidence

[c] Standard of Appellate Review

20.16 Subsequent Safety Remedies--Evid Code § 1151

[1] Evid Code § 1151 Text

[2] Commission Comments

[3] Case Notes

[a] Negligence Versus Strict Liability Cases

20.17 Negotiation Statements--To Compromise, Humanitarian Motives--Evid Code § 1152

[1] Evid Code § 1152 Text

[2] Commission Comments

[3] Reference

[4] Case Notes

20.18 Repealed--Evid Code § 1152.5

20.19 Repealed--Evid Code § 1152.6

20.20 Evidence of Plea of Guilty--Evid Code § 1153

[1] Evid Code § 1153 Text

[2] References

[3] Case Notes

20.21 Officer of Civil Resolution in Criminal Action Not Admissible--Evid Code § 1153.5

[1] Evid Code § 1153.5 Text

20.22 Offer to Satisfy Claim--Evid Code § 1154

[1] Evid Code § 1154 Text

[2] Commission Comment

[3] Case Notes

20.23 Evidence of Liability Insurance--Evid Code § 1155

[1] Evid Code § 1155 Text

[2] Commission Comment

[3] Case Notes

[a] Existence of Insurance Disclosed in Admission of Fault

20.24 Hospital Morbidity or Mortality Studies--Evid Code § 1156

[1] Evid Code § 1156 Text

[2] Commission Comments

20.25 Quality Assurance Committee Morbidity or Mortality Studies--Evid Code § 1156.1

[1] Evid Code § 1156.1 Text

20.26 Hospital Committee Reports Not Subject to Discovery--Exception--Medical Societies--Evid Code § 1157

[1] Evid Code § 1157 Text

[2] Case Notes

20.27 Medical Society Committee Records Immune from Discovery--Evid Code § 1157.5

[1] Evid Code § 1157.5 Text

20.28 Records of Mental Health Committee Not Subject to Discovery--Evid Code § 1157.6

[1] Evid Code § 1157.6 Text

[2] Statutory Note

20.29 Specialty Health Services Discovery Prohibition--Evid Code § 1157.7

[1] Evid Code § 1157.7 Text

20.30 Written Authorization by Patient for Inspection of Hospital Records by Attorney--Evid Code § 1158

[1] Evid Code § 1158 Text

[2] Case Note

20.31 Animal Experimentation Evidence Inadmissible in Product Liability Action--Evid Code § 1159

[1] Evid Code § 1159 Text

20.32 Expressions of Sympathy or Benevolence Inadmissible--Evid Code § 1160

[1] Evid Code § 1160 Text



138 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.01

20.01 Mediation Definitions--Evid Code § 1115

[1] Evid Code § 1115 Text

- *Evid Code § 1115.*

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.**

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1115(a) is drawn from *CCP § 1775.1*. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include 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. A proceeding may be a "mediation" for purposes of this chapter, even though it is denominated differently [Cal Law Rev Com Comment].

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from *CCP § 1775.1*. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter [Cal Law Rev Com Comment].

A "mediator" may be an individual, group of individuals, or entity. *See Evid Code § 175* ("person" defined). *See also*

Evid Code § 10 (singular includes the plural). This definition of 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. A person may be a "mediator" under this chapter even though the person has a different title, such as "ombudsperson." Any person who meets the definition of "mediator" must comply with *Evid Code § 1121* (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute [Cal Law Rev Com Comment].

Evid Code § 1115(c) is drawn from former *Evid Code § 1152.5*, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses 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 [Cal Law Rev Com Comment].

For the scope of this chapter, see *Evid Code § 1117* [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations



139 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.02

20.02 Effect of Mediation Chapter on Dispute Resolution Proceedings--Evid Code § 1116

[1] Evid Code § 1116 Text

■ *Evid Code § 1116.*

(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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1116(a) establishes guiding principles for applying this chapter [Cal Law Rev Com Comment].

Evid Code § 1116(b) continues the first sentence of former *Evid Code § 1152.5(c)* without substantive change [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview



140 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.03

20.03 Applicability of Chapter to Mediation--Evid Code § 1117

[1] Evid Code § 1117 Text

■ *Evid Code § 1117.*

(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*.

LegH: 1997 ch. 772; 2007 ch. 130.

[2] Commission Comments

Under *Evid Code § 1117(a)*, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. *See Evid Code § 1115* Comment [Cal Law Rev Com Comment].

Evid Code § 1117(b) sets forth two exceptions. *Evid Code § 1117(b)(1)* continues without substantive change former *Evid Code § 1152.5(b)*. Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. *See Evid Code § 1040; Fam Code §§ 1818, 3177* [Cal Law Rev Com Comment].

Evid Code § 1117(b)(2) establishes that a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules [Cal Law Rev Com Comment].

[3] Case Notes

The mediation provisions of the Evidence Code, commencing with *Evid Code § 1500*, including those addressing

confidentiality, are applicable to all mediation proceedings, except for court-supervised settlement conferences, family conciliation proceedings, and mediation of visitation and custody issues [*Stewart v. Preston Pipeline, Inc. (2005) 134 CA4th 1565, 1572, 36 CR3d 901* (holding that mediated settlement agreement was admissible under Section 1123 in personal injury action when agreement was signed on behalf of defendants only by their attorney)].

The mediation statutes confer independent privileges on the parties and the mediator, and the statutes could be characterized as providing for confidentiality rather than a privilege [*In re Marriage of Kieturakis (2006) 138 CA4th 429, 41 CR3d 482* (reviewing key cases on mediation privilege and concluding that to apply presumption of undue influence to mediated marital settlements would severely undermine practice of mediating such agreements)].

The mediation privilege is broadly framed and strictly construed [*In re Marriage of Kieturakis (2006) 138 CA4th 429, 41 CR3d 482*] .

The presumption of undue influence must yield when a marital settlement agreement is achieved through mediation, whether or not it is incorporated into a later judgment. This conclusion places parties defending mediated marital settlements at an advantage. Those parties can refuse to waive the privilege and thereby prevent their settlements from effectively being challenged. However, if there is a price to be paid in fairness to preserve mediation confidentiality, the cases have required that it be paid by parties challenging, not defending, what transpired in the mediation [*In re Marriage of Kieturakis (2006) 138 CA4th 429, 41 CR3d 482*] .

Mediation generally falls into two categories. The first is traditional or classic mediation, where attorneys are not present, the mediator meets directly with the parties to facilitate negotiations, and the mediator is passive, expressing neither judgment nor opinion on the merits. The second is the type of mediation conducted as part of voluntary settlement conferences. In that form, lawyers are present and the mediator takes a more active role, often expressing an opinion on the merits but without authority to reach a decision. The mediation conducted here appeared to fall into this second category. The stipulated order by which a judge was appointed stated that the matter had been transferred to him for settlement purposes only, set forth the various powers he was being granted, and acknowledged that he could communicate with the trial court "about the mediation process," as well as make reports on the "status and progress of the mediation." The judge consistently applied the mediation confidentiality privileges throughout the process, and specifically invoked them in his order. As part of that order, he stated that it was his intention to achieve a "mediated settlement." On this record, the order was the result of a mediation proceeding that was governed by the rules applicable to mediations. This decision should not be construed as holding that all voluntary settlement conferences are mediations [*Travelers Casualty & Surety Co. v. Superior Court (2005) 126 CA4th 1131, 1139 & n8, 24 CR3d 751*] .

A trial court exceeds its authority by mandating that the parties attend and pay for private mediation over their objection [*Jeld-Wen, Inc. v. Superior Court (2007) 146 CA4th 536, 541, 53 CR3d 115*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Alternative Dispute Resolution Mediations Contracts Law Defenses Duress & Undue Influence General Overview Family Law Child Custody Visitation General Overview



141 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.04

20.04 Oral Agreement--Evid Code § 1118

[1] Evid Code § 1118 Text

■ *Evid Code § 1118. 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.**

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include *Evid Code* §§ 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 *Evid Code* § 1125 (when mediation ends). For guidance on authority to bind a litigant, see *Williams v. Saunders*, 55 CA4th 1158, 64 CR2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent") [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediationsContracts LawFormationExecutionGovernmentsCourtsCourt
Personnel



142 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.05

20.05 Admissibility, Discovery, or Disclosure of Evidence; Confidentiality--Evid Code § 1119

[1] Evid Code § 1119 Text

■ Evid Code § 1119. 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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1119(a) continues without substantive change former *Evid Code § 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 *Evid Code § 120* ("civil action" includes civil proceedings). In addition, the protection of *Evid Code § 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 [Cal Law Rev Com Comment].

Evid Code § 1119(b) continues without substantive change former *Evid Code § 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 *Evid Code § 120* ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in *Evid Code § 250*, regardless of whether the representations are on paper or on some other

medium [Cal Law Rev Com Comment].

Evid Code § 1119(c) continues former *Evid Code § 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 [Cal Law Rev Com Comment].

See *Evid Code §§ 1115(a)* ("mediation" defined), 1115(c) ("mediation consultation" defined). See also *Evid Code § 703.5* (testimony by a judge, arbitrator, or mediator) [Cal Law Rev Com Comment].

For examples of specialized mediation confidentiality provisions, see *Bus & Prof Code §§ 467.4-467.5* (community dispute resolution programs), 6200 (attorney-client fee disputes); *CCP §§ 1297.371* (international commercial disputes), 1775.10 (civil action mediation in participating courts); *Fam Code §§ 1818* (family conciliation court), 3177 (child custody); *F&A Code § 54453* (agricultural cooperative bargaining associations); *Gov Code §§ 11420.20-11420.30* (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); *Ins Code § 10089.80* (earthquake insurance); *Lab Code § 65* (labor disputes); *W&I Code § 350* (dependency mediation). See also *Cal Const art I, § 1* (right to privacy); *Garstang v. Superior Court*, 39 CA4th 526, 46 CR2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson) [Cal Law Rev Com Comment].

[3] Case Notes

The mediation statutes are to be broadly construed to carry out the legislative intent, even if there are conflicting public policies and even if the equities in a particular case suggest a contrary result [*Wimsatt v. Superior Court* (2007) 152 CA4th 137, 61 CR3d 200] .

There are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of a mediator's reports. Neither a mediator nor a party may reveal communications made during mediation. Although a party may report to the court about the conduct of participants in a mediation session, a mediator may not do so [*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 C4th 1, 108 CR2d 642, 25 P3d 1117 (a judicially created exception permitting a mediator to report to the court a party's failure to comply with an order of the mediator and participate in good faith in the mediation process was inconsistent with the language and legislative intent underlying *Evid Code §§ 1119* and *1121*)] .

The Court of Appeal erred in holding that photographs, videotapes, witness statements, and raw test data from physical samples that were prepared for the purpose of, in the course of, or pursuant to, a mediation in the underlying action were not protected under *Evid Code § 1119* [*Rojas v. Superior Court* (2004) 33 C4th 407, 15 CR3d 643, 92 P3d 260, 93 P3d 260] .

Any communications between mediation participants before the end of mediation that occur outside the mediator's presence, but that are materially related to the mediation, are confidential and inadmissible without express waivers [*Eisendrath v. Superior Court* (2003) 109 CA4th 351, 134 CR2d 716] .

Both the participants and the mediator may assert the privilege, but it can be waived [*Eisendrath v. Superior Court* (2003) 109 CA4th 351, 134 CR2d 716 (mediation communications can be disclosed or admitted with express consent of all participants, including the mediator and other nonparties; there can be no implied waiver); *Rinaker v. Superior Court* (1998) 62 CA4th 155, 74 CR2d 464] .

Under former *Evid Code § 1152.5*, statements made by parties after the mediator announces that an agreement has been reached are still within "the course of mediation" [*Ryan v. Garcia* (1994) 27 CA4th 1006, 33 CR2d 158] .

Although the mediation privilege under former Evid Code § 1152.2 may not have applied in a case where none of the parties participating in the mediation sessions had executed the written agreement, communications disclosed during such mediation sessions sometimes may be protected by the qualified privilege set forth in *Cal Const, art I, § 1* (right to privacy) [*Garstang v. Superior Court* (1995) 39 CA4th 526, 46 CR2d 84 (statements to ombudsman acting in official capacity resolving workplace disputes)].

In an action for legal malpractice, mediation briefs plus e-mails sent the day before the mediation that quoted from a mediation brief were protected by mediation confidentiality under *Evid Code § 1119* [*Wimsatt v. Superior Court* (2007) 152 CA4th 137, 61 CR3d 200 (issuing writ of mandate and directing trial court to issue protective order)].

[a] Exceptions

The public policy served by the confidentiality provisions of *Evid Code § 1119* must yield when necessary to ensure the minors' constitutional right to effective cross-examination and impeachment of an adverse witness in a juvenile delinquency proceeding [*Rinaker v. Superior Court* (1998) 62 CA4th 155, 74 CR2d 464 (court required to conduct in-camera review of statements before requiring mediator to testify regarding statements)].

When materials from mediation included an alleged settlement agreement that one side sought to enforce, and when the parties who objected to discovery of the materials had not waived mediation confidentiality, the agreement was admissible under a statutory exception to *Evid Code § 1119* [*Stewart v. Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 1583-1584, 36 CR3d 901] .

A hearing conducted by an employment termination review panel, as constituted pursuant to an employment contract, was neither an arbitration nor a mediation. Thus, the statements made during the hearing were not protected by the privilege of *Evidence Code section 1119* [*Saeta v. Superior Court* (2004) 117 CA4th 261, 11 CR3d 610] .

Under former Evid Code § 1152.2, a transcript of the settlement made after the parties have concluded their mediation, in order to memorialize the agreement reached, was not barred by former Evid Code § 1152.2 [*Regents of University of California v. Sumner* (1996) 42 CA4th 1209, 50 CR2d 200] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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143 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.06

20.06 Exceptions to Inadmissibility or Protection from Disclosure--Evid Code § 1120

[1] Evid Code § 1120 Text

■ *Evid Code § 1120.*

(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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1120(a) continues former *Evid Code § 1152.5(a)(6)* without change. It limits the scope of *Evid Code § 1119* (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure [Cal Law Rev Com Comment].

Evid Code § 1119(b)(1) makes explicit that Section 1119 does not restrict admissibility of an agreement to mediate. *Evid Code § 1119(b)(2)* continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines.

Evid Code § 1119(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 [Cal Law Rev Com Comment].

See Evid Code §§ 1115(a) ("mediation" defined), *1115(b)* ("mediator" defined), *1115(c)* ("mediation consultation" defined) [Cal Law Rev Com Comment].

[3] Case Notes

A communication made before a mediation hearing by plaintiff's former lawyer to the personal injury defendants, purportedly lowering the settlement demand, was not protected by *Evid Code § 1119*. Plaintiff did not show that the conversation was linked to the second mediation or that it was anything other than expected negotiation posturing that occurs in most civil litigation. Throughout litigation, parties discuss discovery, settlement ranges, and developing evidence, including witnesses and documents. It is not unusual for parties to change positions as new information is developed. Parties revalue liability and damages. They alter their negotiation strategy. All conversations between the parties are not protected by mediation confidentiality simply because the conversations might have occurred temporally before a scheduled mediation [*Wimsatt v. Superior Court* (2007) 152 CA4th 137, 61 CR3d 200 (denying writ of mandate as to this conversation)].

A party cannot secure protection for a writing, including photograph, witness statement, or analysis of test sample that was not prepared for, in the course of, or pursuant to, mediation simply by using or introducing it in mediation or even including it as part of a writing, such as brief or declaration or consultant's report, prepared for or during mediation [*Rojas v. Superior Court* (2004) 33 C4th 407, 15 CR3d 643, 92 P3d 260, 93 P3d 260].

Facts known to percipient witnesses constitute evidence otherwise admissible or subject to discovery outside of a mediation. Those facts do not become inadmissible or protected from disclosure under *Evid Code § 1120(a)* solely by reason of their introduction or use in a mediation through witness statements prepared for the purpose of, in the course of, or pursuant to, the mediation [*Rojas v. Superior Court* (2004) 33 C4th 407, 15 CR3d 643, 92 P3d 260, 93 P3d 260] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureRemediesWritsCommon Law
WritsMandamusTortsProcedureSettlementsMultipartiesGeneral Overview



144 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.07

20.07 Reports--Evid Code § 1121

[1] Evid Code § 1121 Text

■ *Evid Code § 1121.*

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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1121 continues the first sentence of former *Evid Code § 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 decisionmaker 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 *Evid Code § 1117* (scope of chapter), which excludes settlement conferences from this chapter [Cal Law Rev Com Comment].

The exception to *Evid Code § 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 Evid Code § 1122* (disclosure by agreement) [Cal Law Rev Com Comment].

The second sentence of former *Evid Code § 1152.6* is continued without substantive change in *Evid Code § 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* [Cal Law Rev Com Comment].

See Evid Code §§ 1115(a) ("mediation" defined), *1115(b)* ("mediator" defined). *See also Evid Code §§ 703.5* (testimony by a judge, arbitrator, or mediator), *1127* (attorney's fees), *1128* (irregularity in proceedings) [Cal Law Rev Com Comment].

[3] Case Notes

There are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of a mediator's reports. Neither a mediator nor a party may reveal communications made during mediation. Although a party may report to the court about the conduct of participants in a mediation session, a mediator may not do so [*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 C4th 1, 108 CR2d 642, 25 P3d 1117 (a judicially created exception permitting a mediator to report to the court a party's failure to comply with an order of the mediator and participate in good faith in the mediation process was inconsistent with the language and legislative intent underlying *Evidence Code* sections 1119 and 1121)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsEvidenceDocumentary EvidenceWritingsGeneral Overview



145 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.08

20.08 Conditions for Admissibility of Communication or Writing--Evid Code § 1122

[1] Evid Code § 1122 Text

■ *Evid Code § 1122.*

(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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1122 supersedes former *Evid Code § 1152.5(a)(4)* and part of former *Evid Code § 1152.5(a)(2)*, which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents [Cal Law Rev Com Comment].

Evid Code § 1122(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 [Cal Law Rev Com Comment].

Evid Code § 1122(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) [Cal Law Rev Com Comment].

Mediation materials that satisfy the requirements of *Evid Code § 1122(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 [Cal Law Rev Com Comment].

Evid Code § 1122(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 [Cal Law Rev Com Comment].

For exceptions to *Evid Code § 1122*, see *Evid Code §§ 1123* (written settlement agreements reached through mediation) and *1124* (oral agreements reached through mediation) & Comments [Cal Law Rev Com Comment].

See *Evid Code § 1115(a)* ("mediation" defined), *1115(c)* ("mediation consultation" defined). See also *Evid Code §§ 703.5* (testimony by a judge, arbitrator, or mediator), *1119* (mediation confidentiality), *1121* (mediator reports and communications) [Cal Law Rev Com Comment].

[3] Case Notes

Evid Code § 1122(a)(2) permits discovery of protected communications and writings that were prepared by or on behalf of fewer than all the mediation participants if those participants expressly agree to disclosure, and disclosure would not reveal anything said or done or any admission made in the course of the mediation. The language of this provision was designed to give a mediation participant control over whether something prepared for the mediation is used in subsequent litigation [*Rojas v. Superior Court (2004)* 33 C4th 407, 15 CR3d 643, 92 P3d 260, 93 P3d 260] .

If counsel wishes to avoid the effect of the mediation confidentiality rules, they should make clear at the outset that something other than a mediation is intended. Except where the parties have expressly agreed otherwise, appellate courts should not seize on an occasional reference to "settlement" as a means to frustrate the mediation confidentiality statutes, even when the trial court uses the expressions "mediation" and "settlement" interchangeably [Doe 1 v. Superior Court (2005) 132 CA4th 1160, 1166-1167, 34 CR3d 248 (clergy sexual abuse case)].

Evid Code § 1123(b) reflects legislative intent not to make inadmissible settlement agreements that the parties intend to be enforceable, such as by including an arbitration provision that is consistent solely with an intention on the part of the parties for the settlement terms document to be enforceable or binding [*Fair v. Bakhtiari (2004)* 122 CA4th 1457, 19 CR3d 591] .

Evid Code § 1122 prohibits the disclosure of any admission, without qualification. Given the California Supreme Court's insistence on preventing disclosures absent an express statutory exception [*Rojas v. Superior Court (2004)* 33 C4th 407, 415-416, 15 CR3d 643, 92 P3d 260, 93 P3d 260] , *Evid Code § 1122(a)(2)* prevents the disclosure of admissions even by the party who made them. In some situations a party's purported admission might be a disguised accusation of another's misconduct. Drawing fine lines in this area seems counter to the policy embodied in *Rojas* [Doe 1 v. Superior Court (2005) 132 CA4th 1160, 1168 n9, 34 CR3d 248 (clergy sexual abuse case)].

Under *Evid Code § 1122*, information may not be disclosed if it reveals something about the mediation discussion or the

position the parties stake out in mediation. In this case, no proffers could be revealed because it would be possible to determine those priests as to whom the Archdiocese intends to assert during the mediation that it had no notice of their sexual interest in minors, by contrasting proffers in which the church did not concede notice, with others that included the church's admissions of notice [Doe 1 v. *Superior Court* (2005) 132 CA4th 1160, 1168, 34 CR3d 248 (clergy sexual abuse case)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediationsContracts LawContract Conditions & ProvisionsArbitration
ClausesEvidenceDocumentary EvidenceWritingsGeneral Overview



146 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.09

20.09 Admissibility or Disclosure of Written Settlement Agreement--Evid Code § 1123

[1] Evid Code § 1123 Text

■ Evid Code § 1123.

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.**

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 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*, 55 CA4th 1158, 64 CR2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent") [Cal Law Rev Com Comment].

As to an executed written settlement agreement, *Evid Code § 1123(a)* continues part of former *Evid Code § 1152.5(a)(2)*. See also *Ryan v. Garcia*, 27 CA4th 1006, 1012, 33 CR2d 158, 162 (1994) (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") [Cal Law Rev Com Comment].

Evid Code § 1123(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 [Cal Law Rev Com Comment].

As to fully executed written settlement agreements, *Evid Code § 1123(c)* supersedes former *Evid Code § 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 [Cal Law Rev Com Comment].

Evid Code § 1123(d) continues former *Evid Code § 1152.5(a)(5)* without substantive change [Cal Law Rev Com Comment].

A written settlement agreement that satisfies the requirements of *Evid Code § 1123(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 [Cal Law Rev Com Comment].

See *Evid Code § 1115(a)* ("mediation" defined) [Cal Law Rev Com Comment].

[3] Case Notes

The aim of *Evid Code § 1123(b)* is to allow parties in mediation to draft enforceable agreements without requiring the use of a formulaic phrase. However, the writing must make clear that it reflects an agreement and is not simply a memorandum of terms for inclusion in a future agreement. The writing need not be in finished form to be admissible under section 1123(b), but it must be signed by the parties and include a direct statement to the effect that it is enforceable or binding. A handwritten single-page memorandum signed by the parties after a mediation session, captioned "Settlement Terms," and stating that "Any and all disputes subject to JAMS [(Judicial Arbitration and Mediation Services)] arbitration rules" failed to satisfy this standard [*Fair v. Bakhtiari* (2006) 40 C4th 189, 192, 51 CR3d 871, 147 P3d 653] .

To satisfy the "words to that effect" provision of *Evid Code § 1123(b)*, a writing must directly express the parties' agreement to be bound by the document they sign. The court will not infer the parties' intent from the mention of arbitration in the settlement terms memorandum. Arbitration is a method of enforcement subject to negotiation, like other settlement terms. A tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound [*Fair v. Bakhtiari* (2006) 40 C4th 189, 197-198, 51 CR3d 871, 147 P3d 653] .

To satisfy *Evid Code § 1123(b)*, a settlement agreement must include a statement that it is "enforceable" or "binding," or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission under *Evid Code § 1123(b)* [*Fair v. Bakhtiari* (2006) 40 C4th 189, 199-200, 51 CR3d 871, 147 P3d 653] .

Plaintiffs contended that priests could not be considered mediation participants because they did no more than object to the disclosure of the contents of their personnel files, and did not take part in any discussions relating to liability or geared toward actually resolving the actions. However, the priests' participation, including at least one appearance at the mediation by their lawyer, was extensive enough to characterize them as mediation participants, without a clearer factual showing to the contrary [Doe 1 v. *Superior Court* (2005) 132 CA4th 1160, 1169, 34 CR3d 248 (clergy sexual abuse case)].

The requirement in *Evid Code § 1123* that the written settlement agreement be "signed by the settling parties" does not require that an effective mediation-confidentiality waiver be signed by each of the parties litigant, so long as that written waiver is signed by each of the settling parties or their respective counsel [*Stewart v. Preston Pipeline, Inc. (2005) 134 CA4th 1565, 1583, 36 CR3d 901* (mediation agreement stating that it was to be exempt from confidentiality, and that it was executed in full and final settlement, satisfied two conditions of Section 1123 and was not subject to confidentiality rules)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediationsContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawFormationExecution



147 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.10

20.10 Admissibility or Disclosure of Oral Agreement--Evid Code § 1124

[1] Evid Code § 1124 Text

■ Evid Code § 1124.

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.**

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, *Evid Code §§ 1119* (mediation confidentiality) and 1124 codify the rule of *Ryan v. Garcia*, 27 CA4th 1006, 33 CR2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of *Regents of University of California v. Sumner*, 42 CA4th 1209, 50 CR2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms) [Cal Law Rev Com Comment].

Evid Code § 1124(a) 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 *Evid Code § 1125* (when mediation ends) & Comment [Cal Law Rev Com Comment].

Evid Code § 1124(b) parallels *Evid Code § 1123(c)* [Cal Law Rev Com Comment].

Evid Code § 1124(c) parallels *Evid Code § 1123(d)* [Cal Law Rev Com Comment].

An oral agreement that satisfies the requirements of *Evid Code § 1124(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*, 55 CA4th 1158, 64 CR2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent") [Cal Law Rev Com Comment].

See *Evid Code § 1115(a)* ("mediation" defined) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediationsContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawTypes of ContractsOral Agreements



148 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.11

20.11 Conditions Constituting End of Mediation--Evid Code § 1125

[1] Evid Code § 1125 Text

■ *Evid Code § 1125.*

(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.

LegH: 1997 ch. 772.

Consider:

By specifying when a mediation ends, *Evid Code* § 1125 provides guidance on which communications are protected by *Evid Code* § 1119 (mediation confidentiality).

[2] Commission Comments

Under *Evid Code* § 1125(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*, 55 CA4th 1158, 64 CR2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent") [Cal Law Rev Com Comment].

Evid Code § 1125(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 *Evid Code* § 1124 (oral agreements reached through mediation).

Evid Code § 1125(a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). *Evid Code* § 1125(a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur [Cal Law Rev Com Comment].

Evid Code § 1125(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 [Cal Law Rev Com Comment].

Evid Code § 1125(c) limits the effect of Section 1125 [Cal Law Rev Com Comment].

See *Evid Code* § 1115(a) ("mediation" defined), 1115(b) ("mediator" defined) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Alternative Dispute Resolution Mediations Contracts Law Types of Contracts Settlement Agreements Torts Procedure Settlements General Overview



149 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.12

20.12 Confidentiality After End of Mediation--Evid Code § 1126

[1] Evid Code § 1126 Text

■ *Evid Code § 1126.*

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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to *Evid Code § 1125* (when mediation ends) [Cal Law Rev Com Comment].

See Evid Code § 1115(a) ("mediation" defined) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionMediations



150 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.13

20.13 Attorney Fees for Compelling Mediator to Testify or Produce Writing--Evid Code § 1127

[1] Evid Code § 1127 Text

■ *Evid Code § 1127.*

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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1127 continues *Evid Code § 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 *Evid Code § 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 [Cal Law Rev Com Comment].

See *Evid Code § 1115(b)* ("mediator" defined) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Alternative Dispute Resolution Civil Procedure Alternative Dispute Resolution Mandatory ADR



151 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.14

20.14 Reference to Mediation During Subsequent Proceedings--Evid Code § 1128

[1] Evid Code § 1128 Text

■ *Evid Code § 1128.*

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.

LegH: 1997 ch. 772.

[2] Commission Comments

Evid Code § 1128 is drawn from *CCP § 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 [Cal Law Rev Com Comment].

See Evid Code § 1115 ("mediation" defined) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Alternative Dispute Resolution Civil Procedure Alternative Dispute Resolution Mediations



152 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.15

20.15 Evidence Relating to Validity of Verdict--Evid Code § 1150

[1] Evid Code § 1150 Text

■ *Evid Code § 1150.*

(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.

LegH: 1965 ch. 299.

[2] References

Juror's affidavit mistrial, *CCP § 657(2)*.

Criminal proceedings misconduct, *Pen Code § 1181(3), (4)*.

[3] Case Notes

In *Evid Code § 1150(a)*, the distinction between proof of overt acts, objectively ascertainable (admissible) and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved (inadmissible), prevents one juror from upsetting a verdict of the whole jury by impugning his or her own or the fellow jurors' mental processes or reasons for assent or dissent [*People v. Steele* (2002) 27 C4th 1230, 120 CR2d 432, 47 P3d 225 ; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 C3d 98, 95 CR 516, 485 P2d 1132 (improper influences on and misconduct by jury); *People v. Sassounian* (1986) 182 CA3d 361, 226 CR 349 (juror statement about effect of extraneous evidence upon own decision); *Locksley v. Ungureanu* (1986) 178 CA3d 457, 223 CR 737 (juror declaration that he experimented driving with one eye closed to test ability of a one-eyed driver to perceive and react to

surroundings); *Cove v. Mora* (1985) 172 CA3d 97, 218 CR 7 (declarations of five jurors did not set forth overt, objectively verifiable acts or statements); *People v. Elkins* (1981) 123 CA3d 632, 176 CR 729 (juror's misstatement of the law reflected his subjective mental processes and was inadmissible); *People v. Hall* (1980) 108 CA3d 373, 166 CR 578 (affidavits showing subjective reasoning of juror may not be used to impeach verdict); *Putensen v. Clay Adams, Inc.* (1970) 12 CA3d 1062, 91 CR 319 (improper communication by trial judge); *People v. Hutchinson* (1969) 71 C2d 342, 78 CR 196, 455 P2d 132 (improper remarks by bailiff)].

The only improper influences that may be proved to impeach a verdict are those open to sight, hearing, and the other senses, as they are subject to corroboration [*People v. Danks* (2004) 32 C4th 269, 8 CR3d 767 (portions of juror's declarations, relating solely to mental processes and subjective reasoning of declarant regarding penalty deliberations or irrelevant matters, were inadmissible); *People v. Steele* (2002) 27 C4th 1230, 120 CR2d 432, 47 P3d 225 ; *In re Hamilton* (1999) 20 C4th 273, 84 CR2d 403 ; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 C3d 98, 95 CR 516, 485 P2d 1132 (improper influences on and misconduct by jury); *People v. Hutchinson* (1969) 71 C2d 342, 78 CR 196, 455 P2d 132 (improper remarks by bailiff); *Tillery v. Richland* (1984) 158 CA3d 957, 205 CR 191 (statements open to interpretation during jury deliberations--"he'll only blow it in Vegas"--won't overturn verdict)].

It was not misconduct for a jury, during deliberations on the issue of defendant's sanity, to discuss defendant's demeanor towards his attorney during the guilt phase, after a defense expert was expressly prompted by defense counsel to analyze defendant's demeanor during trial as it related to his mental disabilities [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224] .

Juror declarations regarding confused and misunderstood concepts of law are inadmissible to establish juror misconduct. Declarations are inadmissible if they at most suggest deliberative error in the jury's collective mental process--confusion, misunderstanding, and misinterpretation of the law. To be admissible, juror affidavits must contain objective and verifiable incidents of juror misconduct, such as a juror's violation of the court's instruction to follow the law by recounting his or her own outside experience on a question of law, or overt acts, statements, or conduct showing the jury intentionally agreed to disregard applicable law and apply inapplicable law [*People v. Steele* (2002) 27 C4th 1230, 120 CR2d 432, 47 P3d 225 (in capital case, jurors' statements regarding their understanding of meaning of life sentence and what they would have done had they believed differently came squarely within prohibition against impeaching verdict with evidence of jurors' mental processes); *Sanchez-Corea v. Bank of America* (1985) 38 C3d 892, 215 CR 679, 701 P2d 826 ; *People v. Sanchez* (1998) 62 CA4th 460, 72 CR2d 782 (affidavits going to deliberative error--confusion, misunderstanding, and misinterpretation of law--are inadmissible; the mere fact that such mental process was manifested between jurors during deliberations does not alter this rule); *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 CA4th 318, 29 CR2d 330 ; *Mesecher v. County of San Diego* (1992) 9 CA4th 1677, 12 CR2d 279 ; *Ford v. Bennacka* (1990) 226 CA3d 330, 276 CR 512] .

Jury declarations suggesting error in mental process in reaching verdict are inadmissible to impeach verdict [*Chapman v. Enos* (2004) 116 CA4th 920, 10 CR3d 852 (court would not consider declaration that amounted to impeachment of jury verdict with evidence of juror's subjective reasoning process); *People v. Duran* (1996) 50 CA4th 103, 57 CR2d 635 (words by juror about reasons for vote are simply a reflection of the juror's mental processes); *Mesecher v. County of San Diego* (1992) 9 CA4th 1677, 12 CR2d 279] .

To establish misconduct requiring reversal, juror declarations must establish an express agreement by the jurors to consider improper factors in the award for damages [*Moore v. Preventive Medicine Medical Group* (1986) 178 CA3d 728, 223 CR 465 (mere statement of concern about effect of attorney's fee and taxes on award is not sufficient)].

Preexisting bias concealed on voir dire is juror misconduct [*In re Hamilton* (1999) 20 C4th 273, 84 CR2d 403 (an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias; no misconduct found)].

In an action for legal malpractice arising out of a wrongful conviction, the trial court found that a juror had intentionally concealed her substantial knowledge of the Rampart police scandal and determined that her explanation for replying on voir dire that she had not heard about the scandal was not credible. The record as a whole failed to rebut the presumption of prejudice. The Rampart scandal was a volatile subject that provoked strong feelings of revulsion in some members of the public toward tainted police officers and toward the police department in general; disappointment with the criminal justice system that produced so many false convictions; and sympathy for the victims. In light of these circumstances, and the nine to three verdict in favor of a finding of liability, the appellate court could not reasonably conclude that the juror was not biased against the defendants nor that her bias did not affect the result. The trial court did not abuse its discretion in ordering a new trial on the ground of juror misconduct [*Ovando v. County of Los Angeles* (2008) 159 CA4th 42, 71 CR3d 415] .

Evidence by a juror that certain jurors surrendered their conscientious convictions on a material point or reached their verdict by compromise is admissible because it is objective, whereas a juror's unexpressed misinterpretation of the law is not admissible because it is subjective [*People v. Stevenson* (1970) 4 CA3d 443, 84 CR 349 (jurors voting guilty for reasons other than belief in guilt)].

Evidence of jury's explicit or implicit agreement to violate court's instruction does not touch on the juror's subjective reasoning process, and is admissible to impeach the verdict, because it constitutes misconduct [*People v. Perez* (1992) 4 CA4th 893, 6 CR2d 141] .

Jurors' post-trial declarations stating that erroneous jury instructions prejudiced their verdict amounted to impeachment of jury verdict with evidence of jurors' subjective reasoning process [*People v. Jones* (1998) 17 C4th 279, 70 CR2d 793 (statement by juror after trial that "we need a deterrent" does not suggest jury considered deterrence in deliberations); *People v. Dewberry* (1992) 8 CA4th 1017, 10 CR2d 800] .

Evidence of improper jury conduct is admissible to impeach a verdict only if it is likely to have influenced the verdict improperly. Because there is no objective method of calculating pain and suffering damages, and such damages are left to the subjective discretion of the jury, the jury's utilization of the present value method in calculating the award could not have improperly influenced the jurors [*Garfoot v. Avila* (1989) 213 CA3d 1205, 261 CR 924] .

The party who is requesting the court to grant a new trial on jury misconduct grounds must file a no-knowledge declaration, which states that neither the attorney nor the client was aware of the alleged misconduct of the juror prior to the verdict [*Wiley v. Southern Pacific Transp. Co.* (1990) 220 CA3d 177, 269 CR 240] .

Statements consisting of erroneous interpretation of the law by juror who stated he had been on the police force for more than 20 years and knew the law constituted juror misconduct. Testimony of other jurors regarding these statements was admissible to impeach verdict [*In re Stankewitz* (1985) 40 C3d 391, 220 CR 382 (erroneous statements concerning elements of robbery); *Young v. Brunicardi* (1986) 187 CA3d 1344, 232 CR 588 (evidence of erroneous legal advice of retired police officer in jury raised presumption of prejudice); *Moore v. Preventive Medicine Medical Group* (1986) 178 CA3d 728, 223 CR 465 (juror's decision to award substantial damages for pain and suffering after considering awards given in similar actions is not misconduct)].

Remarks of the jury foreman that the judge was authorized to reduce the amount of an award and subsequent jury discussion on the subject are overt acts that are admissible to impeach a verdict [*DiRosario v. Havens* (1987) 196 CA3d 1224, 242 CR 423 (unlike *In re Stankewitz* (1985) 40 C3d 391, 220 CR 382 , the remarks did not usurp the court's function and were not erroneous; denial of motion for new trial upheld)].

Juror's comment on his son's past use of drugs and opinion about drug use affecting memory and another juror's admission of drug use in his youth were not extrajudicial information or misconduct [*People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249] .

Misconduct where jury considered evidence not presented at trial. Trial court committed error in not granting new trial [*People v. Von Villas* (1992) 10 CA4th 201, 13 CR2d 62] .

[a] Presumption of Prejudice/Substantial Likelihood of Bias

Misconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable presumption of prejudice [*In re Hamilton* (1999) 20 C4th 273, 84 CR2d 403 ; *People v. Nesler* (1997) 16 C4th 561, 66 CR2d 454] .

A juror's receipt of information not admitted into evidence raises a presumption of prejudice, but verdict will be set aside only if there appears a substantial likelihood of juror bias [*People v. Majors* (1998) 18 C4th 385, 75 CR2d 684 (whether prejudice arose from juror misconduct is a mixed question of law and fact); *People v. Nessler* (1997) 16 C4th 561, 66 CR2d 454 (presumption subject to independent appellate review as mixed question of law and fact)].

There is no prejudice in the guilt phase of a murder prosecution on the ground that extraneous juror information is inherently prejudicial in and of itself without reference to the rest of the record [*In re Carpenter* (1995) 9 C4th 634, 38 CR2d 665, 889 P2d 985 (juror's misconduct did not necessarily reveal substantial likelihood that juror actually was impermissibly influenced by the outside information); *People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186 (no substantial likelihood that jurors' remarks, which were arguably extraneous information, indicated or caused bias)].

A juror's misconduct in sharing Bible passages with fellow jurors did not demonstrate either the substantial likelihood of actual bias, or that it was substantially likely to result in the actual bias of other jurors. Another juror's misconduct in asking pastor about the Bible's stand on the death penalty was more egregious but not prejudicial, when the juror had already made up her mind and voted on the death penalty. The pastor's support for the death penalty was unsolicited, and not inherently and substantially likely to influence her, nor did she mention this conversation to any other juror [*People v. Danks* (2004) 32 C4th 269, 8 CR3d 767] .

[b] Competent Evidence

A request to strike the declarations of jurors in their entirety would be denied under *Evid Code* § 1150 [Boyette (Maurice) on Habeas Corpus (2007) 2007 C LEXIS 2558].

Jurors are competent witnesses to prove (e.g., by affidavit) objective facts to impeach a verdict [*Bardessono v. Michels* (1970) 3 C3d 780, 91 CR 760, 478 P2d 480 (jury misconduct); *People v. Hutchinson* (1969) 71 C2d 342, 78 CR 196, 455 P2d 132 (improper remarks by bailiff)].

Jurors' affidavits must contain otherwise admissible evidence [*Weathers v. Kaiser Foundation Hospitals* (1971) 5 C3d 98, 95 CR 516, 485 P2d 1132 (improper influences on and misconduct by jury); *People v. Hutchinson* (1969) 71 C2d 342, 78 CR 196, 455 P2d 132 (improper remarks by bailiff); *Johns v. City of Los Angeles* (1978) 78 CA3d 983, 144 CR 629 (judge must have cogent reason for accepting one juror's affidavit and rejecting the others); *People v. Spelio* (1970) 6 CA3d 685, 86 CR 113 (hearsay, twice and thrice removed)].

Hearsay declarations cannot support juror misconduct allegations [*People v. Hayes* (1999) 21 C4th 1211, 91 CR2d 211, 989 P2d 645 (trial court did not abuse its discretion in failing to conduct evidentiary hearing when content of juror's out-of-court statements to defense counsel regarding impropriety was hearsay and did not qualify as adoptive admissions (*Evid Code* § 1221) or statements against penal interest (*Evid Code* § 1230)); *Burns v. 20th Century Ins. Co.* (1992) 9 CA4th 1666, 12 CR2d 462 (inadmissible, two declarations from plaintiff's investigator concerning purported statements and thoughts of two jurors)].

[c] Standard of Appellate Review

A trial court has broad discretion in ruling on jury misconduct, and its rulings will not be disturbed absent a clear abuse of discretion [*People v. Dorsey* (1995) 34 CA4th 694, 40 CR2d 384] .

Whether an individual verdict must be overturned for jury misconduct or irregularity "is resolved by reference to the substantial likelihood test, an objective standard." Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant [*In re Hamilton* (1999) 20 C4th 273, 84 CR2d 403] .

In reviewing denial of a motion for a new trial based on jury misconduct, the appellate court must independently determine whether the alleged misconduct was prejudicial to the appellant's right to a fair trial, and must consider (1) the strength of evidence that misconduct occurred, (2) the nature and seriousness of the misconduct, and (3) the probability that actual prejudice may have ensued. In reviewing the record, the court does not consider those portions of juror declarations that relate only to the juror's subjective reasoning processes [*English v. Lin* (1994) 26 CA4th 1370, 31 CR2d 906] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewCriminal Law & ProcedureJury InstructionsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of Presumptions



153 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.16

20.16 Subsequent Safety Remedies--Evid Code § 1151

[1] Evid Code § 1151 Text

■ *Evid Code § 1151.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 1151 codifies well settled decisional law existing prior to adoption of the Evidence Code [Cal Law Rev Com Comment].

The primary reason for the rule is the sound policy against discouraging the immediate implementation of safety measures [Cal Law Rev Com Comment].

In appropriate circumstances, evidence of subsequent precautions or repairs may properly be admitted when it tends to impeach the testimony of a witness [Cal Law Rev Com Comment].

[3] Case Notes

Evidence of subsequent remedial measures is inadmissible [*Sanchez v. Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 76 CR 372 (worn abrasive tape on stairs); *Pierce v. J. C. Penney Co.* (1959) 167 CA2d 3, 334 P2d 117 (inconsistent conduct)].

Evidence of subsequent repairs may be used to show control of the premises and whose duty it is under a contract to take safety precautions [*Alcaraz v. Vece* (1997) 14 C4th 1149, 60 CR2d 448 (evidence regarding construction of fence was properly admitted, not to prove negligence, but to demonstrate that defendants exercised control over a strip of land owned by the city); *Morehouse v. Taubman Co.* (1970) 5 CA3d 548, 85 CR 308 (absence of handrails on construction

project)].

Evid Code § 1151 limits the admissibility of evidence of subsequent repairs at trial. It does not limit discovery of subsequent remedial conduct [*Bank of the Orient v. Superior Court* (1977) 67 CA3d 588, 136 CR 741] .

Evid Code § 1151 limits admissibility of only subsequent actions taken to repair or correct a problem identified by an investigation, not the factual inquiries undertaken to determine whether such repair or correction was necessary [*Fox v. Kramer* (2000) 22 C4th 531, 93 CR2d 497, 994 P2d 343] .

Evid Code § 1157 does not provide a broad general privilege for peer review committee materials. There is no special rule against the admissibility of peer review committee material [*Fox v. Kramer* (2000) 22 C4th 531, 93 CR2d 497, 994 P2d 343] .

[a] Negligence Versus Strict Liability Cases

The rationale of the statute extends equally to the situation in which a nonparty will be affected by a jury's determination of its negligence [*Santilli v. Otis Elevator Co.* (1989) 215 CA3d 210, 263 CR 496 (evidence of post-accident remedial measures taken by a nonparty hospital in a strict liability action in which the jury was asked to determine if the hospital was negligent and where the jury's determination would have a direct effect on the amount of damages which that entity would be required to pay was inadmissible)].

Although the policy behind *Evid Code § 1151* is not intended to apply to a theory of strict liability, where liability is predicated on negligence, evidence of remedial measures is prohibited [*Santilli v. Otis Elevator Co.* (1989) 215 CA3d 210, 263 CR 496] .

The exclusionary rule of *Evid Code § 1152* does not apply in strict tort liability cases [*Ault v. International Harvester* (1980) 13 C3d 113, 117 CR 812 ; *Schelbauer v. Butler Manufacturing Co.* (1984) 35 C3d 442, 198 CR 155 , (plaintiff may introduce into evidence post-accident warnings in a products liability case)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Search & Seizure Exclusionary Rule General Overview Governments Local Governments Claims By & Against Governments Local Governments Property



154 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.17

20.17 Negotiation Statements--To Compromise, Humanitarian Motives--Evid Code § 1152

[1] Evid Code § 1152 Text

■ *Evid Code § 1152.*

(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.

LegH: 1965 ch. 299, 1967 ch. 650, 1987 ch. 496.

[2] Commission Comments

Evid Code § 1152 is based upon former *CCP § 2078*. *Evid Code § 1152* makes inadmissible statements made during negotiations that were formerly admissible as admissions under the rule of *People ex rel. Dept. of Public Works v. Forster* (1962) 58 C2d 257 [23 CR 582, 373 P2d 630] [Cal Law Rev Com Comment] .

An offer of compromise, like other incompetent evidence, should be considered to the extent that it is relevant when it is presented to the trier of fact without objection [Cal Law Rev Com Comment].

[3] Reference

Partial performance, when retention of benefit therefrom is not presumed to be voluntary, because of circumstances, see *CC § 1477*.



Warning:

Evid Code § 1152 does not apply to criminal cases [*People v. Muniz* (1989) 213 CA3d 1508, 262 CR 743 (defendant's offer to pay some of the victim's medical expenses was admissible)].

[4] Case Notes

Evid Code § 1152 is not an absolute bar to admissibility, since a settlement document may be admissible for a purpose other than proving liability [*Volkswagen of America, Inc. v. Superior Court* (2006) 139 CA4th 1481, 1491, 43 CR3d 723 (discovery case)].

The obvious policy of the statute is to avoid deterring parties from making settlement offers and to facilitate candid discussion that may lead to settlement of disputes. Negotiations could be discouraged where a party knows that certain statements, or failure to make certain statements, could later be used to prove the invalidity of some other claim that he wished to assert [*Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 CA2d 770, 81 CR 332] .

Evid Code § 1152 only prohibits the introduction of evidence for the purpose of proving liability; the evidence may be circumstantial evidence of something else [*Lemer v. Boise Cascade, Inc.* (1980) 107 CA3d 1, 165 CR 555 (settlement offer admitted to show good faith); *Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 CA2d 770, 81 CR 332 (letters introduced to show invalidity of different claim)].

Evid Code § 1152 does not apply to statements that do not involve an offer of compromise or conduct or statement made in negotiation thereof; thus, evidence relative to whether or not there has been an accord and satisfaction does not come within the prohibition of Section 1152 [*Moving Picture Machine Operators Union v. Glasgow Theaters, Inc.* (1970) 6 CA3d 395, 86 CR 33 (settlement negotiations involving contract dispute)].

A party preserved an objection to exclusion of an email under *Evid Code § 1152* through a motion to vacate [*Caira v. Offner* (2005) 126 CA4th 12, 31, 24 CR3d 233 (action by minority shareholder)].

In an action against a real estate broker, the trial court properly excluded the plaintiff's statements made in an offer to compromise. Plaintiff had offered to compromise his claim in exchange for return of the broker's commission. Respondent broker sought to use this statement to prove that the return of the real estate commission was an element of plaintiff's damages claim. From this she argued she was contractually entitled to attorney's fees in this action, as the prevailing party. *Evid Code § 1152(a)* expressly prohibits the admission of such evidence because it tends to establish liability; in this case, liability for attorney's fees [*Hasler v. Howard* (2004) 120 CA4th 1023, 16 CR3d 217] .

Despite the fact that litigation was not pending, an offer by lumber company to dedicate certain access easement if granted permits was made in attempted compromise of litigation supported by public policy in favor of settlement of dispute [*Georgia-Pacific Corp. v. California Coastal Commission* (1982) 132 CA3d 678, 183 CR 395] .

A judgment debtor may not, at the judgment debtor's examination, rely on *Evid Code* §§ 1152 and 1154 to refuse to answer questions concerning post-judgment settlement negotiations [*Young v. Keele* (1987) 188 CA3d 1090, 233 CR 850] .

Evidence of the insurer's acceptance of a settlement offer as to the issue of bad faith is properly admitted in an action against an insurer alleging a breach of the implied covenant of good faith and fair dealing. Although offers of compromise are inadmissible, evidence of settlement negotiations in insurance litigation is admissible if offered to prove not liability for the original loss, but failure to process the claim fairly and in good faith [*Shade Foods, Inc. v. Innovative Prod. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 93 CR2d 364] .

In a libel case stemming from a newsletter report of an alleged rape, the victim's apology to the alleged attacker was not offered to the court to show any liability of the victim but as evidence regarding the truth or falsity in the newsletter [*Carney v. Santa Cruz Women Against Rape* (1990) 221 CA3d 1009, 271 CR 30] .

The provisions of *Evid Code* § 1152(b) do not authorize a private suit under *Ins Code* § 790.03 simply because the Supreme Court's decision in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 C3d 287, 250 CR 116, 758 P2d 58 , failed to address the 1987 enactment of *Evid Code* § 1152(b) in determining that no private civil cause of action exists against an insurer for breach of *Insurance Code* section 790.03 [*Maler v. Superior Court (Fed. Ins.)* (1990) 220 CA3d 1592, 270 CR 222] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Civil Actions Damages Contracts Law Types of Contracts Covenants Real Property
Law Brokers Discipline, Licensing & Regulation



155 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.18

20.18 Repealed--Evid Code § 1152.5

LegH: Enacted 1985, Repealed 1997 ch. 772

Former *Evid Code* § 1152.5 is now contained in Chapter 2 of Division 9 of the Evidence Code (§§ 1115-1128).



156 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.19

20.19 Repealed--Evid Code § 1152.6

LegH: Enacted 1995, Repealed 1997 ch. 772

Former *Evid Code § 1152.6* is now contained in Chapter 2 of Division 9 of the Evidence Code (§§ 1115-1128).



157 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.20

20.20 Evidence of Plea of Guilty--Evid Code § 1153

[1] Evid Code § 1153 Text

■ *Evid Code § 1153.*

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.

LegH: 1965 ch. 299.

[2] References

Nolo contendere plea, see *Pen Code § 1016(3)*.

Guilty plea and withdrawal thereof, see *Pen Code § 1018*.

Use of evidence of withdrawn plea of guilty, see *Pen Code § 1192.4*.

Consider:

The impact on *Evid Code § 1153* of The Victims' Bill of Rights (*Cal Const, art I, § 28(d)*), which states that "relevant evidence shall not be excluded in any criminal proceeding" is uncertain.

[3] Case Notes

In a hearing for change of venue in a multiple-murder prosecution, after the court called for a break, the defendant unexpectedly spoke up and said, "I am guilty," a statement that was heard and recorded by the court reporter. The trial court denied the later-appointed defense attorney's motion to bar the prosecution from using evidence defendant's statement at trial (which it introduced by calling the court reporter). Defendant argued on appeal that his statement was an offer to plead guilty and therefore inadmissible under *Evid Code § 1153*. The appellate court agreed with the trial court that defendant's in-court outburst declaring that he was guilty was not a "bona fide offer to plead guilty" but simply an "unsolicited admission" not made inadmissible by *Evid Code § 1153*. Defendant did not say he wanted to

enter a plea of guilty; that is, to formally admit that he had committed each of the charged crimes. Rather, he said he was guilty, without explaining what he was guilty of. No plea negotiations were underway, and to exclude statements of this kind would not encourage the settlement of criminal cases. The trial court properly denied defendant's motion to exclude the statement [*People v. Leonard* (2007) 40 C4th 1370, 1405, 58 CR3d 368, 157 P3d 973 , cert den 2007 US LEXIS 12044] .

Evid Code § 1153 is not limited to pleas of guilty or offers to plead guilty, but extends to admissions and any incidental statements made in the course of bona fide plea bargaining negotiations. Such statements may not be used by the prosecution in its case-in-chief [*People v. Tanner* (1975) 45 CA3d 345, 119 CR 407] .

However, such statements may be used for impeachment of a defendant who has given contrary testimony. Such statements include statements made by the defendant to another person, evidence of which was revealed to the prosecution during plea negotiations [*People v. Crow* (1994) 28 CA4th 440, 33 CR2d 624 (allowing impeachment by defendant's statements to defense psychologist, when report was furnished to prosecution during plea negotiations)].

Statement made to third party that defendant would accept deal bargain is not bona fide plea bargain and is not inadmissible [*People v. Magana* (1993) 17 CA4th 1371, 22 CR2d 59] .

An arrestee's stipulation to probable cause for arrest, which was followed by dismissal of the misdemeanor prosecution, was not a guilty plea under *Evid Code* § 1153, and could be admitted against her as the plaintiff in a civil tort suit against the police that arose out of the same arrest [*Salazar v. Upland Police Dept.* (2004) 116 CA4th 934, 11 CR3d 22] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Preliminary Proceedings Entry of Pleas Changes & Withdrawals Evidence Procedural Considerations Exclusion & Preservation by Prosecutor



158 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.21

20.21 Officer of Civil Resolution in Criminal Action Not Admissible--Evid Code § 1153.5

[1] Evid Code § 1153.5 Text

■ *Evid Code § 1153.5.*

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.

LegH: 1982 ch. 1518.



159 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.22

20.22 Offer to Satisfy Claim--Evid Code § 1154

[1] Evid Code § 1154 Text

■ *Evid Code § 1154.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

Evid Code § 1154 codifies prior law, and it expands the rule to include "any conduct or statements made in negotiation thereof" [Cal Law Rev Com Comment].

[3] Case Notes

In a personal injury action arising from an automobile accident, the trial court erred in excluding evidence of two letters written by plaintiff to an insurance company regarding his injuries from a subsequent accident, which allegedly worsened his injuries from the first accident. Although no doubt the letters were written to induce a settlement offer regarding the second accident, the letters were admissible in the first action and not excluded by *Evid Code § 1154*, because they were not offered to prove fault in the second accident nor to disprove plaintiff's claim from the second accident. Any error was harmless in view of other evidence introduced concerning the second accident, and in light of the defense theory, which attacked plaintiff's evidence of injuries and treatment before the second accident [*Zhou v. Unisource Worldwide* (2007) 157 CA4th 1471, 1478-1482, 69 CR3d 273] .

Evid Code § 1154 is not an absolute bar to admissibility, since a settlement document may be admissible for a purpose other than proving liability [*Volkswagen of America, Inc. v. Superior Court* (2006) 139 CA4th 1481, 1491, 43 CR3d 723 (discovery case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral Overview



160 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.23

20.23 Evidence of Liability Insurance--Evid Code § 1155

[1] Evid Code § 1155 Text

- *Evid Code § 1155.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

Evid Code § 1155 is a particular application of the relevancy rule; liability insurance is not relevant to the issue of liability [Cal Law Rev Com Comment].



Strategic Points:

In a personal injury action, counsel may, in good faith, ask prospective jurors on voir dire whether they are interested in a particular insurance company as long as the question does not unnecessarily convey the impression that defendant is in fact insured [*Hart v. Wielt* (1970) 4 CA3d 224, 84 CR 220] .

A witness may in a proper case be cross-examined to show interest, bias, or motive, even though it is thereby disclosed that defendant was protected by insurance. Nevertheless, a thin line divides permissible reference to the existence of insurance from prejudicial error resulting from attorney's misconduct [*Hart v. Wielt* (1970) 4 CA3d 224, 84 CR 220 (cross-examination of insurance investigator)].

[3] Case Notes

Notwithstanding the general exclusion of evidence of insurance on the issue of wrongdoing [*Evid Code § 1155*], the Civil Discovery Act [CCP § 2017.210] allows discovery of a defendant's liability insurance coverage of right, without

the need for a threshold showing of relevancy and admissibility. However, the liability insurer's own contracts for reinsurance would be discoverable only under narrow circumstances not present in this case [*Catholic Mutual Relief Society v. Superior Court* (2007) 42 C4th 358, 64 CR3d 434, 165 P3d 154] .

Whether plaintiff's loss is covered by defendant's insurance is irrelevant to issue of liability [*Schaefer/Karpf Productions v. CNA Ins. Co.* (1998) 64 CA4th 1306, 76 CR2d 42] .

Evid Code § 1155 applies only to liability insurance [*Garfield v. Russell* (1967) 251 CA2d 275, 59 CR 379 (medical insurance to prove motive for seeing a doctor)].

Prejudicial effect is to be determined by the trial court in its discretion under *Evid Code* § 352 [*Acosta v. Southern C Rapid Transit Dist.* (1970) 2 C3d 19, 84 CR 184, 464 P2d 72 (evidence excluded when defendant refused to develop facts out of jury's hearing so that judge might determine prejudicial effect); *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173, 465 P2d 61 ; *Staples v. Hoefke* (1987) 189 CA3d 1397, 235 CR 165 (evidence of insurance to show collusion between a defendant and the plaintiff has little probative value; properly excluded)].

[a] Existence of Insurance Disclosed in Admission of Fault

When insurance coverage is mentioned in a statement made by defendant, which statement contains an admission of fault, the probative value of the evidence may in a given case outweigh the prejudicial effect of the statement [*Menefee v. Williams* (1968) 259 CA2d 56, 68 CR 168 (held not an admission)].

When the mention of insurance is incidental to the statement of admission of fault, such as to prove ownership of an automobile or to prove employment, evidence of insurance may in a given case be admissible [*Menefee v. Williams* (1968) 259 CA2d 56, 68 CR 168 (held not an admission)].

A joint trial against the insured for negligence and against the insurer for violating its duties under *Ins Code* § 790.03(h) (prohibiting certain unfair claims settlement practices) violates the letter and the spirit of *Evid Code* § 1155 [*Ahmed v. Peterson* (1986) 186 CA3d 374, 230 CR 636 (cause of action against insurer should be bifurcated from cause of action against insured)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Procedural

Considerations Exclusion & Preservation by Prosecutor Insurance Law Industry Regulation Unfair Business

Practices Claims Investigations & Practices



161 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.24

20.24 Hospital Morbidity or Mortality Studies--Evid Code § 1156

[1] Evid Code § 1156 Text

■ *Evid Code § 1156.*

(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.

LegH: 1965 ch. 299, operative January 1, 1967, 1975 ch. 674, 2004 ch. 182, operative July 1, 2005.

[2] Commission Comments

Evid Code § 1156 restates, with minor changes, the substance of former *CCP § 1936.1* [Cal Law Rev Com Comment].

To preserve the physician-patient and psychotherapist-patient privilege, *Evid Code § 1156* prohibits the disclosure of the names of patients without their consent [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorHealthcare LawActions Against FacilitiesGeneral Overview



162 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.25

20.25 Quality Assurance Committee Morbidity or Mortality Studies--Evid Code § 1156.1

[1] Evid Code § 1156.1 Text

■ Evid Code § 1156.1.

(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.

LegH: 1982 ch. 234, effective June 2, 1982, 2004 ch. 182, operative July 1, 2005.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Privilege Evidence Procedural Considerations Exclusion & Preservation by Prosecutor Evidence Scientific Evidence Psychiatric & Psychological Evidence



163 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.26

20.26 Hospital Committee Reports Not Subject to Discovery--Exception--Medical Societies--Evid Code § 1157

[1] Evid Code § 1157 Text

■ *Evid Code § 1157.*

(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.

LegH: 1968 ch. 1122, 1975 ch. 674, 1978 ch. 7, eff. Feb. 10, 1978, ch. 503, 1982 ch. 705, 1983 chs. 289, 422, 1081, 1985 ch. 725, 1990 ch. 196, 1994 ch. 815, 2000 ch. 136.



Strategic Point:

The privilege of *Evid Code* § 1157 may properly be invoked by a doctor or a hospital in a malpractice proceeding in which either has been made a party.

[2] Case Notes

Peer review records are immune from discovery [*Fox v. Kramer* (2000) 22 C4th 531, 93 CR2d 497, 994 P2d 343] .

In an action against a correctional facility arising out of the death of an inmate, *Evid Code* § 1157 protected the reports of the Jail Mental Health Services Division, which is responsible for overseeing and providing mental health services to the inmates at the Los Angeles County Jail. The fact that the quality of medical care in the Los Angeles County Jail had drawn the scrutiny of federal authorities was irrelevant to the issue of whether the court should apply state evidentiary rules in a state civil action [*County of Los Angeles v. Superior Court* (2006) 139 CA4th 8, 17, 42 CR3d 390] .

The exception was designed to permit discovery in suits by doctors claiming wrongful or arbitrary exclusion from hospital staff privileges. It does not apply to a malpractice proceeding in which the doctor or the hospital have been made parties. Otherwise, the immunity provisions of the statute would be rendered sterile [*Schulz v. Superior Court* (1977) 66 CA3d 440, 136 CR 67] .

An independent association of doctors may properly invoke the staff privileges exception [*Roseville Community Hospital v. Superior Court* (1979) 70 CA3d 809, 139 CR 170 (pathology department in contract dispute with hospital)].

A malpractice plaintiff may not discover statements contained in a transcript of a hearing before a hospital staff committee resulting in the suspension of a doctor's hospital and surgical privileges. The filing of the same transcript in a separate mandamus proceeding does not constitute a waiver by the hospital of the privilege [*Henry Mayo Newhall Mem. Hosp. v. Superior Court* (1978) 81 CA3d 626, 146 CR 542] .

A hospital may be found liable under the doctrine of corporate negligence for negligently screening the competency of its medical staff [*Brown v. Superior Court* (1985) 168 CA3d 489, 214 CR 266 (plaintiff's argument that hospital used *Evid Code* § 1157 to frustrate discovery failed); *Elam v. College Park Hospital* (1982) 132 CA3d 332, 183 CR 156] .

Legislature did not intend to immunize peer review records from investigative subpoenas by administrative agencies [*Arnett v. Dal Cielo* (1996) 14 C4th 4, 56 CR2d 706 (Medical Board of California's investigative subpoena not "discovery" within meaning of statute)].

Evid Code § 1157 does not shield from discovery hospital administrative activities that are related to, yet independent of, the investigative and evaluative activities of medical staff committees. The party claiming immunity from discovery has the burden of demonstrating that the evidence it seeks to suppress is within the terms of the statute [*Santa Rosa Memorial Hosp. v. Superior Court* (1985) 174 CA3d 711, 220 CR 236 (requires judicial inquiry into the facts in camera where application of *Evid Code* § 1157 to disputed facts is not facially apparent)].

The participation of hospital staff who are not physicians in a committee meeting does not preclude the application of *Evid Code § 1157* [*Santa Rosa Memorial Hosp. v. Superior Court* (1985) 174 CA3d 711, 220 CR 236] .

Evid Code § 1157 does not require formal organizational indicia [*County of Los Angeles v. Martinez* (1990) 224 CA3d 1446, 274 CR 712] .

Although *Evid Code § 1157* bars any member of the hospital medical review staff committee from being required to testify as to what transpired at a committee meeting, it does not preclude a committee member from testifying voluntarily [*West Covina Hospital v. Superior Court* (1986) 41 C3d 846, 226 CR 132, 718 P2d 119] .

Evid Code § 1157(a) does not bar the introduction of evidence voluntarily offered by a participant in peer review proceedings or voluntarily produced in the course of discovery [*Fox v. Kramer* (2000) 22 C4th 531, 93 CR2d 497, 994 P2d 343] .

Proceedings and records of hospital administration are discoverable to the extent they do not contain references to proceedings protected by *Evid Code § 1157*. Prior to the production of hospital administration records, there must be an in camera hearing by the trial court so it can review each item to ensure that reference to protected proceedings is excluded [*Saddleback Community Hosp. v. Superior Court* (1984) 158 CA3d 206, 204 CR 598] .

The applicability of *Evid Code § 1157* is not limited to physician peer review. By its terms, the section applies to committee records and proceedings relating to the evaluation and improvement of the quality of care rendered in the hospital, including product review of drugs used [*Mt. Diablo Hospital Dist. v. Superior Court* (1986) 183 CA3d 30, 227 CR 790] .

The privilege applies to applications for staff privileges, which pertain to the staff committee's investigative and evaluative functions [*Alexander v. Superior Court* (1993) 5 C4th 1218, 22 CR2d 397, 859 P2d 96] .

The privilege applies in actions for damages by a hospital employee [*Willits v. Superior Court* (1993) 20 CA4th 90, 24 CR2d 348] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Prisoner Rights Medical Treatment Evidence Procedural Considerations Exclusion & Preservation by Prosecutor Family Law Marriage General Overview



164 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.27

20.27 Medical Society Committee Records Immune from Discovery--Evid Code § 1157.5

[1] Evid Code § 1157.5 Text

■ *Evid Code § 1157.5.*

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 non-profit 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.

LegH: 1973 ch. 848, 1980 ch. 524.

 Consider:

Evid Code § 1157.5 gives immunity to the proceedings or records of a committee of a medical care foundation that is a part of a medical society.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawActions Against FacilitiesGovernmental & Nonprofit LiabilityGeneral Overview



165 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.28

20.28 Records of Mental Health Committee Not Subject to Discovery--Evid Code § 1157.6

[1] Evid Code § 1157.6 Text

■ *Evid Code § 1157.6.*

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 of 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.

LegH: 1982 ch. 234, urgency eff. June 2, 1982.

[2] Statutory Note

W&I Code § 5624, referred to in the first sentence of this section, was repealed Stats 1991 ch 89.



166 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.29

20.29 Specialty Health Services Discovery Prohibition--Evid Code § 1157.7

[1] Evid Code § 1157.7 Text

■ *Evid Code § 1157.7.*

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.

LegH: 1983 ch. 1237.



167 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.30

20.30 Written Authorization by Patient for Inspection of Hospital Records by Attorney--Evid Code § 1158

[1] Evid Code § 1158 Text

■ *Evid Code § 1158.*

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.

LegH: 1968 ch. 1122, 1970 ch. 556, 1974 chs. 250, 667, 1975 ch. 563, 1978 ch. 493, 1980, ch. 697, 1986 ch. 603, 1987 ch. 19 urgency eff. May 12, 1987, 1993 ch. 226, 1997 ch. 442.

[2] Case Note

Health care records belong to the patient, and the health care practitioner cannot refuse a valid subpoena [*Person v. Farmers Insurance Co.* (1997) 52 CA4th 813, 61 CR2d 97 (sanctions upheld against practitioner that held records hostage until patient paid a lien)].

Considering *Evid Code § 1158*'s manifest purpose of limiting the cost of copying medical records, the appellate court would not construe the scope of the statute so narrowly and mechanically that the limitation was easily and effectively avoided by health care providers who attempt to contract away their responsibilities under the statute. On the other hand, the court would not by way of judicial construction radically expand the scope and impact of the statute. Thus, as it interpreted the admittedly ambiguous provisions of *Evid Code § 1158*, the agents or contractors of entities expressly covered in the first paragraph of the statute may be held liable under the statute but only if (1) they have assumed the duty of responding to Section 1158 requests and (2) they are acting for their own advantage and benefit as well the interests of entities expressly covered by the statute. The court took particular note that here the request for records was made directly to the hospital by the patient. It expressly did not consider the application of section 1158 where the request for records is made directly to a copy service by an attorney [*Thornburg v. Superior Court* (2006) 138 CA4th 43, 41 CR3d 156 (finding that entity that took care of medical record request for hospital may not charge more than allowed by statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
 Conservators & Guardians
 Conservators General Overview
 Estate, Gift & Trust Law
 Probate General Overview
 Family Law
 Guardians General Overview



168 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.31

20.31 Animal Experimentation Evidence Inadmissible in Product Liability Action--Evid Code § 1159

[1] Evid Code § 1159 Text

■ *Evid Code § 1159.*

(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.

LegH: 1992 ch. 188.

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsTransportation TortsMotor VehiclesGeneral Overview



169 of 169 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

I. Extrinsic Policies (Evid Code §§ 1100-1160)

Chapter 20 Mediation and Other Extrinsic Policies Evidence Code §§ 1115-1160

1-20 California Courtroom Evidence 20.32

20.32 Expressions of Sympathy or Benevolence Inadmissible--Evid Code § 1160

[1] Evid Code § 1160 Text

■ *Evid Code § 1160.*

(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.

LegH: 2000 ch. 195.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral Overview



1 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.syn

§ 21.syn Synopsis to Chapter 21: Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

21.01 Hearsay Rule Defined--Evid Code § 1200

[1] Evid Code § 1200 Text

[2] Introduction

[3] Official Comments

[4] Case Notes

[a] Procedures

[b] Nonhearsay Because Not Offered for Truth of Assertion

[c] Nonhearsay Because Nonassertive Conduct

[d] Due Process Concerns at Penalty Phase

21.02 Exception to Rule--Evid Code § 1201

[1] Evid Code § 1201 Text

[2] Commission Comments

[3] Case Notes

21.03 Credibility of Hearsay Declarant--Evid Code § 1202

[1] Evid Code § 1202 Text

[2] Commission Comments

[3] Case Notes

21.04 Examination of Hearsay Declarant-Applicability--Evid Code § 1203

[1] Evid Code § 1203 Text

[2] Legislative Committee Comments

21.05 Examination of Hearsay Declarant-Preliminary Examinations--Evid Code § 1203.1

[1] Evid Code § 1203.1 Text

[2] Introduction: Prop. 115

[3] Case Notes

21.06 Criminal Actions--Evid Code § 1204

[1] Evid Code § 1204 Text

[2] References

[3] Legislative Committee Comments

[4] Case Notes

21.07 Repeal by Implication Relating to this Division--Evid Code § 1205

[1] Evid Code § 1205 Text

[2] References

[3] Commission Comments

21.08 Statement of Party to Action--Evid Code § 1220

[1] Evid Code § 1220 Text

[2] References

[3] Commission Comments

[4] Case Notes

[a] Constitutional Limitations

[b] Interaction of Section 1220 with Section 1101(b)

[c] Statement Made Through Interpreter/Translator

21.09 Statements by Party Manifesting Belief in its Truth--Evid Code § 1221

[1] Evid Code § 1221 Text

[2] Case Notes

[a] Evidence Admissible

[b] Evidence Inadmissible

[c] Constitutional Limitations

21.10 Statement by Authorization--Evid Code § 1222

[1] Evid Code § 1222 Text

[2] Reference

[3] Commission Comments

[4] Case Notes

21.11 Statement of Conspirator--Evid Code § 1223

[1] Evid Code § 1223 Text

[2] Case Notes

[a] Prerequisite: Conspiracy in Existence

[b] Requirement: Admission Made Before or During Participation

[c] Requirement: Admission Made in Furtherance of Conspiracy

[d] Constitutional Limitations

21.12 Liability, Duty of Declarant--Evid Code § 1224

[1] Evid Code § 1224 Text

[2] Commission Comments

[3] Case Notes

21.13 Declarant as Title Holder--Evid Code § 1225

[1] Evid Code § 1225 Text

[2] Commission Comments

[3] Case Notes

21.14 Statement by Minor Child--Evid Code § 1226

[1] Evid Code § 1226 Text

[2] Commission Comments

21.15 Statement by Deceased in Wrongful Death Action--Evid Code § 1227

[1] Evid Code § 1227 Text

[2] Commission Comments

[3] Statutory Note

21.16 Admissibility or Statement of Complaining Witness-Child Abuse--Evid Code § 1228

[1] Evid Code § 1228 Text

[2] Case Notes

21.17 Use of Parent/Guardian's Signature, Acceptance of Services, or Failure to Cooperate--Evid Code § 1228

[1] Evid Code § 1228 Text

[2] Legislative Notes

21.18 Declarations Against Interest--Evid Code § 1230

[1] Evid Code § 1230 Text

[2] Legislative Committee Comments

[3] Case Notes

[a] Requirement: Statement Must Be Against Declarant's Own Interest

[b] Requirement: Entirety of Statement Must Be Against Interest

[c] Requirement: Unavailability of Declarant

[d] Special Considerations for Multiple Defendants

[e] Constitutional Considerations

21.19 Gang-Related Crime Hearsay Exception--Evid Code § 1231

[1] Evid Code § 1231 Text

[2] Legislative Notes

[3] Case Notes

21.20 Intent to Offer Statement-Gang-Related Crime Exception--Evid Code § 1231.1

[1] Evid Code § 1231.1 Text

[2] Legislative Notes

21.21 Peace Officer Administering Oath-Gang-Related Crime Exception--Evid Code § 1231.2

[1] Evid Code § 1231.2 Text

[2] Legislative Notes

21.22 Law Enforcement Experience Requirement-Gang-Related Crime Exception--Evid Code § 1231.3

[1] Evid Code § 1231.3 Text

[2] Legislative Notes

21.23 Statement to Jury-Gang-Related Crime Exception--Evid Code § 1231.4

[1] Evid Code § 1231.4 Text

[2] Legislative Notes

[3] Case Notes

21.24 Inconsistent Statements--Evid Code § 1235

[1] Evid Code § 1235 Text

[2] Commission Comments

[3] Case Notes

[a] Requirement: Testimony at Hearing

[b] Implied Inconsistency

[c] Impeachment

[d] Accomplice Testimony

[e] Constitutional Limitations

[f] Sufficiency of Evidence

21.25 Statement Consistent--Evid Code § 1236

[1] Evid Code § 1236 Text

[2] Commission Comments

[3] Case Notes

21.26 Statement Made in Writing by Witness When Fact Occurred--Evid Code § 1237

[1] Evid Code § 1237 Text

[2] Legislative Committee Comments

[3] Case Notes

21.27 Statement of Identification--Evid Code § 1238

[1] Evid Code § 1238 Text

[2] Commission Comments

[3] Case Notes

21.28 Spontaneous Statement--Evid Code § 1240

[1] Evid Code § 1240 Text

[2] Commission Comments

[3] Case Notes

[a] Constitutional Considerations

21.29 Contemporaneous Statement--Evid Code § 1241

[1] Evid Code § 1241 Text

[2] Legislative Committee Comments

[3] Case Notes

21.30 Statement by Dying Person--Evid Code § 1242

[1] Evid Code § 1242 Text

[2] Commission Comments

[3] Case Notes

[a] Constitutional Considerations

21.31 Existing State of Mind, Emotion, Physical Sensation--Evid Code § 1250

[1] Evid Code § 1250 Text

[2] Legislative Committee Comments

[3] Case Notes

[a] Statements of Intention

[b] Evidence Admissible

[c] Evidence Inadmissible

[d] Evidence Not Hearsay

21.32 Prior State of Mind--Evid Code § 1251

[1] Evid Code § 1251 Text

[2] Commission Comments

[3] Case Notes

21.33 Statement Under Circumstances Showing Lack of Trustworthiness--Evid Code § 1252

[1] Evid Code § 1252 Text

[2] Commission Comments

[3] Case Notes

21.34 Statement by Minor of Medical Diagnosis or Treatment Related to Abuse or Neglect--Evid Code § 1253

[1] Evid Code § 1253 Text

[2] Case Notes

21.35 Statement Relating to Wills--Evid Code § 1260

[1] Evid Code § 1260 Text

[2] Commission Comments

21.36 Statement Relating to Claims Against Estates--Evid Code § 1261

[1] Evid Code § 1261 Text

[2] Commission Comment

[3] Case Notes

21.37 Business Defined--Evid Code § 1270

[1] Evid Code § 1270 Text

[2] Commission Comments

[3] Case Notes

21.38 Evidence of Writing as Record--Evid Code § 1271

[1] Evid Code § 1271 Text

[2] Commission Comments

[3] Case Notes

[a] Personal Knowledge and Duty to Report Requirements

[b] Requirement: Act, Condition, or Event

[c] Qualified Witness

[d] Trustworthiness Requirement

[e] Types of Records Admissible

[f] Constitutional Considerations

21.39 Evidence of Absence from Records of Record Event--Evid Code § 1272

[1] Evid Code § 1272 Text

[2] Commission Comments

[3] Case Notes

21.40 General Provision--Evid Code § 1280

[1] Evid Code § 1280 Text

[2] Legislative Notes

[3] Commission Comments

[4] Case Notes

[a] Prerequisites for Admissibility

[b] Basing Report on Direct Observation

[c] Types of Public Records Admissible

[d] Constitutional Considerations

21.41 Public Records--Evid Code § 1281

[1] Evid Code § 1281 Text

[2] Commission Comments

21.42 Written Finding of Death Under Federal Missing Persons Act--Evid Code § 1282

[1] Evid Code § 1282 Text

[2] Commission Comments

[3] Case Notes

21.43 Report of Missing Persons-Evid Code § 1283

[1] Evid Code § 1283 Text

[2] Case Notes

21.44 Evidence of Search and Failure to Find a Record--Evid Code § 1284

[1] Evid Code § 1284 Text

[2] Legislative Committee Comments

21.45 Former Testimony Defined--Evid Code § 1290

[1] Evid Code § 1290 Text

[2] Commission Comments

21.46 Admissibility of Former Testimony--Evid Code § 1291

[1] Evid Code § 1291 Text

[2] Reference

[3] Legislative Committee Comments

[4] Case Notes

[a] Unavailability

[i] Due Diligence

[b] Requirement of Similarity in Interest and Motive

[c] Use of Prior Deposition Testimony

[d] Confrontation Clause

21.47 Party with Similar Interest--Evid Code § 1292

[1] Evid Code § 1292 Text

[2] Legislative Committee Comments

[3] Case Note

21.48 Minor Child's Testimony Offered in Dependency Proceeding--Evid Code § 1293

[1] Evid Code § 1293 Text

21.49 Prior Inconsistent Statements; Former Testimony of Same Criminal Matter--Evid Code § 1294

[1] Evid Code § 1294 Text

[2] Reference

[3] Case Note

21.50 Judgment of Felony in Civil Action-Exception--Evid Code § 1300

[1] Evid Code § 1300 Text

[2] Reference

[3] Commission Comments

[4] Case Notes

21.51 Indemnity or Warranty Action by Judgment--Evid Code § 1301

[1] Evid Code § 1301 Text

[2] Commission Comment

21.52 Judgment Against Third Person Whose Duty in Issue--Evid Code § 1302

[1] Evid Code § 1302 Text

[2] Case Note

21.53 Statement by Declarant Whose Family History in Issue--Evid Code § 1310

[1] Evid Code § 1310 Text

[2] Commission Comments

[3] Case Notes

21.54 Statement by Legal Relative or Family Friend--Evid Code § 1311

[1] Evid Code § 1311 Text

[2] Commission Comments

21.55 Entries in Bible, Books--Evid Code § 1312

[1] Evid Code § 1312 Text

21.56 Reputation of Family--Evid Code § 1313

[1] Evid Code § 1313 Text

[2] Commission Comments

21.57 Reputation in Community--Evid Code § 1314

[1] Evid Code § 1314 Text

[2] Commission Comment

21.58 Records of Church--Evid Code § 1315

[1] Evid Code § 1315 Text

[2] Commission Comments

21.59 Certificates of Sacraments--Evid Code § 1316

[1] Evid Code § 1316 Text

[2] Commission Comments

21.60 Reputation in Community Concerning Historical Event--Evid Code § 1320

[1] Evid Code § 1320 Text

[2] Commission Comments

21.61 Interest of Public--Evid Code § 1321

[1] Evid Code § 1321 Text

[2] Commission Comments

[3] Case Notes

21.62 Reputation Relating to Boundaries or Customs of Land--Evid Code § 1322

[1] Evid Code § 1322 Text

21.63 Statement of Boundaries--Evid Code § 1323

[1] Evid Code § 1323 Text

21.64 General Reputation--Evid Code § 1324

[1] Evid Code § 1324 Text

[2] Commission Comments

21.65 Statement in Deed or Will--Evid Code § 1330

[1] Evid Code § 1330 Text

[2] Commission Comments

21.66 Statement in Ancient Writing--Evid Code § 1331

[1] Evid Code § 1331 Text

[2] Commission Comments

21.67 Published Tabulations, Lists, Directories, Registers--Evid Code § 1340

[1] Evid Code § 1340 Text

[2] Case Notes

21.68 Historical Works, Books of Science, Art-Maps or Charts--Evid Code § 1341

[1] Evid Code § 1341 Text

21.69 Admissibility of Statement of Unavailable Witness in Criminal Proceeding--Evid Code § 1350

[1] Evid Code § 1350 Text

[2] Reference

[3] Case Notes

21.70 Statement by Minors in Criminal Proceeding of Child Abuse or Neglect; Notice to Adverse Party; "Abuse," "Neglect" Defined--Evid Code § 1360

[1] Evid Code § 1360 Text

[2] Case Notes

[a] Indicia of Reliability

21.71 Statement of Infliction or Threat of Physical Injury Upon Declarant--Evid Code § 1370

[1] Evid Code § 1370 Text

[2] Legislative Note

[3] Case Notes

21.72 Statement by Victim of Elder Abuse--Evid Code § 1380

[1] Text

[2] Case Notes

21.73 Miscellaneous Exceptions to Hearsay Rule

[1] Child Dependency Cases--Admissibility of Investigation and Social Study Reports

[a] Explanation

[b] Case Notes

[2] Child Dependency Cases--Admissibility of Child's Statements in Abuse Cases

[a] Explanation

[b] Case Notes

[3] Bills and Receipts for Repairs



2 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence Scope

Scope

Scope

This chapter contains the hearsay rule and the most commonly used exceptions to the rule in *Evid Code §§ 1200 through 1380*. Other exceptions may be found in other statutes scattered throughout the codes [Cal Law Rev Com Comment].



Cross Reference:

Further discussion of hearsay, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 9, *The Hearsay Rule and Its Exceptions* (Matthew Bender).

Practical application of the hearsay rule, see Matthew Bender(R) *Practice Guide: California Trial and Post-Trial Civil Procedure*, Ch. 11, *Questioning Witnesses and Objections*.



3 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.01

21.01 Hearsay Rule Defined--Evid Code § 1200

[1] Evid Code § 1200 Text

■ *Evid Code § 1200.*

(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.

LegH: 1965 ch. 299.

[2] Introduction

Based on former CCP § 1845, *Evid Code § 1200* resolves an ambiguity in the decisional law by providing that evidence of nonassertive conduct is not hearsay evidence.

Evid Code § 225 defines "statement" as oral or written verbal expression or non-verbal conduct of a person intended by him as a substitute for oral or written verbal expression.

Evid Code § 160 defines "law" to include constitutional, statutory, and decisional law.

The *Confrontation Clause* is not violated when evidence is received for a nonhearsay purpose.

The Victims' *Bill of Rights* (*Cal Const, art I, § 28(d)*) expressly excludes from its ambit statutory rules of evidence relating to hearsay.

[3] Official Comments

This section defines hearsay evidence and provides that such evidence is inadmissible unless it meets the conditions of

an exception established by law [Leg Com Comment].

The principal objection to the use of hearsay evidence is that the declarant is not subject to cross-examination at trial [Leg Com Comment].

Exceptions to the hearsay rule may be found either in statutes or in decisional law [Cal Law Rev Com Comment].

The fact that certain evidence meets the requirements of an exception to the hearsay rule does not necessarily make such evidence admissible, for some other rule of evidence may compel its exclusion [Leg Com Comment].

In some situations, hearsay evidence is admitted because there is either some exceptional need for the evidence or some circumstantial probability of its trustworthiness, or both [Leg Com Comment].

A statement that is offered for some purpose other than to prove the truth of the fact stated therein is not hearsay [Leg Com Comment].

Nonassertive conduct is not hearsay [Leg Com Comment].



Strategic Point:

Hearsay evidence is admissible in small claims court even if no hearsay exception is applicable because small claims hearings are informal by statute and because it is unrealistic to require lay persons to abide by the formal rules of evidence [*Houghtaling v. Superior Court* (1993) 17 CA4th 1128, 21 CR2d 855] .



Warnings:

When opposing counsel not only failed to raise a hearsay objection to the witness's testimony but also called the witness and elicited the same testimony, the lack of objection rendered the evidence competent [see *Evid Code* § 353(a)]. Hearsay evidence admitted without objection is sufficient to sustain a finding in a judicial proceeding [*Frudden Enterprises, Inc. v. Agricultural Labor Relations Board* (1984) 153 CA3d 262, 201 CR 371 (hearsay sufficient to sustain a finding in ALRB proceeding)].

Under a longstanding rule, incompetent hearsay admitted without objection is sufficient to sustain a finding or judgment. In a case where the hearsay objection was waived in the trial court and on appeal, the hearsay evidence was direct evidence of the fact it was offered to prove [*Gallagher v. Connell* (2004) 123 CA4th 1260, 20 CR3d 673 (hearsay supported opposition to SLAPP motion arising out of slander suit)].

[4] Case Notes

The main judicial policy objection to hearsay evidence is that the declarant is not subject to cross-examination [*People v. Duarte* (2000) 24 C4th 603, 101 CR2d 701, 12 P3d 1110 (declaration against interest); *People v. Sundlee* (1977) 70 CA3d 477, 138 CR 834 (tape recording of extrajudicial statements of non-parties is hearsay); *People v. Spriggs* (1964) 60 C2d 868, 36 CR 841, 389 P2d 377 (declaration against penal interest); *People v. Gould* (1960) 54 C2d 621, 7 CR 273, 254 P2d 865 (extrajudicial identification); *People v. Bob* (1946) 29 C2d 321, 175 P2d 12 (declarant should be produced as witness)].

Rumors that the gang of which victim allegedly had been a member had committed the crime defendant was accused of were inadmissible hearsay [*People v. Soto* (1984) 157 CA3d 694, 204 CR 204 (evidence of victim's gang membership was not relevant)].

Evidence of a misdemeanor conviction, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility, since there is no Evidence Code section allowing evidence of misdemeanor convictions as there is for felony convictions. However, evidence of past criminal conduct amounting to a misdemeanor is admissible, subject to trial court discretion, as relevant evidence under *Cal Const, art I, § 28*, if the conduct has some logical bearing on the veracity of a witness in a criminal proceeding [*People v. Wheeler (1992) 4 C4th 284, 14 CR2d 418, 841 P2d 938*] .

Computer-generated statistical analysis comparing accident rates for the type of aircraft that crashed with rates for other aircraft on a per flight basis is inadmissible hearsay in a wrongful death action [*Brake v. Beech Aircraft Corp. (1986) 184 CA3d 930, 229 CR 336*] .

Exceptions to hearsay rule are not limited to those enumerated in Evidence Code, and may also be found in other codes and decisional law [*In re Malinda S. (1990) 51 C3d 368, 272 CR 787, 795 P2d 1244* ; *In re Cindy L. (1997) 17 C4th 15, 69 CR2d 803* (the legislature has not made hearsay law the exclusive province of statute); *In re Conservatorship of Jones (1986) 188 CA3d 306, 232 CR 600* (affidavit of proof of service exempted by the *Code of Civil Procedure*); *In re Michael V. (1986) 178 CA3d 159, 223 CR 503* (statutory exception contained in *W&I Code §§ 706, 725.5*); *People v. Spriggs (1964) 60 C2d 868, 36 CR 841, 389 P2d 377* (judicial exception codified in *Evid Code § 1230*); *Nardoni v. McConnell (1957) 48 C2d 500, 310 P2d 644* (statutory exception contained in *Gov Code § 11513(c)*)].

There is no exception to the hearsay rule for statements made under hypnosis because there is no solid assurance that the statements are reliable [*People v. Blair (1979) 25 C3d 640, 159 CR 818*] .

[a] Procedures

Local courts may not create their own rules of evidence and procedure in conflict with statewide statutes. A trial court's local rule and pretrial scheduling order calling for the admission and use of declarations, in lieu of oral testimony at marital dissolution trials, conflicted with the hearsay rule and was contrary to the interest of the public in access to justice and resolution of a controversy on its merits [*Elkins v. Superior Court (2007) 41 C4th 1337, 1359-1360, 63 CR3d 483, 163 P3d 160* (trial court abused its discretion in sanctioning self-represented petitioner by excluding most of his evidence after he failed, prior to trial, to file declaration establishing admissibility of his trial evidence)].

The burden of producing evidence to establish the foundational facts of a hearsay exception falls to the proponent of the hearsay evidence [*People v. Demetrulias (2006) 39 C4th 1, 27, 45 CR3d 407, 137 P3d 229* (defense failed to establish foundation for excited utterance or business records exceptions)].

In a prosecution for driving under the influence, defendant underwent a preliminary alcohol screening test (PAS). At trial, the container's label stated the test solution was .10 percent alcohol. Since the witness was relying on the truth of this statement in making his determination whether the PAS device was functioning accurately, the statement on the label was hearsay. However, the challenged testimony was correctly admitted because the witness was testifying as an expert witness. Although he was never expressly declared by the court to be an expert witness on the accuracy of the PAS device, the record amply supported the conclusion he was qualified and so testifying, and that the parties and court understood this [*People v. Hallquist (2005) 133 CA4th 291, 295-299, 34 CR3d 621* (trial court correctly admitted testimony based on preliminary alcohol screening test)].

If evidence is "totally devoid of any nonhearsay probative value," then an inadmissible hearsay objection preserves appellate review [*People v. Scalzi (1981) 126 CA3d 901, 179 CR 61*] .

In proceedings that are not criminal prosecutions, hearsay evidence may be admitted, in the discretion of the court, if it is trustworthy and there are sufficient indicia of reliability. In such proceedings, the full panoply of rights due a criminal

defendant do not apply and the rules of evidence are relaxed [*People v. Sword* (1994) 29 CA4th 614, 34 CR2d 810 (in outpatient status hearing under *Pen Code* § 1026, records of conversations with other people in defendant's hospital records were admissible); *People v. Brown* (1989) 215 CA3d 452, 263 CR 39 (parole revocation proceeding)].

An allegation made on information and belief does not serve to establish the facts because an affidavit that is to be used as evidence must be direct, positive, and not based on hearsay. If offered to prove its truth, an information and belief allegation in a complaint could pose a double hearsay problem: the complaint would be hearsay and the statement made on information and belief would also be hearsay [*Magnolia Square Homeowners v. Safeco Ins.* (1990) 221 CA3d 1049, 271 CR 1] .

In a product liability and personal injury action against the manufacturer and distributor of a motorcycle side stand, plaintiff's attorney sought to introduce an identical stand as exemplar, and attempted by declaration to use the package label and enclosed instruction sheet to prove that the content of the package was a certain brand and model side stand distributed by a defendant. The product package and enclosed instruction sheet were inadmissible hearsay as offered, because they were extrajudicial assertions offered to prove the truth of the matter asserted, namely, that the box contained a certain brand and model product. The declaration purporting to recite this written information was inadmissible double hearsay. However, neither party argued that the compilation hearsay exception of *Evid Code* § 1340 applied [*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 CA4th 666, 69 CR3d 888] .

Where the prosecution elicited hearsay testimony from a witness without objection, it was error for the trial court to refuse cross-examination on the evidence brought forward by the prosecution [*People v. Fatone* (1985) 165 CA3d 1164, 211 CR 288] .

If the trial court is mistaken as to the correct hearsay exception, the evidence is acceptable on appellate review if it comes under a proper hearsay exception [*People v. Rowland* (1992) 4 C4th 238, 14 CR2d 377 (victim's extrajudicial statements came within the state of mind exception); *People v. Lopez* (1980) 110 CA3d 1010, 168 CR 378 (admission of party admitted under spontaneous statements exception); *Davey v. Southern Pac. Co.* (1897) 116 C 325] .

[b] Nonhearsay Because Not Offered for Truth of Assertion

The court cannot rule that an out-of-court statement is admissible merely by identifying a nonhearsay purpose for the statement; it must also find that such purpose is relevant to an issue in dispute [*People v. Turner* (1994) 8 C4th 137 32 CR2d 762, 878 P2d 521 ; *People v. Armendariz* (1984) 37 C3d 573, 209 CR 664] .

► Cross References:

Discussion of *Evid Code* § 350, see 6.01.

Practical application of the hearsay rule, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.

Defendant's stepdaughter's accusations of molestation were not offered to prove defendant actually molested her, but rather to prove defendant was aware of the accusations and to explain defendant's motive for killing his stepdaughter and others [*People v. Mendoza* (2007) 42 C4th 686, 697-698, 68 CR3d 274, 171 P3d 2 (accusations were properly admitted for nonhearsay purpose, to explain defendant's state of mind, motive, and conduct)].

In an action for wrongful termination and sexual harassment, the trial court sustained objections to parts of plaintiff's declaration that allegedly repeated the harasser's offensive statements. The trial court then dismissed the action on summary judgment, based on the plaintiff's procedural failure to complete an internal complaint process before filing suit. The appellate court reversed on the same ground, noting in passing that the trial court erred in excluding plaintiff's

version of what a coworker allegedly said to her, because the statements were not offered to establish the truth of what he allegedly said but that fact that he made those statements. Whether plaintiff reasonably interpreted the intent behind his statements was an issue for the jury [*Ahmadi-Kashani v. Regents of the University of California* (2008) 159 CA4th 449, 71 CR3d 556].

Defendant's stepfather's false report of robbery was offered not for truth but to prove stepfather's attempt to establish alibi, as circumstantial evidence of his awareness of defendant's plan to commit crime [*People v. Crew* (2003) 31 C4th 822, 3 CR3d 733 ; *People v. Bolin* (1998) 18 C4th 297, 75 CR2d 412 (witness testified to murder victim's pleas to defendant to spare his life--not offered for truth but the fact of the statements); *Silva v. Lucky Stores, Inc.* (1998) 65 CA4th 256, 76 CR2d 382 (in a sexual harassment investigation, where the reasonableness of a person's conduct is at issue, the statements of others on which he or she acted are admissible and not hearsay); *People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (witness's statements that murder suspect said he would kill her if she informed shows killer's state of mind); *Simon v. Steelman* (1990) 224 CA3d 1002, 274 CR 218 (offered to prove declarant made statement); *Shimoyama v. Board of Education* (1981) 120 CA3d 517, 174 CR 748 (testimony as witness to past event of his state of mind at the time); *People v. Lo Cicero* (1969) 71 C2d 1186, 80 CR 913, 459 P2d 241 (offered to prove effect upon listener)].

A utility bill, a fishing license, and two checks were held to be admissible nonhearsay when introduced to show a person's residency because they are more likely to be found in the residence of the person named on the documents than in the residence of any other person [*People v. Williams* (1992) 3 CA4th, 5 CR2d 372] .

Statements of both codefendants were not offered by the prosecution for their truth, but for their falsity (the prosecution intended to show that both codefendants manifested a consciousness of guilt by lying to the police). Used for this purpose, the statements were admissible without qualifying under any of the hearsay exceptions [*People v. Duran* (2001) 94 CA4th 923, 114 CR2d 595] .

A telephone number on a pager is not hearsay [*People v. Fields* (1998) 61 CA4th 1063, 72 CR2d 255 ; *Tennessee v. Street* (1985) 471 US 409, 105 S Ct 2078, 85 L Ed2d 425] .

Subject to *Evid Code* § 352, and appropriate editing, when a police officer participates in a telephone conversation where he is lawfully executing a search warrant and hears a third person offer to purchase a controlled substance, testimony thereon is not made inadmissible by the hearsay rule and may be received as circumstantial evidence tending to show the controlled substance seized at that location was possessed for purposes of sale [*People v. Nealy* (1991) 228 CA3d 447, 279 CR 36 (three telephone requests for the purchase of "doves" was not hearsay)].

[c] Nonhearsay Because Nonassertive Conduct

Defendant's lack of response to information concerning a murder discussed in his presence was not an adoptive admission, but was probative of defendant's prior knowledge of the killing. Admission of such nonassertive, nonverbal conduct is not proscribed by the hearsay rule [*People v. Snow* (1987) 44 C3d 216, 242 CR 477] .

A young child's play with anatomical dolls is deemed not to be a substitute for verbal expression [*In re Cheryl H.* (1984) 153 CA3d 1098, 200 CR 789 (dolls used as therapy in situations where sexual molestation is suspected)].

[d] Due Process Concerns at Penalty Phase

Due process requires the admission of hearsay evidence at the penalty phase of a capital trial, even though a state's evidentiary rules are to the contrary, if both of the following conditions are present: (1) the testimony is highly relevant to a critical issue in the punishment phase of trial, and (2) there are substantial reasons to assume the reliability of the evidence [*People v. Morrison* (2004) 34 C4th 698, 21 CR3d 682 , citing *People v. Champion* (1995) 9 C4th 879, 39

CR2d 547 ; but see Crawford v. Washington (2004) 541 US 36, 124 S Ct 1354, 158 L Ed2d 177 (if hearsay statement offered for its truth is testimonial in nature, its admission violates *Confrontation Clause* unless defendant had prior opportunity to cross-examine declarant)).

While *Crawford* literally says there must be both witness unavailability and a prior opportunity for cross-examination, the extrajudicial statements of declarants who are available for current cross-examination need not be excluded. Where the declarant is unavailable at trial, the prosecution cannot admit such evidence against the defendant unless the defendant previously had the chance to test its veracity in an adversarial setting. But *Crawford* cannot reasonably be understood as barring such evidence where the declarant was available for that purpose at trial, and the defendant could have cross-examined the declarant [*People v. Lewis and Oliver*, 39 C4th 970, 1028 n19, 47 CR3d 467, 140 P3d 775 (no error in introduction of extrajudicial statements by witnesses to police)].

Exclusion of hearsay evidence at the penalty phase does not deprive a defendant of due process where the evidence is not relevant and there appear no reasons, substantial or otherwise, supporting its reliability. Police investigation could not tie the bag of \$31,000 in cash to the victim's relative's drug-dealing, so the informer's tip about the source of the cash was inadmissible. The presence of \$31,000 in the house did not extenuate the murder-robbery, nor did the prosecution argue that defendants chose this house randomly for murder, when, in fact, evidence showed that defendants knew the victims [*People v. Morrison (2004) 34 C4th 698, 21 CR3d 682*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals General Overview Evidence Procedural Considerations Exclusion & Preservation by Prosecutor Evidence Procedural Considerations Objections & Offers of Proof Objections



4 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.02

21.02 Exception to Rule--Evid Code § 1201

[1] Evid Code § 1201 Text

■ Evid Code § 1201.

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.

LegH: 1965 ch. 299, 1967 ch. 650.

[2] Commission Comments

This section makes it possible to use admissible hearsay to prove another statement that is also admissible hearsay [Cal Law Rev Com Comment].

[3] Case Notes

Multiple hearsay is admissible for its truth only if each hearsay layer separately meets the requirements of a hearsay exception [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224 ; *People v. Woodell* (1998) 17 C4th 448, 71 CR2d 241 (judicial notice of court opinion does not obviate necessity of finding exception to hearsay rule for hearsay statements in opinion, and to each level of multiple hearsay); *People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 (exception found for each layer: prior inconsistent statement and admission of party opponent); *People v. Arias* (1996) 13 C4th 92, 51 CR2d 770 (exception found for each layer: spontaneous declaration and admission of party opponent); *People v. Reed* (1996) 13 C4th 217, 52 CR2d 106 (portions of probation report in transcript constituted inadmissible multiple hearsay: transcript admissible under prior testimony exception, but no exception for probation report); *People v. Zapien* (1993) 4 C4th 929, 17 CR2d 122, 846 P2d 704 (inconsistent statement established another inconsistent statement); *People v. Collup* (1946) 27 C2d 829, 167 P2d 714 (transcript of witness's former testimony used to prove defendant's admission)].

Although Proposition 115 (*Evid Code* § 1203.1) created an exception to the basic hearsay rule (*Evid Code* § 1200), it did not create a similar exception to *Evid Code* § 1201 relating to multiple hearsay [*Whitman v. Superior Court of*

Santa Clara County (1991) 54 C3d 1063, 2 CR2d 160, 820 P2d 262] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay Evidence Hearsay Hearsay Within
Hearsay Evidence Hearsay Rule Components Truth of Matter Asserted



5 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.03

21.03 Credibility of Hearsay Declarant--Evid Code § 1202

[1] Evid Code § 1202 Text

■ *Evid Code § 1202.*

Evidence of a statement or other conduct by a declarant that is inconsistent with 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.

LegH: 1965 ch. 299.

[2] Commission Comments

The standard rule on use of a prior inconsistent statement is modified so a hearsay declarant may be impeached by inconsistent statements made before or after his admitted statement whether or not he has been given an opportunity to explain or deny the inconsistency at trial; however, such inconsistent statements may not be used to prove the truth of the matter asserted [Cal Law Rev Com Comment].

Evid Code § 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified [Cal Law Rev Com Comment].

If the hearsay declarant is available, the party electing to use the hearsay should have the burden of calling him to explain or deny the alleged inconsistencies [Cal Law Rev Com Comment].

Evidence to impeach a hearsay declarant is not to be excluded on the ground that it is collateral per se; however, the trial judge may regulate such impeachment under *Evid Code § 352* if the inquiry becomes too remote from the controverted issues [Cal Law Rev Com Comment].

[3] Case Notes

This section liberalizes the rules for the impeachment of a hearsay declarant, particularly with regard to introducing evidence of inconsistent statements [*People v. Ruiz* (1998) 62 CA4th 234, 72 CR2d 572 (gang evidence admitted to point out inconsistency of witness's hearsay statement); *O'Gan v. King City Joint Union High School Dist.* (1970) 3 CA3d 641, 83 CR 795 (a hearsay declarant may be impeached by inconsistent statements made before or after his admitted statement whether or not he has been given an opportunity to explain or deny the inconsistency at trial; however, such inconsistent statements may not be used to prove the truth of the matter asserted)].

When the portion of witness's tape-recorded statement differed substantially from witness's trial testimony, there is no error in admitting the statement for impeachment purposes as being inconsistent with trial testimony [*People v. Romo* (1975) 14 C3d 189, 121 CR 111, 534 P2d 1015] .

A defendant's prior felony convictions are admissible under *Evid Code* §§ 1202 and 788 to attack his or her credibility when, at the defendant's own request, his or her exculpatory out-of-court statement to the police is admitted into evidence, but he or she does not testify at trial [*People v. Jacobs* (2000) 78 CA4th 1444, 93 CR2d 783] .

Evid Code § 1202 is not limited in its application to hearsay statements in the form of prior testimony [*People v. Jacobs* (2000) 78 CA4th 1444, 93 CR2d 783] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Hearsay Credibility of Declarants Impeachment Evidence Evidence Hearsay Credibility of Declarants Rehabilitation



6 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.04

21.04 Examination of Hearsay Declarant-Applicability--Evid Code § 1203

[1] Evid Code § 1203 Text

■ *Evid Code § 1203.*

- (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.**

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

The policy in favor of cross-examination that underlies the hearsay rule indicates that an adverse party should be accorded the right to call the declarant of a hearsay statement received in evidence and to cross-examine him concerning his statement [Leg Com Comment].

The unavailability of a hearsay declarant for examination under this section has no effect on the admissibility of his hearsay statements [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayRule ComponentsStatements



7 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.05

21.05 Examination of Hearsay Declarant--Preliminary Examinations--Evid Code § 1203.1

[1] Evid Code § 1203.1 Text

■ *Evid Code § 1203.1.*

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 (Prop 115) June 5, 1990.

[2] Introduction: Prop. 115

Pen Code § 872(b) was adopted by California voters on June 5, 1990, by Proposition 115, the initiative measure known as the Crime Victims Justice Reform Act. The stated purpose of the act is to adopt "comprehensive reforms ... needed in order to restore balance and fairness to our criminal justice system." In order to facilitate these purposes, the initiative made changes both to the California Constitution and to statutory law dealing with criminal behavior and the conduct of trials. The initiative provides in part that the Constitution shall not be construed to prohibit joinder, makes hearsay evidence admissible at preliminary hearings, and makes criminal discovery reciprocal. The constitutionality of Proposition 115 was challenged before the California Supreme Court in the case of *Raven v. Deukmejian* (1990) 52 C3d 336, 276 CR 326, 801 P2d 1077. Though the act's effort to amend the California Constitution to limit a criminal accused's rights to those afforded by the United States Constitution was struck down in that case, its remaining provisions were found severable from the invalid portion and may properly be given effect.

Proposition 115 has significantly changed California's preliminary hearing procedure. The relevant statutory and constitutional provisions permit the prosecution to meet the requirements of establishing probable cause through the admission of hearsay evidence. The provisions limit the defendant's opportunity to cross-examine the hearsay declarant and provide specified procedures for the presentation of defense witnesses.

Section 5 of the initiative added *Section 30 to article I of the state constitution*. Subdivision (b) of this section provides that "in order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process."

Section 18 of the initiative amended *Pen Code* § 872(b) to provide that "Notwithstanding *Evid Code* § 1200 [hearsay rule], the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating to statements of declarants made out of court offered for the truth of the matter asserted. Any law enforcement officer testifying as to hearsay statements 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."

Although Proposition 115 has established a new procedure for the determination of probable cause, thus limiting a defendant's right to cross-examine a hearsay declarant at the preliminary hearing, it has been held that no loss of *Confrontation Clause* rights occurs. Pursuant to *Gerstein v. Pugh* (1975) 420 US 103, 95 S Ct 854, 43 L Ed2d 54 there is no federal constitutional right to confront and cross-examine witnesses at a probable cause hearing [*Faubel v. Superior Court* (1991) 228 CA3d 1515, 279 CR 658].

In *Tapia v. Superior Court* (1991) 53 C3d 282, 279 CR 592, 807 P2d 434 , the California Supreme Court granted review to determine whether the provisions of Proposition 115 should be applied to prosecutions of crimes committed before its effective date. The court distinguished between the provisions of Proposition 115 that addressed criminal behavior and provisions that addressed the conduct of trials. The general rule is that statutes addressing the conduct of trials are prospective, even as applied to prosecutions of crimes committed before the law's effective date. A statute is not retroactive where it addresses the conduct of trials that have yet to take place, as opposed to a law applying to criminal behavior that has already taken place. Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future. Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment ... [instead,] [t]he effect of such statutes is actually prospective in nature since they related to the procedure to be followed in the future." (*Strauch v. Superior Court* (1980) 107 CA3d 45, 49 , quoting *Olivas v. Weiner* (1954) 127 CA2d 597, 600-601, 274 P2d 476).

The court determined that the application of provisions such as those making hearsay evidence admissible at preliminary hearings addressed the conduct of trials and that these provisions may be applied to pending cases, regardless of when the charged offense is alleged to have occurred [*Tapia v. Superior Court* (1991) 53 C3d 282, 279 CR 592, 807 P2d 434 (voir dire to be conducted pursuant to a new statute addressed in Proposition 115 did not apply retrospectively)].

The California Supreme Court found no violations of state or federal self-incrimination privileges, due process privileges, rights to effective assistance of counsel, or privileges regarding attorney work product by the new discovery chapter (Proposition 115). "Properly construed and applied, the discovery provisions of Proposition 115 are valid under the State and Federal Constitutions and ... effectively reopened the two-way street of reciprocal discovery in criminal cases in California" [*Izazaga v. Superior Court of Tulare County* (1991) 54 C3d 356, 285 CR 231, 815 P2d 304] .

[3] Case Notes

Proposition 115 does not authorize a finding of probable cause based on the testimony of a non-investigating officer or "reader" merely reciting a police report. The probable intent of the framers was to allow a properly qualified investigating officer to relate out-of-court statements by crime victims or witnesses without requiring their presence [*Whitman v. Superior Court of Santa Clara County* (1991) 54 C3d 1063, 2 CR2d 160, 820 P2d 262] .

An investigating officer may be one who has sufficient knowledge of the crime or circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement [*People v. Wimberly* (1992) 5 CA4th 439, 6 CR2d 800 ; *Whitman v. Superior Court of Santa Clara County* (1991) 54 C3d 1063, 2 CR2d 160, 820 P2d 262] .

The hearsay exception for preliminary hearings does not create a general hearsay exception for other proceedings [

People v. Best (1997) 56 CA4th 41, 64 CR2d 809 (error to use preliminary hearsay to prove prior conviction at trial)].

Proposition 115 does not violate state or federal constitutional rights regarding confrontation of accusers or separation of powers [*Whitman v. Superior Court of Santa Clara County* (1991) 54 C3d 1063, 2 CR2d 160, 820 P2d 262] .

Although Proposition 115 created an exception to the basic hearsay rule [*Evid Code* § 1200], it did not create a similar exception to *Evid Code* § 1201 relating to multiple hearsay [*Montez v. Superior Court of Los Angeles* (1992) 4 CA4th 577, 5 CR2d 723 (multiple level hearsay might not contravene underlying purposes of Proposition 115); *Whitman v. Superior Court of Santa Clara County* (1991) 54 C3d 1063, 2 CR2d 160, 820 P2d 262] .

Proposition 115 does not purport to create an exception to the multiple hearsay rule. However, a generally unbiased and adequately skilled translator simply serves as a "language conduit," and thus a contemporaneous translation does not add a layer of hearsay when the translated statement fairly is attributable to the declarant. Therefore, the California Supreme Court concluded that in view of the limited function of the probable cause determination and the resulting circumscribed interests of defendants at preliminary hearings, and their ability to cross-examine the investigating officers and to call witnesses, the court of appeal erred in determining that defendant's right of cross-examination was infringed, or that the translated evidence was so unreliable that its admission constituted a denial of due process of law [*Correa v. Superior Court* (2002) 27 C4th 444, 117 CR2d 27, 40 P3d 739 (investigating officers, who did not speak Spanish, testified at defendant's preliminary hearing regarding extrajudicial statements made by Spanish-speaking victim of alleged crimes and by another Spanish-speaking witness based on received statements of victim and witness through contemporaneous translations provided by apparently unbiased bystanders during officers' investigation of crimes, and persons who acted as translators during these interviews also testified at preliminary hearing regarding their language skills and circumstances of translation; under these circumstances participation of translator does not interpose an additional layer of hearsay; overruling early opinions to the extent they characterize such translations as constituting hearsay)].

The statement of a witness, recounted by a qualified law enforcement officer at a preliminary hearing, need not be corroborated when the witness is not a coparticipant in the offense as a matter of law [*Ruiz v. Superior Court* (1994) 26 CA4th 935, 31 CR2d 741 (perhaps implying, but not deciding, that corroboration is needed when a witness is a coparticipant as a matter of law)].

Neither Proposition 115 nor federal decisions applying *confrontation clause* principles creates an "accomplice confession" exception to the general rule permitting admission of hearsay evidence at preliminary examinations [*People v. Miranda* (2000) 23 C4th 340, 96 CR2d 758, 1 P3d 73] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law
Amendment Process
Criminal Law & Procedure
Discovery & Inspection
General Overview
Criminal Law & Procedure
Preliminary Proceedings
Preliminary Hearings
Evidence



8 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.06

21.06 Criminal Actions--Evid Code § 1204

[1] Evid Code § 1204 Text

■ *Evid Code § 1204.*

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.

LegH: 1965 ch. 299.

[2] References

Privilege against self incrimination, see *Cal Const, article I, § 15* and *Pen Code § 688*.

[3] Legislative Committee Comments

Prior inconsistent statements are inadmissible under certain conditions against criminal defendants [Leg Com Comment].

Evid Code § 1204 applies to state and federal constitutional protections; however, insofar as the Constitution of the United States is concerned, this section refers only to those rules required to be observed in state proceedings, not those rules required to be observed only in federal proceedings [Leg Com Comment].

Consider:

For the relationship between exceptions to the hearsay rule in criminal cases and *Sixth Amendment confrontation clause*, see *People v. Coble* (1976) 65 CA3d 187, 195, 135 CR 199 (admission of extrajudicial statements falling within exceptions to hearsay rule may violate *confrontation clause* if extrajudicial statement goes to heart of case, is "crucial" or "devastating" to defendant).

[4] Case Notes

Testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the *Confrontation Clause* unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination [*Crawford v. Washington* (2004) 541 US 36, 59, 124 S Ct 1354, 158 LEd2d 177] . *Crawford* is not retroactively applicable to cases on collateral review [Whorton v. Bockting (2007) -- US --, 127 SCt 1173, 1177, 1184, 167 LEd2d 1].

A statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial. The critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial, but the circumstances under which the statement was made. Statements made in laboratory reports and other types of forensic evidence are nontestimonial statements under *Crawford*, notwithstanding their possible use at trial [*People v. Geier* (2007) 41 C4th 555, 605-607, 61 CR3d 580, 161 P3d 104 petition for cert (11/14/2007) (in murder/rape trial, DNA report was not testimonial for purposes of *Crawford* and *Davis*)].

An assault victim's statement to the physician who treated him at the hospital was nontestimonial and not barred by *Crawford*. In order to help diagnose the nature of the victim's slash wound, and to determine the appropriate treatment, the physician asked the victim a single question--"What happened?" The victim responded that his grandmother held him down while defendant, his mother, cut him. The primary purpose of the physician's general question, objectively considered, was not to obtain proof of a past criminal act, or the identity of the perpetrator, for possible use in court, but to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound. The victim's statement lacked those attributes of testimony by a witness that are the concern of the *confrontation clause*. In contrast, the victim's statements to a deputy, both in a hospital emergency room, and later on tape at the sheriff's station, were testimonial. Though the two occasions varied in their formality, all the attendant statements were given as an analog of testimony by a witness--they 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 a crime and establish or prove some past fact. However, the erroneous admission of the victim's statements to the deputy was harmless beyond a reasonable doubt [*People v. Cage* (2007) 40 C4th 965, 970-971, 56 CR3d 789, 155 P3d 205 , cert den 2007 US LEXIS 12279] .

During a kidnapping investigation, the police on their own initiative brought defendant's grandmother to the jail to speak to him. The grandmother later testified that she understood that the police wanted her to ask her grandson questions about what had happened. During the conversation, defendant, who was on probation for another crime, denied murdering his girlfriend, and commented, "I don't care about her, I'm just tired." He also made a number of comments that showed consciousness of guilt of serious crimes, including fears of never leaving prison. The appellate court found no *Fifth*, *Sixth*, or *Fourteenth Amendment* violation in the procedure by which the police obtained defendant's extrajudicial statements. Defendant's conversations with his own visitors were not the constitutional equivalent of police interrogation. There was no improper persuasion or coercion. The trial court reasonably found that the statement was probative as tending to show defendant's deliberation and intent in committing the murder, and that its probative value substantially outweighed its prejudicial effect [*People v. Thornton* (2007) 41 C4th 391, 429-434, 61 CR3d 461, 161 P3d 3 , cert den 2007 US LEXIS 12579] .

In relating his version of the fatal events in a murder prosecution, defendant repeated statements allegedly made by the victim. He testified that they had had a "typical" argument earlier that day. The victim knew defendant was with his new girlfriend and had said she was on her way there to kill her. When she arrived, she threatened to kill both defendant and "that bitch." Afraid the victim had something in her hand, defendant shot at her several times after she "charged" him. Thus, partially through the victim's own alleged statements, defendant portrayed her as a violent, aggressive, foulmouthed, jealous, and volatile person. Defendant then argued that admission of the victim's extrajudicial statements to the police, which conflict with his portrayal of the victim as the aggressor, violated his confrontation rights. The court held that defendant should not be able to take advantage of his own wrong by using the victim's statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the

prosecution from using her conflicting statements [*People v. Giles*, 40 C4th 833, 850, 55 CR3d 133, 152 P3d 433 , cert granted 2008 US LEXIS 758 (Jan. 11, 2008)] .

Someone who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation, subject to several limitations. First, the witness should be genuinely unavailable to testify, and the unavailability for cross-examination should be caused by the defendant's intentional criminal act [see *Evid Code* § 1350(a)(1)]. Second, a trial court cannot make a forfeiture finding based solely on the unavailable witness's uncontroverted testimony. There must be independent corroborative evidence that supports the forfeiture finding. The forfeiture by wrongdoing doctrine in California only bars a defendant's objection under the *confrontation clause of the federal Constitution* and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect. Finally, the jury should not be advised of the trial court's underlying finding that defendant committed an intentional criminal act, so that the jury will draw no inference about the ultimate issue of guilt based on the evidentiary ruling itself [*People v. Giles* (2007) 40 C4th 833, 850, 55 CR3d 133, 152 P3d 433 , cert granted 2008 US LEXIS 758 (Jan 11, 2008) (Court of Appeal correctly found that there was clear and convincing evidence that defendant procured victim's unavailability through criminal homicide)].

Prior inconsistent statements made under pressure from police are inadmissible [*People v. Underwood* (1964) 61 C2d 113, 37 CR 313] .

A criminal defendant has no standing to object to a violation of a third party's *Fifth Amendment* privilege against self-incrimination. A defendant cannot seek exclusion of a third party's trial testimony on the sole ground that it is the "fruit" of an involuntary extrajudicial statement of the party. In order to have standing to argue that the testimony of a third party should be excluded because it is coerced or involuntary, a defendant must allege a violation of his own federal rights. The defendant must allege that the third party's trial testimony is coerced and that its admission will deprive him of his federal due process right to a fair trial [*People v. Badgett* (1995) 10 C4th 330, 41 CR2d 635, 895 P2d 877 (disapproving to extent inconsistent *In re Clyde J.* (1987) 192 CA3d 710, 237 CR 550 , which held defendants had standing under *Evid Code* § 1204 to challenge voluntariness of third party's confession); *People v. Douglas* (1990) 50 C3d 468, 268 CR 126, 788 P2d 640] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Justiciability
Standing
General Overview
Evidence
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Self-Incrimination Privilege
General Overview
Evidence
Procedural Considerations
Exclusion & Preservation by Prosecutor



9 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.07

21.07 Repeal by Implication Relating to this Division--Evid Code § 1205

[1] Evid Code § 1205 Text

- *Evid Code § 1205.*

Nothing in this [Evidence Code] division [sections 1200 through 1380 regarding Hearsay Evidence] shall be construed to repeal by implication any other statute relating to hearsay evidence.

LegH: 1965 ch. 299.

[2] References

Gov Code § 11513.

W&I Code § 701.

[3] Commission Comments

For the most part, the statutes that remain in the various codes are narrowly drawn to make a particular type of hearsay evidence admissible under specifically limited circumstances [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay



10 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.08

21.08 Statement of Party to Action--Evid Code § 1220

[1] Evid Code § 1220 Text

- *Evid Code § 1220.*

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.

LegH: 1965 ch. 299.

[2] References

Plea of nolo contendere, *Pen Code § 1111*.

Privilege against self-incrimination, *Evid Code § 940*.

[3] Commission Comments

The statement need not be one that would be admissible if made at the hearing [Cal Law Rev Com Comment].

The rationale underlying this exception is that the party against whom the hearsay statement is admitted cannot object to the lack of the right to cross-examine the witness who testifies to the party's statement and can explain or deny the purported admission [Cal Law Rev Com Comment].

Decision Point:

Pretrial statements of a party, whether in the form of statements given to police or investigators, depositions, or answers to interrogatories, constitute evidentiary admissions. A party may present evidence at trial that varies from such pretrial statements, but he runs the risk of being impeached [*Lake v. Reed* (1997) 16 C4th 448, 65 CR2d 860 (police report, party admitted driving); *Weiss v. Baba* (1963) 218 CA2d 45 (pretrial statements); *Mayhood v. LaRosa* (1962) 58 C2d 498, 24 CR 837, 374 P2d 805 (deposition); *People v. Pearson* (1952) 111 CA2d 9, 244 P2d 35 (grand jury testimony)].

[4] Case Notes

An admission is a statement made by a party to a proceeding that is relevant to any fact in dispute [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 (summary or paraphrase of defendant's statement sufficient as admission by party); *People v. Fauber* (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249 (defendant's threats were admission by party); *People v. Dees* (1990) 221 CA3d 588, 270 CR 554 (defendant's statement that he was owner of automobile where drugs were found is admissible; prosecution offered statement to prove defendant owned or possessed automobile and its incriminating contents); *People v. Luparello* (1986) 187 CA3d 410, 231 CR 832 (co-conspirator's statement to defendant concerning payment of bribe to silence witness implies that co-conspirator and defendant had done something about which witness testimony could be incriminatory); *Carson v. Facilities Development Co.* (1984) 36 C3d 830, 206 CR 136 (plaintiff's statement that his wife did not have time to drive through intersection implies that the one who struck her was not negligent); *Dillenbeck v. City of Los Angeles* (1968) 69 C2d 472, 72 CR 321 (employer's safety rules held admissible as implied admissions because due care requires certain applicable standards be recognized); *Smith v. Whittier* (1892) 95 C 279, 30 P 529 (statement that party is willing to settle)].

In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (1) the defendant heard and understood the statement under circumstances that normally would call for a response; and (2) by words or conduct, the defendant adopted the statement as true [*People v. Davis* (2005) 36 C4th 510, 535, 31 CR3d 96, 115 P3d 417 (jury could have concluded from tone of voice and inflection in excerpts of recorded jailhouse conversations that defendant had made adoptive admissions, notwithstanding argument that defendant's comments were often unintelligible or nonresponsive)].

The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence or equivocal or evasive conduct. There are only two requirements for the introduction of adoptive admissions: (1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement [*People v. Combs* (2004) 34 C4th 821, 843, 22 CR3d 61, 101 P3d 1007] .

The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for admissions of a party. However, *Evid Code* § 1220 covers all statements of a party, whether or not they might otherwise be characterized as admissions [*People v. Horning* (2004) 34 C 4th 871, 22 CR3d 305 (defendant's out-of-court statements were admissible as statements of party)].

A statement may be received as an admission under the doctrine of limited admissibility even though it refers to a matter excluded by an extrinsic policy [*People ex rel. Dept. of Public Works v. Forster* (1962) 58 C2d 257, 23 CR 582, 373 P2d 630 (offer to compromise)].

In construction defect litigation, the documents establishing the tolling agreement constituted an admission by a party [*Evid Code* § 1220] that it had agreed not to enforce the statute of limitations. Thus, the tolling documents were not rendered inadmissible by the hearsay rule [*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 CA4th 1401, 66 CR3d 776] .

An arrestee's stipulation to probable cause for arrest in a misdemeanor prosecution, which was made voluntarily, and while she was informed and represented by counsel, could be admitted against her as the plaintiff in a civil tort suit against the police arising out of the same arrest [*Salazar v. Upland Police Dept.* (2004) 116 CA4th 934, 11 CR3d 22] .

A statement of a defendant charged with automobile theft to the effect that he merely wanted to do a good deed and push the subject automobile into a driveway did not fall under the exception to the hearsay rule for evidence "offered against the declarant" where the defendant sought introduction of the statement on his own behalf [*People v. Williamson* (1977) 71 CA3d 206, 139 CR 222] .

A pleading in a prior civil action or a plea of guilty in a prior criminal case may be admitted as an evidentiary admission against the pleader or defendant in a subsequent civil case [*Salazar v. Upland Police Dept.* (2004) 116 CA4th 934, 11 CR3d 22 (arrestee's stipulation to probable cause for arrest in misdemeanor prosecution could be admitted against her as plaintiff in civil tort suit against police); *Arenstein v. California State Bd. of Pharmacy* (1968) 265 CA2d 179, 1 CR 357 (prior guilty plea); *Muth v. Urricelqui* (1967) 251 CA2d 901, 60 CR 166 (prior civil pleading)].

[a] Constitutional Limitations

In a criminal action, the *Fourteenth Amendment* guarantee of due process precludes the admission of a defendant's statement unless it was voluntarily made (i.e., unless it was the product of a rational intellect and a free will) [*People v. MacPherson* (1970) 2 C3d 109, 84 CR 129, 415 P2d 17 (jailhouse admissions made by schizophrenic while jamming a pencil in his eye were not the product of a rational intellect); *People v. Sanchez* (1969) 70 C2d 562 75 CR 642, 451 P2d 74 (admission of involuntary confession held prejudicial error per se); *People v. Atchley* (1959) 53 C2d 160 346 P2d 764 (admission of involuntary admission stated erroneous)].

The *Fourth Amendment* guarantee of freedom from illegal searches and seizures precludes the admission of a criminal defendant's statement unless it was the product of a legal search or seizure [*People v. Stoner* (1967) 65 C2d 595 (courtroom identification sufficiently distinguishable from earlier tainted show-up identification); *People v. Bilderbach* (1965) 62 C2d 757 44 CR 313 401 P2d 921 (confession induced by illegal search excluded); *People v. Faris* (1965) 63 C2d 541 47 CR 370, 407 P2d 282 (admission of defendant's statement made during search without warrant was prejudicial and required reversal)].

The *Fifth Amendment* privilege against self-incrimination and the *Sixth Amendment* right to counsel preclude the admission of a criminal defendant's extrajudicial statements unless the full range of *Fifth* and *Sixth Amendment* "protective devices" prescribed by *Miranda* was in operation when such statements were obtained [*People v. Burton* (1971) 6 C3d 375 94 CR 1 491 P2d 743 (minor's request to see parents made near inception of questioning may be within the *Fifth Amendment* privilege); *People v. Randall* (1970) 1 C3d 948 83 CR 658 464 P2d 114 (admission of improper confession held prejudicial error per se); *In re Shipp* (1967) 66 C2d 721 39 CR 97, 427 P2d 761 (admission of improper admission held prejudicial error); *Miranda v. Arizona* (1966) 384 US 436 86 S Ct 1602, 16 L Ed2d 761 (the privilege against self-incrimination is the mainstay of the adversary system)].

On retrial on charges of possession and sale of methamphetamine, the trial court did not err in admitting, as party admissions under *Evid Code* § 1220, defendant's statements made while he was representing himself at closing argument in his first trial. Defendant argued on appeal that he should not have to surrender his *Fifth Amendment* right against self-incrimination in order to exercise his *Sixth Amendment* right to represent himself at trial. However, the two rights are not necessarily incompatible. A defendant can represent himself at trial without incriminating himself [*People v. Kiney* (2007) 151 CA4th 807, 60 CR3d 168 ; cert denied 2008 U.S. LEXIS 1737 (sentence modified; conviction affirmed)].

No statement, inculpatory or exculpatory, obtained from a defendant in violation of his constitutional right to silence is admissible for any testimonial purpose over defendant's objection. However, a suspect may change his mind and decide to give a statement, and such a statement is admissible provided the change of mind is voluntary [*People v. Webb* (1978) 83 CA3d 83, 147 CR 608 (statement to victim's girlfriend in police car admissible; *Miranda* warnings apply only to police questioning)].

In a joint trial, statements made in joint interview could be offered against defendant who made statement, but not against codefendant, as admission by party [*People v. Castille* (2003) 108 CA4th 469, 133 CR2d 489 ; *People v. Fletcher* (1996) 13 C4th 451, 55 CR2d 572 ; *People v. Mitcham* (1992) 1 C4th 1027, 5 CR2d 230] .

[b] Interaction of Section 1220 with Section 1101(b)

An admission that is made in part in the form of a threat need not be independently admissible as proof of identity under *Evid Code § 1101(b)* in order to qualify for use at trial. *Evid Code § 1101(b)* deals with evidence of a crime or other act that is relevant to prove a fact such as motive, opportunity, intent, or identity. To prove identity, the act must contain distinctive characteristics that are so unusual as to be like a signature. Admissions that tend to prove that the declarant committed a charged offense, however, are not offered as other crimes evidence, but instead are offered simply as statements made by a defendant that in and of themselves tend to prove that defendant committed a charged offense. These statements are admissible to prove the identity of the perpetrator regardless of whether they demonstrate "distinctive characteristics" akin to a signature [*People v. Robinson (2000) 85 CA4th 434, 102 CR2d 179* (no error to admit defendant's former girlfriend's testimony about defendant's threats made to that girlfriend days after victim's body was recovered)].

[c] Statement Made Through Interpreter/Translator

When a declarant makes an out-of-court statement through an interpreter, and that statement is otherwise admissible, the hearsay rule does not bar a percipient witness other than the interpreter from testifying to the content of the out-of-court statement, even though the witness testifies to the words uttered by the interpreter, not the declarant. Based on the theory of agency, the interpreter's statements are regarded as the statements of the declarant who willingly used the services of an interpreter, the translator being no more than a "language conduit." The agency theory applies unless circumstances are present which would negate the presumption of agency. The fact that the interpreter is a law enforcement officer or other employee of government does not prevent the interpreter from acting as the declarant's agent, even where the declarant is being investigated by law enforcement [*People v. Torres (1989) 213 CA3d 1248, 262 CR 323* (trial court properly admitted testimony of investigating police officer, based upon the words of the translator, another officer, who assisted when defendant who was not fluent in English asked to make a statement to the police; the defendant's out-of-court statement was an admission, and the words of the interpreter communicating the statement constituted the authorized statement of the defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Criminal Offenses Controlled Substances Possession General
Overview Evidence Privileges Self-Incrimination Privilege Exceptions Torts Transportation Torts General Overview



11 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.09

21.09 Statements by Party Manifesting Belief in its Truth--Evid Code § 1221

[1] Evid Code § 1221 Text

■ Evid Code § 1221.

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.

LegH: 1965 ch. 299.

[2] Case Notes

When a person makes a statement, such as an accusation of a crime, negligence, or wrongdoing, in the presence of a party under circumstances that would normally call for a response if the statement were untrue, the party's silence, evasion, or equivocation may be considered as a tacit admission of the truth of the statement [*Gilbert v. City of Los Angeles* (1967) 249 CA2d 1006, 58 CR 56 (statement admissible for limited purpose of showing reaction to it); *Estate of Neilson* (1962) 57 C2d 733, 22 CR 1, 371 P2d 745 (circumstances calling for a response accusation of crime, negligence, wrongdoing)].

The admissibility of such evidence depends upon whether the declarant made the statement under circumstances calling for a reply, whether the party understood the statement, and whether the party's conduct supports the inference that he adopted the statement as an admission [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 (telephone call admissible where defendant could hear both sides of conversation, responded when called by name, and was able to respond to any untrue or unfair accusation against him); *Gilbert v. City of Los Angeles* (1967) 249 CA2d 1006, 58 CR 56 (statement admissible for limited purpose of showing reaction to it); *Estate of Neilson* (1962) 57 C2d 733, 22 CR 1, 371 P2d 745 (admissible for limited purpose of showing reaction)].

An accusation and a silent, evasive, or equivocal response may be admitted for a nonhearsay purpose (i.e., as circumstantial evidence to prove the party's consciousness of guilt) [*People v. Combs* (34 C4th 821, 22 CR3d 61 (accomplice's statements made during videotaped re-enactment of murder, which corroborated defendant's prior statements that he did not retract, were admissible as adoptive admissions); *Nightlife Partners, Ltd. v. City of Beverly*

Hills (2003) 108 CA4th 81, 133 CR2d 234 (the failure of otherwise detailed sworn declaration to respond to fundamental allegations of wrongdoing created inference that allegations were true); *Los Robles Motor Lodge, Inc. v. Dept. of Alcoholic Bev. Control (1966) 246 CA2d 198, 54 CR 547* (silence of bartenders in presence of prostitutes soliciting undercover agents); *People v. Wilson (1965) 238 CA2d 447, 48 CR 55* (defendant's failure to answer questions on police stop may give rise to inference of guilt); *People v. Simmons (1946) 28 C2d 699, 172 P2d 18* (accusatory statement by third person)].

For adoptive admission exception to hearsay rule to apply, direct accusation in so many words is not essential [*People v. Fauber (1992) 2 C4th 792, 9 CR2d 24, 831 P2d 249*].

The adoptive admission exception does not apply if there is no evidence that the party adopted the statements [*People v. Hayes (1999) 21 C4th 1211, 91 CR2d 211, 989 P2d 645*, cert. den., sub nom. *Hayes v. California (2000) 531 US 980, 121 S Ct 431, 148 L Ed2d 438* (criminal defendant attempted to attribute statement to People; People offered evidence that statements in questions were untrue)].

[a] Evidence Admissible

A defendant's guilty plea can lead to an adoptive admission [*People v. Sohal (1997) 53 CA4th 911, 62 CR2d 110* (defendant adopted DA's facts to be proved when pleading guilty)].

An investigative report by a company may be classified as an adoptive or authorized admission [*Levy-Zenter Co. v. Southern Pacific Trans. Co. (1977) 74 CA3d 762, 142 CR 1*].

Statements by a creditor about a debtor are admissible adoptive admissions where the debtor admitted the truth of the statements when confronted with them [*Brown v. Surety Co. of the Pacific (1981) 122 CA3d 614, 176 CR 143*].

In a phone conversation between a father and a nurse concerning a sick baby, where the father's statements were used as prior inconsistent statements, the nurse's statements were adoptive admissions of the father where the father "by words ... manifested his adoption or belief in [their] truth" [*Dincau v. Tamayose (1982) 131 CA3d 780, 182 CR 855* (nurse's statements also constitute authorized admissions as to mother)].

[b] Evidence Inadmissible

A police officer's narrative statements during his interrogation of a murder suspect are not admissible as adoptive admissions. It is fundamentally unfair to expect point-by-point denials of long narrative statements containing numerous facts and theories, particularly where the theories are advance statement rather than question form [*People v. Sanders (1977) 75 CA3d 501 142 CR 227*].

Routine questioning, short of accusation, followed by silence may constitute non-assertive conduct (i.e., the silence may not be a "statement" subject to the hearsay rule). Senate Judiciary Committee Comment (to *Evid Code § 1200*). [*People v. Gordon (1966) 244 CA2d 391, 53 CR 252* (silence in face of codefendant's accusation of crime in presence of police); *People v. Wilson (1967) 238 CA2d 447, 48 CR 55* (failure to give name and address, explain his hurry, and whether he lived in the area)].

A rental car invoice signed by probationer found when his home was searched was not admissible as adoptive admission where the contents were introduced not to prove their truth, but to show probationer's presence outside the jurisdiction [*People v. Maki (1985) 39 C3d 707, 217 CR 676, 704 P2d 743*].

[c] Constitutional Limitations

An accomplice's out-of-court statement ("We took care of the problem and we dumped the body at Balboa Park") was admissible as an adoptive admission by defendant. He must have heard and understood the statement because he was sitting on the same couch with the accomplice, the circumstances called for a denial or protest if the statement was inaccurate, nothing prevented him from making a response, and nothing supported an inference that he was relying on a constitutional right of silence. In this situation, the jury could properly view defendant's silence as adopting the accomplice's statement. Assuming without deciding that the issue was preserved for appellate review, the right of confrontation is not violated when the jury hears evidence, from a witness subject to cross-examination, relating a defendant's own out-of-court statements and adoptive admissions [*People v. Jurado* (2006) 38 C4th 72, 116-117, 41 CR3d 319, 131 P3d 400 (murder trial)].

Admission of evidence of a criminal defendant's extrajudicial silence or evasive answers in the face of police accusations constitute Griffin error in violation of defendant's *Fifth Amendment* privilege against self incrimination [*People v. Haston* (1968) 69 C2d 233, 70 CR 419, 444 P2d 91 (admission of evidence of evasive answers not based on claim of privilege held prejudicial error); *People v. Cockrell* (1965) 63 C2d 659, 47 CR 788, 408 P2d 116 (admission of evidence of silence without express claim of privilege held harmless error); *People v. Savala* (1970) 10 CA3d 958, 89 CR 475 (testimony of officer concerning defendant's silence during interrogation harmless error where evidence of guilt is overwhelming)].

Neither the judicial rules of practice pertaining to the use of codefendant's extrajudicial statements in joint trials, declared in *People v. Aranda* (1965) 63 C2d 518, 47 CR 353, 407 P2d 265, nor the *confrontation clause of the Sixth Amendment* prohibits the use of co-defendants' extrajudicial statements against each other in joint trials where such statements constitute adoptive admissions [*People v. Castille* (2003) 108 CA4th 469, 133 CR2d 489 (in joint trial, statements made in custodial joint interview could be offered against all defendants where interview tape showed defendants' explicit adoptive admission of incriminating statements); *People v. Osuna* (1969) 70 C2d 759, 78 CR 462, 452 P2d 678] .

Incriminating statements made in conversation between two defendants admissible as adoptive admissions [*People v. Williams* (1982) 128 CA3d 981, 180 CR 734 (not violative of *Miranda* because statement not made to third party)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Interrogation
General Overview
Evidence
Privileges
Self-Incrimination Privilege
General Overview
Evidence
Procedural Considerations
Exclusion & Preservation by Prosecutor



12 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.10

21.10 Statement by Authorization--Evid Code § 1222

[1] Evid Code § 1222 Text

- *Evid Code § 1222.*

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.

LegH: 1965 ch. 299.

[2] Reference

Partnership admission, *Corp Code § 15011*.

[3] Commission Comments

If a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself [Cal Law Rev Com Comment].

The authority of the declarant to make the statement need not be expressed; it may be implied. It is to be determined in each case under the substantive law of agency [Cal Law Rev Com Comment].

Prerequisite: An authorized admission is admissible only when a proper foundation has been laid as to the witness's authorization to speak on behalf of the party against whom the statement is authorized [*Rochis v. Walt Disney Co.* (1993) 19 CA4th 201, 23 CR2d 793] .

[4] Case Notes

In an action for discrimination and retaliatory discharge, the trial court erred in excluding an official letter from the sheriff's department to plaintiff employee, a trainer, informing her that her complaint of discrimination had been investigated and her allegations were deemed "founded." The letter was admissible, *inter alia*, as an admission by an authorized party representative under *Evid Code* § 1222 and as a record by a public employee under *Evid Code* § 1280. The letter was not information from a personnel record, nor did it concern a "peace officer or custodial officer" nor a public complaint, so *Pen Code* § 832.7 did not apply [*Hammond v. County of Los Angeles* (2008) 160 CA4th 1579, 2008 Cal App LEXIS 379, *15-16].

Statements by a county's district attorney about other lawyers whom she had appointed as de facto officers or deputies to prosecute a certain case were not admissible under *Evid Code* § 1222 as authorized statements. There was no evidence that the district attorney was agent for those lawyers or that they authorized her to speak on their behalf [*Miller v. Filter* (2007) 150 CA4th 652, 58 CR3d 671] .

California follows a restrictive interpretation concerning which employee statements constitute admissions on the part of their organizational employer, typically imputing to the employer only the statements of high-ranking executives and spokespersons [*Snider v. Superior Court* (2003) 113 CA4th 1187, 7 CR3d 119 (holding that certain employees were not executive-level employees)].

The authority of an employee to make a statement for an employer can be implied as well as express, and the employee's place in the company hierarchy can be an important consideration in determining whether the employee has such authority [*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 CA4th 563, 570, 69 CR2d 389] . Nevertheless, an employee's title, without more, is not sufficient to show the employee had authority to make admissions on behalf of a company [*O'Mary*, 59 CA4th at 572 (vice-president did not automatically have authority to make admissions on behalf of company); *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 55 CR3d 551 (in absence of foundation that Director of Regulatory Affairs had authority to make statement on behalf of company, court properly excluded report)].

In a civil rights action arising from police use of a canine unit, the trial court properly exercised its discretion in excluding the report of a retired judge, who was previously retained by the county as special counsel to perform a one-time investigation and report on police practices, with recommendations including the canine unit. The report was hearsay and the judge did not have the authority to make an admission on behalf of the county as contemplated by *Evid Code* § 1222, either by virtue of his temporary position in the county's hierarchy, or from the terms of his retention [*Thompson v. County of Los Angeles* (2006) 142 CA4th 154, 169, 47 CR3d 702] .

An agent's statement is admissible against the principal if he is authorized to speak on behalf of the principal regarding the transaction, but not if he is authorized merely to act for the principal regarding the transaction [*Souza v. Pratico* (1966) 245 CA2d 651, 54 CR 159 (subcontractor's employee lacked authority to make statement); *Miller v. Anson-Smith Construction Co.* (1960) 185 CA2d 161, 8 CR 131 (admission of agent on his own authority not admissible); *Dillon v. Wallace* (1957) 148 CA2d 447, 306 P2d 1044 (store manager had no authority to investigate claims)].

An agent's statement is admissible against his principal only if it is made during the continuance of the agency and while the agent is acting in the course of the transaction entrusted to his care [*Markley v. Beagle* (1967) 66 C2d 951, 59 CR 809, 429 P2d 129 (statement of former employee is hearsay); *Souza v. Pratico* (1966) 245 CA2d 651, 54 CR 159 (statement nine months after accident when declarant no longer employed by subcontractor); *Marshall v. Marshall* (1965) 232 CA2d 232, 42 CR 686 (attorney as agent for defendant's decedent)].

The testimony of an agent as a witness is admissible to prove either authorization or ratification [*Stewart v. WCAB* (1968) 264 CA2d 947, 71 CR 20 (extra-judicial declarations may not prove agency unless in presence of, communicated

to, or acquiesced in by principal); *Zander v. Texaco, Inc.* (1968) 259 CA2d 793, 66 CR 561 (insurance broker)].

When two persons speaking different languages select an interpreter as a medium of their communication, unless circumstances are present which would suggest otherwise, the interpreter is regarded as their joint agent for that purpose. The fact that an interpreter is a law enforcement officer or other employee of government does not prevent the interpreter from acting as the declarant's agent, even where the declarant is being investigated by law enforcement [*People v. Torres* (1989) 213 CA3d 1248, 262 CR 323 (trial court properly admitted testimony of investigating police officer, based upon the words of the translator, another officer, who assisted when defendant who was not fluent in English asked to make a statement to the police; the defendant's out-of-court statement was an admission, and the words of the interpreter communicating the statement constituted the authorized statement of the defendant)].

Agency may be proved by circumstantial evidence, including the parties' acts and communications [*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 CA4th 563, 69 CR2d 389 (vice-president had authority to convey president's policy of replacing older workers with younger ones; subordinate's testimony of vice-president's statements should have been admitted as authorized admission to prove age discrimination; reversible error to exclude); *Zander v. Texaco, Inc.* (1968) 259 CA2d 793, 66 CR 561 (issuance of insurance bonds); *Skyways Aircraft Ferrying Service, Inc. v. Stanton* (1966) 242 CA2d 272, 51 CR 352 (authorized admission case)].

Statements by father to nurse concerning sick children constitute authorized admissions of the mother and are admissible against her [*Dincau v. Tamayose* (1982) 131 CA3d 780, 182 CR 855 (parents were team caring for sick children)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance Law Industry Regulation Insurance Company Operations Representatives General Overview Insurance Law Industry Regulation Unfair Business Practices Discrimination Labor & Employment Law Discrimination Age Discrimination Proof General Overview



13 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.11

21.11 Statement of Conspirator--Evid Code § 1223

[1] Evid Code § 1223 Text

- *Evid Code § 1223.*

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.**

LegH: 1965 ch. 299.

[2] Case Notes

This exception to the hearsay rule has been explained on the theory that the declarant conspirator is an agent of another conspirator, that the declarations are likely to be true, or that the declarations are acts of the conspiracy for which the other conspirator is legally responsible [*People v. Brawley* (1969) 1 C3d 277, 82 CR 161, 461 P2d 361] .

The elements of conspiracy are (1) an agreement, (2) specific intent, (3) unlawful objective, and (4) overt act [*Castro v. Superior Court* (1970) 9 CA3d 675, 88 CR 508 (membership in political group may be conspiracy); *People v. Morales* (1968) 263 CA2d 368, 69 CR 402 (conspiracy to sell marijuana); *People v. Aday* (1964) 226 CA2d 520, 38 CR 199 (overt act need not be criminal)].

The fact that a declarant has made a statement to an undercover law enforcement officer or an informant does not preclude admissibility of the statement under *Evid Code § 1223* [*People v. Towery* (1985) 174 CA3d 1114, 220 CR

475 (tape recordings of police informant's conversations with three codefendants admissible)].

The co-defendant's comment, overheard by the witness, that someone had asked the co-defendant "if he knew someone that could do a hit for this certain individual, and that they would get paid for doing it," was admissible under the coconspirator exception to the hearsay rule [*In re Hardy* (2007) 41 C4th 977, 997, 63 CR3d 845, 163 P3d 853] .

[a] Prerequisite: Conspiracy in Existence

Evidence of a conspiracy may be proved by circumstantial evidence and the sufficiency of the evidence offered to establish the conspiracy must be viewed against the background of the type involved. The foundational requirements may be met without establishing a conspiracy beyond a reasonable doubt or even by a preponderance of the evidence; only prima facie evidence of the fact is required [*People v. Longines* (1995) 34 CA4th 621, 40 CR2d 356 (admission of minor's out-of-court statements in prosecution for selling marijuana with use of minor); *People v. Jourdain* (1980) 111 CA3d 396, 168 CR 702 (standard for admission of co-conspirators' statements is "evidence sufficient to sustain a finding of conspiracy; prima facie evidence is sufficient; court refused to fashion new standard for admission); *In re David B.* (1978) 81 CA3d 806, 146 CR 815 (rape of victim by nine men and a minor acting in concert); *People v. Earnest* (1975) 53 CA3d 734, 126 CR 107] .

In recognition of the fact that in many conspiracy trials it is impossible as a practical matter to demand prima facie proof of the conspiracy before the evidence of co-conspirators' extrajudicial statements is received, this section expressly permits the trial court, in its discretion, to allow such declarations to be received before independent proof of the conspiracy exists. The trial court is not required to make its own finding of the existence of a conspiracy before the jury is permitted to hear the "hodgepodge of acts and statements by others" [*Castro v. Superior Court* (1970) 9 CA3d 675, 88 CR 508 (membership in political group may be conspiracy)].

A co-conspirator's admission is admissible only if there is proof of the existence of a conspiracy based upon independent evidence [*People v. Brawley* (1969) 1 C3d 277, 82 CR 161, 461 P2d 361 ; *People v. Morales* (1968) 263 CA2d 368, 69 CR 402 (declarations may be received subject to a showing of conspiracy by independent evidence); *Laurel v. Superior Court* (1967) 255 CA2d 292, 63 CR 114] .

In a charge of prostitution against the pimp, statements made by the prostitute are admissible as exceptions to the hearsay rule [*People v. Ambrose* (1986) 183 CA3d 136, 227 CR 885 (doctrine in *People v. Berger* (1960) 185 CA2d 16, 7 CR 827 , that prostitute cannot be accomplice of her pimp, is inapplicable)].

[b] Requirement: Admission Made Before or During Participation

A co-conspirator's admission must be made "while participating in a conspiracy," not after the conspiracy's duration, and "in furtherance of the conspiracy" (i.e., while promoting its objective) [*People v. Herrera* (2000) 83 CA4th 46, 98 CR2d 911 , (in drug prosecution, codefendant's statement to undercover police officer admissible); *People v. Pic'l* (1981) 114 CA3d 824, 171 CR 106 , overruled on other grounds in *People v. Kimble* (1988) 44 C3d 480, 244 CR 148 (when conspiracy was terminated by defendant's arrest, implied hearsay statement of declarant that he and defendant were co-conspirators did not satisfy *Evid Code* § 1223(b) exception); *People v. Morales* (1968) 263 CA2d 368, 69 CR 402 (confessions after arrest not within the exception)].

Where payment of money is a crucial objective of a conspiracy, a co-conspirator's statement made after the crime but before payment may be admissible under the co-conspirator exception [*People v. Easley* (1983) 34 C3d 858, 196 CR 309 (independent evidence of conspiracy's continuing nature is necessary)].

Co-conspirators' statements made after the commission of the crime that was the object of the conspiracy are admissible where it is shown that the conspiracy intended to pay an accessory for his participation in the crime [*Downey Savings*

and *Loan Association v. Ohio Casualty Insurance Co.* (1987) 189 CA3d 1072, 234 CR 835].

A conspiracy to collect money by doing a criminal act may continue after the act is committed. Thus, where the object of the conspiracy was not murder but the collection of insurance on the life of the person murdered, the conspiracy did not end with the killing. The conspiracy continues until the conspirators receive the proceeds [*People v. Hardy* (1992) 2 C4th 86, 5 CR2d 796, 825 P2d 781 ; 2 C4th 86, 5 CR2d 796, 825 P2d 781 ; *People v. Humphries* (1986) 185 CA3d 1315, 230 CR 536 ; *People v. Saling* (1972) 7 C3d 844, 103 CR 698, 500 P2d 610] .

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 continued in existence at the time the statements were made. Independent evidence that one conspirator was induced to enter the conspiracy by a promise of payment by a co-conspirator is not sufficient to establish prima facie that the conspiracy continues until the payment has been received since it is commonplace for conspirators to forsake each other once the original object of the conspiracy is achieved or abandoned [*People v. Leach* (1975) 15 C3d 419, 124 CR 752, 541 P2d 296] .

[c] Requirement: Admission Made in Furtherance of Conspiracy

Whether statements are made "in furtherance of a conspiracy" depends upon an analysis of the totality of the facts and circumstances [*People v. Hardy* (1992) 2 C4th 86, 5 CR2d 796, 825 P2d 781 ; *People v. Herrera* (2000) 83 CA4th 46, 98 CR2d 911 (co-conspirator's admission must be made "in furtherance of the conspiracy," i.e., while promoting its objective); *People v. Hardeman* (1966) 244 CA2d 1, 53 CR 168 (declarations in furtherance of the conspiracy)].

Explanation of check-kiting scheme by co-conspirator to bank's attorney was not in furtherance of conspiracy and therefore not admissible under this hearsay exception [*Bank of California, N.A. v. Pan American Tire Corp.* (1982) 132 CA3d 843, 183 CR 470] .

[d] Constitutional Limitations

The co-conspirator's exception to the hearsay rule violates neither the judicial rules of practice pertaining to the use of codefendant's extrajudicial statements in joint trials, declared in *People v. Aranda* (1965) 63 C2d 518, 530-531, 47 CR 353, 407 P2d 265 , nor the *confrontation clause of the Sixth Amendment* [*People v. Brawley* (1969) 1 C3d 277, 82 CR 161, 461 P2d 361 ; *In re Domingo* (1969) 268 CA2d 642, 74 CR 161 (collateral assertion of failure to adhere to *Aranda* rules through habeas corpus is improper); *People v. Morales* (1968) 263 CA2d 368, 69 CR 402 (*Aranda* discussion)].

Under state law and federal constitutional law, *Bruton/Aranda* rule that hearsay declaration of one defendant incriminating another at trial is inadmissible does not apply to statements made by co-conspirators during any furtherance of conspiracy [*People v. Roberts* (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274] .

Admission of statements containing ambiguous pronouns is error because the jury could infer that the nondeclarant codefendant was a participant [*People v. Roberts* (1992) 2 C4th 271, 6 CR2d 276, 826 P2d 274] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Criminal Offenses
Controlled Substances
Delivery, Distribution & Sale
Conspiracy
General Overview
Criminal Law & Procedure
Criminal Offenses
Inchoate Crimes
Conspiracy
Elements
Evidence
Hearsay
Exemptions
Statements by Coconspirators
Statements Furthering Conspiracy



14 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.12

21.12 Liability, Duty of Declarant--Evid Code § 1224

[1] Evid Code § 1224 Text

■ *Evid Code § 1224.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 1224 and *Evid Code § 1302* restate the substance of former CCP § 1851 [Cal Law Rev Com Comment].

This section refers specifically to "breach of duty" in order to admit statements of a declarant whose breach of duty is in issue without regard to whether that breach gives rise to a liability of the party against whom the statements are offered or merely defeats a right being asserted by that party [Cal Law Rev Com Comment].

This section is similar to *Evid Code § 1230* which makes declarations against interest admissible. However, the declaration need not have been against the declarant's interest when made to be admissible under this section [Cal Law Rev Com Comment].

[3] Case Notes

The admissions of a person having virtually the same interests, and the motive and means for obtaining knowledge, will in general be likely to be equally worthy of consideration as the admissions of the party himself [*Markley v. Beagle* (1967) 66 C2d 951, 59 CR 809, 429 P2d 129] .

The terms "liability, obligation, or duty" do not ordinarily include tort liabilities of employees that are imputed to their

employers under the doctrine of respondeat superior [*Markley v. Beagle* (1967) 66 C2d 951, 59 CR 809, 429 P2d 129] .

This section may be applied to respondeat superior situations if the declarant made the statement under special circumstances indicating its trustworthiness [*Labis v. Stopper* (1970) 11 CA3d 1003, 89 CR 926] .

This section applies in situations in which a third person's "obligation or duty" is an essential operative fact [*Brown v. Surety Co. of the Pacific* (1981) 122 CA3d 614, 176 CR 143] .

Where it is contended that a party was contributorily negligent, his admissions are also admissible as statements of a declarant whose liability or breach of duty is at issue [*Dincau v. Tamayose* (1982) 131 CA3d 780, 182 CR 855] .

In an action by an insurance company against its insured, where the insurance company's obligation to indemnify and defend the insured employer depended on whether or not an employee was criminally liable, the employee's admissions are admissible against his employer if they would have been admissible against the employee in an action involving his criminal liability [*Atlas Assurance Co., Ltd. v. McCombs Corp.* (1983) 146 CA3d 135, 194 CR 66] .

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsVicarious LiabilityEmployersIndemnity



15 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.13

21.13 Declarant as Title Holder--Evid Code § 1225

[1] Evid Code § 1225 Text

■ *Evid Code § 1225.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is derived from former CCP § 1849. It follows the prior decisional law which liberalized Section 1849 by extending the hearsay exception to statements concerning personal property as well as statements concerning real property [Cal Law Rev Com Comment].

This section permits predecessor's statements to be admitted against successors of either real or personal property. However, statements made before the declarant acquired title or after he parted with title are not admissible under this section [Cal Law Rev Com Comment].

[3] Case Notes

The relationship of privity is considered a sufficient basis for the introduction of the admissions of a predecessor in title against his successor in interest [*Altwater v. Breckenridge* (1959) 174 CA2d 790 345 P2d 358 ; *Stearns v. Los Angeles City School Dist.* (1966) 244 CA2d 696 53 CR 482] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsRecords of Documents Affecting Property InterestsEvidenceHearsayRule
ComponentsStatements



16 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.14

21.14 Statement by Minor Child--Evid Code § 1226

[1] Evid Code § 1226 Text

■ *Evid Code § 1226.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The parent of an injured child stands in reality so completely on the right of the injured child that the child's admissions are admissible against the parent even though, as a technical matter, the parent is asserting an independent right [Cal Law Rev Com Comment to *Evid Code § 1227*].



17 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.15

21.15 Statement by Deceased in Wrongful Death Action--Evid Code § 1227

[1] Evid Code § 1227 Text

- *Evid Code § 1227.*

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*.

LegH: 1965 ch. 299.

[2] Commission Comments

The plaintiff in a wrongful death action stands in reality so completely on the right of the deceased that such person's admissions are admissible against the plaintiff, even though, as a technical matter, the plaintiff is asserting an independent right [Cal Law Rev Com Comment].

[3] Statutory Note

CCP § 377, referred to in this section, was repealed by Stats 1992 ch 178.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay Torts Wrongful Death & Survival Actions General Overview



18 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.16

21.16 Admissibility or Statement of Complaining Witness-Child Abuse--Evid Code § 1228

[1] Evid Code § 1228 Text

■ *Evid Code § 1228.*

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.

LegH: 1984 ch. 1421, 1985 ch. 1572, urgency eff. October 2, 1985.

[2] Case Notes

A confession requires a declaration that the person is guilty of a crime and must encompass all elements of a crime; while an admission may be either express or implied and is merely an acknowledgment of some fact which tends to prove guilt. A prosecution cannot continue under *Evid Code § 1228* if the defendant has made an ambiguous, equivocal, or incomplete self-inculpatory statement [*Cruetz v. Superior Court (1996) 49 CA4th 822, 56 CR2d 870* (no confession; defendant only admitted to touching minor in vaginal area while bathing her, did so without lewd intent, and denied he did anything wrong)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsStatements of Child AbuseEvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect



19 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.17

21.17 Use of Parent/Guardian's Signature, Acceptance of Services, or Failure to Cooperate--Evid Code § 1228

[1] Evid Code § 1228 Text

■ *Evid Code § 1228.*

(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*.

LegH: 1995 ch. 540, 1997 ch. 793.

[2] Legislative Notes

In enacting this legislation, it is the intent of the Legislature that these provisions result in cost efficiencies, and any cost savings only be used to supplement, and not supplant, other children's services programs.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral Overview



20 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.18

21.18 Declarations Against Interest--Evid Code § 1230

[1] Evid Code § 1230 Text

■ *Evid Code § 1230.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

Evid Code § 1230 conditions admissibility upon the unavailability of the declarant in order to require the proponent of the evidence to use the in-court testimony of the declarant if it is possible to do so [Leg Com Comment].

The requirement that the declarant have "sufficient knowledge of the subject" means that the declarant must have some peculiar means, such as personal observation, for obtaining accurate knowledge of the matter stated [Leg Com Comment].

[3] Case Notes

In a murder investigation, the victim's wife gave three statements to police. In her first statement, she said she came home from work, was unable to find her husband, and knew nothing of his death. In a second statement, she suggested that defendant and another man had killed her husband on their own initiative to obtain insurance money. In a third statement, she told police that she alone had killed her husband because he had hurt their daughter. Defendant called her to the stand, but she asserted her privilege against self-incrimination and was declared by the trial court to be unavailable. Defendant then sought to introduce the third statement as a statement against penal interest under *Evid Code § 1230*. The trial court did not abuse its discretion in declining to admit the third statement. On their face, two of

her three mutually exclusive statements were absolutely untruthful, rendering the reliability of any of the statements questionable. The fact that she confessed to killing her husband in the third statement did not, by itself, establish that the third statement was any more reliable than the other two, and the third statement was exculpatory, in that it set up a possible defense of self defense or reduction of a charge from murder to manslaughter [*People v. Geier* (2007) 41 C4th 555, 583-585, 61 CR3d 580, 161 P3d 104, petition for cert (11/14/2007)].

Hearsay declarations against interest are admitted because they are unlikely to be false [*People v. Spriggs* (1964) 60 C2d 868, 36 CR 841, 389 P2d 377] .

The heart of the declaration against interest exception is the basic trustworthiness of the declaration, and that question is left to the trial court's discretion [*People v. Wheeler* (2003) 105 CA4th 1423, 129 CR2d 916 (in homicide prosecution, defendant's wife's confession of adultery with man who became murder victim was admissible hearsay under social interest exception); *People v. Greenberg* (1997) 58 CA4th 298, 68 CR2d 61 (in determining particularized guarantees of trustworthiness, court's consideration of corroborating evidence is inappropriate since that would constitute "bootstrapping on the trustworthiness of other evidence at trial"); *People v. Bryden* (1998) 63 CA4th 159, 73 CR2d 554 (statements untrustworthy because declarant motivated to please recipient); *People v. Gordon* (1990) 50 C3d 1223, 270 CR 451, 792 P2d 251 (statement of murder defendant's uncle regarding medical care he had given after robbery in which defendant was wounded was properly admitted as statement against penal interest)].

For a statement to be admissible under the declaration against interest exception, it must be shown that a reasonable person in the declarant's position would have realized that the statement was so contrary to the declarant's interest that it would not have been made unless the declarant believed it to be true [*People v. Fuentes* (1998) 61 CA4th 956, 72 CR2d 237 (statements amounting to confession to murder in first degree with special circumstances are on their face a declaration against a penal interest); *People v. Huggins* (1986) 182 CA3d 828 (hearsay exception does not apply to statement of declarant regarding the circumstances of her discovery of the burglary which contained no admission against penal interest); *In re Martin* (1983) 150 CA3d 148, 197 CR 655 (allegations that party paid for witness testimony; witnesses currently incarcerated); *Estate of Huntington* (1976) 58 CA3d 197, 129 CR 787] .

Statement made by person that exposed her to liability as an accessory to a crime was admissible as a declaration against interest exception to the hearsay rule [*People v. Wilson* (1993) 17 CA4th 271, 21 CR2d 420] .

Statements of fellow gang member to his cell-mate concerning his participation in a killing were specifically dis-serving to declarant's interest because they were admissions that he was on the scene with guilty knowledge. Since the statements were not crucial or devastating to defendant's case they were admissible [*People v. Frutos* (1984) 158 CA3d 979, 205 CR 204 (declarant stated he drove to the scene and provided weapons)].

A statement against the penal interest of an unavailable witness should not be excluded because of the court's doubt about the credibility of the witness to whom the statement was made; issues of the credibility of in-court witnesses are for the jury [*People v. Cudho* (1993) 6 C4th 585, 25 CR2d 390, 863 P2d 635] .

[a] Requirement: Statement Must Be Against Declarant's Own Interest

A statement admissible under *Evid Code* § 1230 must be against the interest of the person making the statement [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145] (witness's admission that he entered car and assisted defendant in fleeing scene of robbery/murder was admissible statement against penal interest); *People v. Phillips* (2000) 22 C4th 226, 92 CR2d 58, 991 P2d 145] .

In a murder prosecution, a hearsay statement about the shooting in question by a deceased friend of defendant's is not admissible as a statement against penal interest, because the statement is against the defendant's, rather than the friend's, penal interest [*People v. Phillips* (2000) 22 C4th 226, 92 CR2d 58, 991 P2d 145] .

[b] Requirement: Entirety of Statement Must Be Against Interest

A hearsay statement that is in part inculpatory and in part exculpatory does not meet the test of trustworthiness and is thus inadmissible [*People v. Duarte* (2000) 24 C4th 603, 101 CR2d 701, 12 P3d 1110 (alleged accomplice's statements admitted in error in light of the possible dishonest motivation of the alleged accomplice; statements not sufficiently reliable)].

The hearsay exception does not apply to collateral assertions within declarations against penal interest. The exception to the hearsay rule provided by *Evid Code* § 1230 is inapplicable to evidence of any statement or portion of a statement not itself specifically dis-serving the interests of the declarant [*People v. Schmaus* (2003) 109 CA4th 846 (unauthenticated recording of codefendant's out-of-court repetition of statement against interest by defendant, who did not testify, was not trustworthy or admissible under any hearsay exceptions; however, error was harmless); *People v. Lawley* (2002) 27 C4th 102, 115 CR2d 614, 38 P3d 461 (the trial court did not abuse its discretion in ruling admissible declarant's statement that he was hired and paid to kill the victim and did kill him; the trial court likewise did not abuse its discretion in excluding declarant's statement that the Aryan Brotherhood was the party that had hired him)].

Hearsay statements may be redacted to excise portions not admissible under *Evid Code* § 1230; however, even statements so redacted are inadmissible if they do not satisfy the reliability requirement of section 1230 [*People v. Duarte* (2000) 24 C4th 603, 101 CR2d 701, 12 P3d 1110] .

[c] Requirement: Unavailability of Declarant

For purposes of admitting defendant's out of-court statement against penal interest under the hearsay exception, the defendant may not create "unavailability of the witness" by invoking the privilege not to testify [*People v. Elliot* (2005) 37 C4th 453, 483, 35 CR3d 759, 122 P3d 968] .

A witness who has been convicted of a crime and who has appealed that conviction cannot be compelled to testify in the trial of a codefendant pending the resolution of that appeal [*People v. Lopez* (1980) 110 CA3d 1010, 168 CR 378 (privilege against self-incrimination single proceeding rule extended)].

[d] Special Considerations for Multiple Defendants

In a joint trial of codefendants, because declarations against interest may be admitted without offending the *confrontation clause*, such declarations, when made by a codefendant, should also be admissible [*People v. Fuentes* (1998) 61 CA4th 956, 72 CR2d 237 (in murder prosecution, statement against penal interest by one defendant did not directly inculcate codefendant but incriminated him only to show robbery was intended; not violation of *confrontation clause* to admit), citing *People v. Greenberg* (1997) 58 CA4th 298, 68 CR2d 61 (references to the non-declarant codefendant implicating him were an integral part of the declarant's statement; no violation of *confrontation clause* to admit given indicia of reliability)].

The declaration against interest exception to the hearsay rule is inapplicable to evidence of any statement or portion of a statement not itself specifically dis-serving to the interests of the declarant [*In re Sakarias* (2005) 35 C4th 140, 155, 25 CR3d 265, 106 P3d 931 , cert denied *Waidla v. California*, 126 S Ct 430 (defendant's hearsay statement about what third person did to murder victim would not have been admissible in defendant's trial as against defendant's penal interest because it tended to deflect culpability from defendant)].

Thus, statements of a conspirator which are against his own penal interest but also collaterally implicate his co-conspirator are inadmissible in a joint trial of the conspirators unless the collateral material is deleted. The Supreme Court based its opinion on *People v. Aranda* (1965) 63 C2d 518 47 CR 353, 407 P2d 265 , and *Bruton v. United States* (1967) 391 US 123 88 S Ct 1620, 20 L Ed2d 476 [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145 (

Aranda-Bruton rule did not apply to extrajudicial statements of declarant who was separately tried and convicted); *People v. Jackson* (1980) 28 C3d 264, 168 CR 603, 618 P2d 149 (where defendants are tried separately, different principles concerning admissibility apply); *Estate of Huntington* (1976) 58 CA3d 197, 129 CR 787 (statement concerning interest of others in trust is not a declaration against interest); *People v. Coble* (1976) 65 CA3d 187, 135 CR 199 (tape recording implicating defendant was therefore not against declarant's penal interest); *People v. Leach* (1975) 15 C3d 419, 124 CR 752, 541 P2d 296] .

The trial court has discretion to exclude accomplices' declarations against interest (with references to defendant excised) when their admission would create substantial danger of misleading the jury (*Evid Code* § 352) [*People v. Beller* (1985) 172 CA3d 904, 218 CR 488 (could mislead jury into believing that the only persons involved in the charged robbery had confessed)].

[e] Constitutional Considerations

A statement against a penal interest that satisfies the requirements of *Evid Code* § 1230 does not violate the *Sixth Amendment Confrontation Clause* [*People v. Fuentes* (1998) 61 CA4th 956, 72 CR2d 237 (constitutional if statement so far contrary to declarant's interest that a reasonable man would not have made statement unless he believed it to be true and declarant unavailable; in-court testimony of declarant must be used if possible); *People v. Greenberg* (1997) 58 CA4th 298, 68 CR2d 61] .

The court must balance the admission of the statement against the right of the defendant to confront and cross-examine the witness [*People v. Schmaus* (2003) 109 CA4th 846 (*Confrontation Clause* was violated by admission of unauthenticated recording of codefendant's out-of-court, non-self-incriminating statement, which repeated alleged statement against interest made by defendant who did not testify; however, error was harmless); *People v. Rios* (1985) 163 CA3d 852, 210 CR 271 (co-participant's statements should be excluded if they are devastating or crucial to defendant's case); *People v. Claxton* (1982) 129 CA3d 638, 181 CR 281 (denial of confrontation here is harmless error)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidencePrivilegesSelf-Incrimination PrivilegeElementsEvidencePrivilegesSelf-Incrimination
PrivilegeExceptionsEvidencePrivilegesSelf-Incrimination PrivilegeScope



21 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.19

21.19 Gang-Related Crime Hearsay Exception--Evid Code § 1231

[1] Evid Code § 1231 Text

■ *Evid Code § 1231.*

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.

LegH: 1997 ch. 499.

[2] Legislative Notes

"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." (1997 ch. 499)

[3] Case Notes

A decedent's sworn statements from a prior proceeding regarding gang-related crimes was properly admitted [*People v. Batts* (2003) 30 C4th 660, 134 CR2d 67] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Criminal Process Right to Confrontation Evidence Hearsay Rule Components Statements Evidence Testimony Credibility Impeachment Bias, Motive & Prejudice



22 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.20

21.20 Intent to Offer Statement-Gang-Related Crime Exception--Evid Code § 1231.1

[1] Evid Code § 1231.1 Text

■ *Evid Code § 1231.1.*

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.

LegH: 1997 ch. 499.

[2] Legislative Notes

"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." (1997 ch. 499)

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Confrontation



23 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.21

21.21 Peace Officer Administering Oath-Gang-Related Crime Exception--Evid Code § 1231.2

[1] Evid Code § 1231.2 Text

- *Evid Code § 1231.2.*

A peace officer may administer and certify oaths for purposes of this article.

LegH: 1997 ch. 499, 1998 ch. 606.

[2] Legislative Notes

"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." (1997 ch. 499)

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Confrontation



24 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.22

21.22 Law Enforcement Experience Requirement-Gang-Related Crime Exception--Evid Code § 1231.3

[1] Evid Code § 1231.3 Text

■ *Evid Code § 1231.3.*

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.

LegH: 1997 ch. 499.

[2] Legislative Notes

"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." (1997 ch. 499)

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Constitutional Law Bill of Rights Fundamental Rights Criminal Process Right to Confrontation Criminal Law & Procedure Preliminary Proceedings Preliminary Hearings Evidence



25 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.23

21.23 Statement to Jury-Gang-Related Crime Exception--Evid Code § 1231.4

[1] Evid Code § 1231.4 Text

■ *Evid Code § 1231.4.*

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.

LegH: 1997 ch. 499.

[2] Legislative Notes

"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." (1997 ch. 499)

[3] Case Notes

The prosecutor's misconduct in eliciting testimony that declarant was unavailable because "he was murdered" required retrial [*People v. Batts (2003) 30 C4th 660, 134 CR2d 67*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Confrontation



26 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.24

21.24 Inconsistent Statements--Evid Code § 1235

[1] Evid Code § 1235 Text

- *Evid Code § 1235.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

A party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony [Cal Law Rev Com Comment].

The substantive use of prior inconsistent statements is permitted on the theory that the usual dangers of hearsay are largely nonexistent when the witness testifies at trial, the witness is present and subject to cross-examination and there is ample opportunity to test him as to the basis for his former statement [Cal Law Rev Com Comment].

Counter-Attack:

A party may introduce evidence to rebut an impression that a prior inconsistent statement was untruthful [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384 (prosecution permitted to introduce other testimony to rebut damaging impression by defense that witness's attorney persuaded him to lie when giving first statement)].

[3] Case Notes

Evidence of inconsistent statements properly introduced [*People v. Woodberry* (1970) 10 CA3d 695, 89 CR 330 (surprise not required); *O'Gan v. King City Joint Union High School Dist.* (1970) 3 CA3d 641, 83 CR 795 (damaging testimony not required)].

Evid Code § 1235 changes the rule that a witness's inconsistent statements may be used only to impeach the witness by

providing that such statements can also be used as substantive evidence. Statements admissible as prior inconsistent statements are admissible for all purposes [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384 (admissible for both impeachment of credibility and truth of the matter asserted); *Dincau v. Tamayose* (1982) 131 CA3d 780, 182 CR 855 (inconsistent statements of father admissible against his infant son)].

In California, it is not a requirement that the prior inconsistent statement be made under oath. This is required under FRE 801(d)(1)(A) [*Dincau v. Tamayose* (1982) 131 CA3d 780, 182 CR 855] .

It was proper, however, to refuse to allow defendant to cross-examine minor witness about statement allegedly made at pretrial "settlement meeting" that was inconsistent with trial statement [*People v. Rios* (1992) 7 CA4th 507, 8 CR2d 894] .

Where a witness attempts to explain away or deny a pretrial statement, the prior inconsistent statement is admissible [*Stebbins v. White* (1987) 190 CA3d 769, 235 CR 656 (witness's judicial statement that he was offered a bribe was properly admitted)].

Extrajudicial statements that are repudiated at trial do not lose their character as inconsistent statements when declarant attempts to alter the nature of the statements by providing less detail [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1] .

Extrajudicial statements that are repudiated at trial, when the party who made the statements admits making them but claims they were lies, do not lose their character as inconsistent statements [*People v. Brown* (1995) 35 CA4th 1585, 42 CR2d 156 (mother of murdered fetus claimed at trial that prior statements--that defendant beat her--were lies)].

Multiple hearsay is admissible when each hearsay level constitutes a prior inconsistent statement [*People v. Zapien* (1993) 4 C4th 929, 17 CR2d 122, 846 P2d 704 (inconsistent statement established another inconsistent statement)].

Evid Code § 1235 does not permit the wholesale admission into evidence of entire works in which a statement appears. Prior statements that are not inconsistent with a witness's testimony are not admissible, even though they are made at the same time and as a part of the same conversation in which inconsistent statements are made [*Benson v. Honda Motor Co.* (1994) 26 CA4th 1337, 32 CR2d 322 (several papers authored by expert witness were not admissible in their entirety as inconsistent statements)].

[a] Requirement: Testimony at Hearing

The hearsay exception established by *Evid Code* § 1235 applies only when the person whose statement is to be used is a witness and has an opportunity to explain or to deny the statement [*People v. Williams* (1997) 16 C4th 153, 66 CR2d 123 (witness denied statement); *O'Gan v. King City Joint Union High School Dist.* (1970) 3 CA3d 641, 83 CR 795 (prior statement excluded); *City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (superseded pleading excluded, for no specific witness was impeached)].

The witness's testimony, that he had overheard codefendant say that defendant had not shown up for something he was supposed to do, that codefendant went in his place, that defendant "was too chickenshit to go along," and that codefendant "needed his part of the money to get the drugs that he wanted and needed," were admissible because they recounted codefendant's prior inconsistent statements. Codefendant testified at trial and at the evidentiary hearing that he was completely innocent of the murders and uninvolved in the conspiracy. In light of these denials, the witness's testimony was admissible under *Evid Code* § 1235 as evidence of the codefendant's prior inconsistent statements. Even if respondent had preserved this issue, the referee would properly have admitted the evidence over the hearsay objection [In re Hardy (2007) 41 4th 977, 1001, 63 CR3d 845, 163 P3d 853] .

In order to admit the prior extrajudicial statement of a forgetful witness as an inconsistent statement, the forgetfulness must be feigned. The present circumstances provided a reasonable basis for the trial court's implicit conclusion that it was feigned. The witness had been a friend of defendant for decades. He did not have any problem recalling the details of the casino incident a few months after it had occurred, as shown in his prior interview, although he claimed to do so at trial. The trial court, which had the benefit of observing the demeanor of the witness, could find it improbable that the witness would not recall his friend shooting himself through the leg at the casino, after dropping a gun in close proximity to the witness (which, as the witness recalled in the interview, angered him greatly and led him to yell at defendant on the trip home). The witness's prior interview was properly admissible under state law as an inconsistent statement [*People v. Gunder* (2007) 151 CA4th 412, 59 CR3d 817 (murder convictions affirmed)].

An accomplice's extrajudicial statement to police was erroneously admitted as inconsistent statement where accomplice claimed *Fifth Amendment* and did not testify [*People v. Martinez* (2003) 113 CA4th 400, 7 CR3d 49 (however, error held to be harmless); *California v. Green* (1969) 399 US 149 90 S Ct 1930, 26 L Ed2d 489] .

When a witness does not testify at trial (the hearing, see *Evid Code* § 145, at which the admissibility of prior inconsistent statements arises), his or her statements were not inconsistent with testimony "at the hearing." Therefore, testimony regarding the nonwitness's prior inconsistent statements is not admissible under *Evid Code* § 1235. *People v. Bynum* (1971) 4 C3d 589, 94 CR 241, 483 P2d 1193 , and *People v. Browning* (1975) 45 CA3d 125 are overruled to the extent they conflict with this view [*People v. Williams* (1976) 16 C3d 663, 128 CR 888, 547 P2d 1000] .

[b] Implied Inconsistency

Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement [*People v. Sapp* (2003) 31 C4th 240, 2 CR3d 554 (witness's prior statements to prosecutor were properly admitted as prior inconsistent statements after witness's lack of memory amounted to deliberate evasion); *People v. Green* (1971) 3 C3d 981, 92 CR 492, 479 P2d 998 (deliberate evasion of forgetful witness at trial created inconsistency); *People v. Woodberry* (1970) 10 CA3d 695, 89 CR 330 (surprise not required)].

In normal circumstances, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event [*People v. Simmons* (1981) 123 CA3d 677, 177 CR 17 (amnesiac witness; no opportunity for contemporaneous cross-examination with prior statement--no implied inconsistency); *People v. Green* (1971) 3 C3d 981, 92 CR 494, 479 P2d 998 (statement found inconsistent in effect); *People v. Sam* (1969) 71 C2d 194, 77 CR 804, 454 P2d 700 (rule followed)].

There is no relevant difference between a witness who does not remember the facts and a witness who refuses to answer questions for purposes of determining inconsistency. In either case there has been no statement from which to infer or deduce implied inconsistency. *Evid Code* § 1235 does not apply to either situation [*People v. Rios* (1985) 163 CA3d 852, 210 CR 271 (admission of statements prejudicial error)].

The rule is that a witness's deliberately evasive "I don't remember" response constitutes an implied denial of a fact asserted by him in a prior statement. This makes the prior statement admissible under *Evid Code* § 1235. The rule is not limited to cases in which the witness either admits or denies making the statement or suffers selective forgetfulness at the trial or hearing, testifying as to at least some of the events surrounding a crime, while forgetting others. The prior statements of a witness are admissible so long as there is a reasonable basis in the record for concluding that her "I don't remember" responses are evasive and untruthful [*People v. Arias* (1996) 13 C4th 92, 51 CR2d 770 ; *People v. Perez* (2000) 82 CA4th 760, 98 CR2d 522 ; *Dincau v. Tamayose* (1982) 131 CA3d 780, 182 CR 855 (party remembered conversation, but not the part containing inconsistent statements); *People v. O'Quinn* (1980) 109 CA3d 219, 167 CR 141 (witness was sister of two defendants and girlfriend of third)].

The prior inconsistent statement of a prosecution witness, who gave a statement implicating the defendant at the time of

the offense but at trial testified he could not recall having made a statement to officers, is admissible to prove the truth of the matters asserted as well as to impeach witness's credibility [*People v. Romo* (1975) 14 C3d 189, 121 CR 111, 534 P2d 1015] .

[c] Impeachment

Impeachment by means of prior inconsistent statements made to prosecuting attorney has been permitted in California [*People v. Johnson* (1981) 121 CA3d 94, 175 CR 8 (prosecutor should take precautions against creating situation where prosecutor would be potential witness)].

If the admission of certain prior inconsistent statements to prove the truth of the matter stated would violate the *confrontation clause*, such statements may be used only for the limited purpose of impeachment [*People v. Spencer* (1969) 71 C2d 933, 80 CR 99, 458 P2d 43 (court must indicate that effect of statement is limited to impeachment); *People v. Odom* (1969) 71 C2d 709, 78 CR 873, 456 P2d 145 (statements admitted without limiting instruction reversible error); *People v. Woodberry* (1970) 10 CA3d 695, 89 CR 330] .

[d] Accomplice Testimony

For the purpose of interpreting *Pen Code* § 1111 (conviction cannot be based on uncorroborated accomplice testimony) a prior inconsistent statement not given under oath by an accomplice constitutes testimony. This preserves the intent of the legislature, which enacted *Pen Code* § 111 before enactment of the Evidence Code, to prevent convictions based solely on the self-serving, unreliable evidence of an accomplice [*People v. Belton* (1979) 23 C3d 516, 153 CR 195, 591 P2d 485] .

Evidence of an accomplice should be viewed with "care, caution, and suspicion because it comes from a tainted source." Accomplice testimony is considered suspect when given under oath; therefore, statements not made under oath are even more suspect [*In re Miguel L.* (1982) 32 C3d 100, 185 CR 120] .

[e] Constitutional Limitations

Corroboration of extrajudicial statements are unnecessary in affording a defendant due process and a fair trial [*People v. Jones* (1980) 105 CA3d 572, 164 CR 605] .

The admission of a prior inconsistent statement in a criminal case to prove the truth of the matter asserted does not violate the *confrontation clause of the Sixth Amendment to the U.S. Constitution* provided that (1) the statement was made by the declarant in testifying as a witness at the preliminary hearing or (2) the declarant testifies as a witness on direct and cross-examination at the trial, regardless of the circumstances in which the prior statement was made [*California v. Green* (1969) 399 US 149 90 S Ct 1930, 26 L Ed2d 484 ; *People v. Bynum* (1971) 4 C3d 589, 94 CR 241, 483 P2d 1193 (situation (1)); *People v. Green* (1971) 3 C3d 981, 92 CR 494, 479 P2d 998 (situation (2))].

Cross-examination contemporaneous with a witness's prior statements is not required by the state *confrontation clause* [*People v. Chavez* (1980) 26 C3d 334, 161 CR 762, 605 P2d 401 (witness is subject to full cross-examination at trial)].

[f] Sufficiency of Evidence

This section deals only with the admissibility of evidence; it does not determine what constitutes evidence sufficient to sustain a verdict [*In re Johnny G.* (1979) 25 C3d 543, 159 CR 180, 601 P2d 196] .

Extrajudicial statements that are repudiated at trial do not require corroboration and are admissible as substantive evidence. Such prior inconsistent statements constitute sufficient evidence to support a conviction without independent corroborative evidence [*People v. Carey* (1995) 35 CA4th 1029, 41 CR2d 715 (videotape properly admitted as prior

inconsistent statement; prior statements by molested children repudiated at trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceProcedural
ConsiderationsObjections & Offers of ProofObjectionsEvidenceTestimonyExaminationCross-ExaminationGeneral
Overview



27 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.25

21.25 Statement Consistent--Evid Code § 1236

[1] Evid Code § 1236 Text

- *Evid Code § 1236.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true [Cal Law Rev Com Comment].

[3] Case Notes

Evidence of a prior consistent statement made by a witness is admissible if there has been an express or implied charge that the witness's testimony is recently fabricated and the prior consistent statement was made before the motive for fabrication is alleged to have arisen. In evaluating admissibility, the court looks at the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive [*People v. Crew (2003) 31 C4th 822, 3 CR3d 733*] .

This section changes the former rule that a witness's prior consistent statements may be used only to rehabilitate the witness by providing that such statements can also be used as substantive evidence. Thus, statements admissible as prior consistent statements are admissible for all purposes [*People v. Crew (2003) 31 C4th 822, 3 CR3d 733*] .

A videotaped interview between a child molestation victim and a social worker was admissible as a prior consistent statement [*People v. Archer (1989) 215 CA3d 197, 263 CR 486* (video-tape was introduced after the victim's testimony to rehabilitate her credibility, not as the evidentiary centerpiece to demonstrate the defendant's guilt, and defense counsel had impeached the victim through the use of prior inconsistent statements from her preliminary hearing testimony)].

"Section 1236 should be interpreted consistently with section 1235" [*People v. Hitchings* (1997) 59 CA4th 915, 69 CR2d 484 (evidence excluded because defendant did not testify at second trial)].

This section is viable as written and does not violate the *confrontation clause of the Sixth Amendment to the United States Constitution* [*People v. Bynum* (1971) 4 C3d 589, 94 CR 241, 483 P2d 1193 (circumstances of preliminary hearing similar to those of trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Preliminary Proceedings General Overview Criminal Law & Procedure Witnesses General Overview



28 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.26

21.26 Statement Made in Writing by Witness When Fact Occurred--Evid Code § 1237

[1] Evid Code § 1237 Text

■ *Evid Code § 1237.*

(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. (1965 ch. 299)

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement [Leg Com Comment].

[3] Case Notes

This section liberalizes the past recollection recorded hearsay exception by providing that the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness's statement. Furthermore, such a person who records the witness's statement may authenticate the accuracy of the record of the statement [*People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (suggesting statement recorded by police officer shortly after crime could have been read into record if proper foundation laid); *People v. Miller* (1996) 46 CA4th 412, 53 CR2d 773 (officer permitted to testify about statements he recorded from witness; statements reliable, foundational elements are met, and witness sufficiently cross-examined by opponent); *People v. Cummings* (1993) 4 C4th 1233, 18 CR2d 796, 850 P2d 1 (prior statement by snitch admissible when he testified that what he said was true even though he could not remember the conversation and police officer recorded substance of conversation); *People v. Simmons* (1981) 123 CA3d 677, 177 CR 17 (statement by amnesiac that prior statement is true is not sufficiently trustworthy); *People v. Gentry* (1969) 270 CA2d 462, 76 CR 336 (witness admits truthfulness of recorded statements)].

A traffic accident report may not be introduced into evidence as past recollection recorded (see *Veh Code* § 20013), but the contents may be used to refresh a witness's memory [*Sherrell v. Kelso* (1981) 116 CA3d Supp 22, 172 CR 667] .

Evid Code § 1237 is viable as written but must be construed in light of the *confrontation clause of the Sixth Amendment to the United States Constitution* [*People v. Cummings* (1993) 4 C4th 1233, 18 CR2d 796, 850 P2d 1 (Sixth Amendment satisfied when witness extensively cross-examined); *People v. Coble* (1976) 65 CA3d 187, 195, 135 CR 199 (admission of extrajudicial statements falling within exceptions to hearsay rule may violate *confrontation clause* if extra-judicial statement goes to heart of case, is "crucial" or "devastating" to defendant); *People v. Bynum* (1971) 4 C3d 589, 94 CR 241, 483 P2d 1193 (preliminary hearing testimony of witness now dead used to contradict alibi defense); *People v. Gentry* (1969) 270 CA2d 462, 76 CR 336 (witness admits truthfulness of recorded statements)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Criminal Process Right to Confrontation Evidence Documentary Evidence Writings General Overview Evidence Testimony General Overview



29 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.27

21.27 Statement of Identification--Evid Code § 1238

[1] Evid Code § 1238 Text

■ *Evid Code § 1238.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

The earlier identification has greater probative value than an identification made in the courtroom after the passage of time, inasmuch as the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness's mind [Cal Law Rev Com Comment].

[3] Case Notes

Evid Code § 1238, together with *Evid Code § 1235*, restates a judicially developed exception to the hearsay rule. The principal danger of admitting hearsay evidence is not present in this situation because the witness is available for cross-examination at trial [*People v. Martinez* (2003) 113 CA4th 400, 7 CR3d 49 (accomplice's extrajudicial statement to police was erroneously admitted as identification where accomplice claimed *Fifth Amendment* and did not testify); *People v. Hatfield* (1969) 273 CA2d 745, 78 CR 805 (victim's description of robbers to police minutes after the crime);

People v. Gould (1960) 54 C2d 621, 7 CR 273, 354 P2d 865 (identification of a person has greater reliability and probative value than identification of photo; failure to repeat extrajudicial identification in court does not destroy its probative value); *People v. Slobodion* (1948) 31 C2d 555, 191 P2d 1 (previous lineup identification)].

The Supreme Court has expressly disapproved a corroboration requirement for an out-of-court identification; a conviction will be upheld if the identification passes the substantial evidence test [*People v. Cuevas* (1995) 12 C4th 252, 48 CR2d 135 (disapproving *People v. Gould* (1960) 54 C2d 621 and its progeny)].

Evid Code § 1238 applies to a prior description as well as a prior identification of a perpetrator of a crime [*People v. Hatfield* (1969) 273 CA2d 745, 78 CR 805] .

Under this section, evidence of a prior identification is admissible if the witness admits the prior identification and vouches for its accuracy; under Section 1235, such evidence is admissible if the witness denies or contradicts the prior identification [*People v. Scoglio* (1969) 3 CA3d 1, 82 CR 869 (prior identification in robbery case)].

A composite drawing by police based on witness's description of the suspect is admissible as independent evidence of identity. If the witness admits the prior identification, it is admissible under this section; if the witness denies the prior identification, it is admissible as an inconsistent statement under *Evid Code* § 1235 [*People v. Cooks* (1983) 141 CA3d 224, 190 CR 211] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureEyewitness IdentificationGeneral OverviewCriminal Law & ProcedureTrialsExamination of WitnessesCross-ExaminationEvidenceHearsayRule ComponentsStatements



30 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.28

21.28 Spontaneous Statement--Evid Code § 1240

[1] Evid Code § 1240 Text

- *Evid Code § 1240.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

The spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness [Cal Law Rev Com Comment].

Distinguish:

The "fresh-complaint doctrine," found in sexual assault cases, is distinct from the "spontaneous exclamation" exception. It is not an exception to the hearsay rule but rather allows evidence of a "fresh" or prompt complaint of sexual assault, not constituting a spontaneous exclamation, for the nonhearsay purpose of showing that a complaint was made and the circumstances of its making, although the details of the complaint are not admissible for the truth of the matter asserted [*People v. Clark (1987) 193 CA3d 178, 238 CR 230* (statement of child seven months after incident was admissible where child did not have impetus to make complaint until she attended class and learned importance of reporting molestation)].

The "fresh-complaint doctrine" is still viable as revised, and is governed by the principles generally applicable to the determination of relevance and admissibility. The original premise underlying the rule is no longer valid, but such evidence still may be admitted for the nonhearsay purpose of establishing the

fact of, and the circumstances surrounding, a victims' disclosure of the offense to others, so long as it is relevant. It is subject to exclusion if its probative value does not outweigh its prejudicial effect. Its admissibility no longer turns on whether the complaint was fresh or was prompted by inquiry from others. Such statements also may be admissible for a hearsay purpose--to prove the truth of the matter asserted--under an exception to the hearsay rule, such as a spontaneous statement or as evidence of prior identification, if the requirements for admission under such an exception are met [*People v. Brown* (1994) 8 C4th 746, 35 CR2d 407, 883 P2d 949] .

[3] Case Notes

The declarant's mental state is the critical factor in determining the applicability of the excited utterance exception to the hearsay rule. Thus, the fact that the declarant's statement is in response to a question rather than volunteered is an important factor, though not dispositive on the issue of spontaneity [*People v. Hines* (1997) 15 C4th 997, 64 CR2d 594 (responses on telephone to questions insufficiently spontaneous); *People v. Farmer* (1989) 47 C3d 888, 254 CR 508 (gunshot victim's responses to police dispatcher's questions in telephone conversation relating to assailant's race, weight, height, and age were admissible)].

Neither the lapse of time between the event and declarations nor the fact that questions elicited the declarations deprives the statements of spontaneity if they were made under the stress of excitement and while the reflective powers were still in abeyance [*People v. Williams* (2006) 40 C4th 287, 318-319, 52 CR3d 268, 148 P3d 47, time for grant or denial of reh'g extended 2007 C LEXIS 1066 (Jan. 17, 2007) (trial court did not abuse its discretion in concluding that defendant's somewhat self-serving statements made several hours after murder did not qualify as spontaneous utterance); *People v. Morrison* (2004) 34 C4th 698, 21 CR3d 682 (fact that victim had just been shot, and appeared about to faint or die, made her identification of assailants to police spontaneous despite police inquiry; court must decide each such case on facts); *People v. Brown* (2003) 31 C4th 518, 3 CR3d 145 (statements made more than two hours after shooting were nevertheless spontaneous where declarant was still crying, shaking, and visibly upset); *People v. Roybal* (1998) 19 C4th 481, 79 CR2d 487, 966 P2d 521 (husband discovers body of murdered wife, immediately calls 911, and shortly thereafter the first officer to arrive tape-recorded his statement; both statements qualify as spontaneous statements); *People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (four-year-old's statements made later in day after mother's murder were still under the stress of excitement); *People v. Poggi* (1988) 45 C3d 306, 246 CR 886, 753 P2d 1082 (statements made 30 minutes after attack in response to police questioning); *People v. Washington* (1969) 71 C2d 1061, 80 CR 567, 458 P2d 479 (slowness in making statement because of brain damage and breathing difficulty not considered unspontaneous reflection); *People v. Costa* (1953) 40 C2d 160, 252 P2d 1 (period of unconsciousness before statement); *Showalter v. Western Pacific R.R. Co.* (1940) 16 C2d 460, 106 P2d 895 (physical shock, nervous excitement); *People v. Riva* (2003) 112 CA4th 981, 5 CR3d 649 (statement of self-identified target, made one minute after being shot at, was spontaneous; challenges to reliability and trustworthiness of statement go to weight of evidence, not admissibility); *People v. Trimble* (1992) 5 CA4th 1225, 7 CR2d 450 (child's statements that father had murdered mother admissible where made two days after crime; child had been sequestered at home and became hysterical and commenced her frantic description of events to relative at first opportunity); *People v. Hughey* (1987) 194 CA3d 1383, 240 CR 269 (statements made by woman who was screaming upon police arrival at scene, concerning assaults just inflicted on her and her child); *People v. Jackson* (1986) 178 CA3d 694, 224 CR 37 (victim's hearsay statement to the police describing the circumstances of the robbery in a very frightened manner immediately after defendant was arrested); *People v. Jones* (1984) 155 CA3d 653, 202 CR 289 (statement by burn victim 30 to 40 minutes after injury in response to question, "What happened?" is admissible); *People v. Williams* (1980) 102 CA3d 1018, 162 CR 748 (statement by victim that he wished he had a gun is admissible to suggest shooting was unprovoked); *People v. Panky* (1978) 82 CA3d 772, 147 CR 341 (phone call by victim of rape and kidnapping after seeing assailant on the street); *People v. Solomon* (1969) 1 CA3d 907, 82 CR 215 (questions elicited declaration); *People v. Gonzales* (1967) 269 CA2d 586, 75 CR 267 (cries of anguish from fatally wounded victim)].

Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a

question of fact. In performing this task, the court necessarily exercises some element of discretion [*People v. Smith* (2007) 40 C4th 483, 54 CR3d 245, 150 P3d 1224 (in prosecution, husband's statement to wife that visitor had just confessed to murder was not spontaneous statement when husband made statement 30 to 60 minutes after he returned to wife)].

Excited utterance is particularly likely to be truthful and, because of its superior trustworthiness, is better than is likely to be obtained from the same person on the witness stand [*People v. Anthony O.* (1992) 5 CA4th 428, 6 CR2d 794] .

Admissibility of excited utterance does not depend upon declarant's availability [*People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (confrontation clause of Sixth Amendment does not require unavailability as prerequisite for spontaneous declarations); *People v. Anthony O.* (1992) 5 CA4th 428, 6 CR2d 794] .

However, where the spontaneous declarant is available as a witness, the existence and truth of the declaration may be explored in an examination under oath [*People v. Morrison* (2004) 34 C4th 698, 21 CR3d 682 (wounded victim's identification of assailants to police arriving on scene)].

Under *Evid Code* § 1240(a), a hearsay statement, even if otherwise spontaneous, is admissible only if it relates to an event the declarant perceived personally [*People v. Phillips* (2000) 22 C4th 226, 92 CR2d 58, 991 P2d 145] .

An excited utterance declarant need not suffer any injury; only an "exciting" event is necessary [*People v. Anthony O.* (1992) 5 CA4th 428, 6 CR2d 794] .

An excited utterance may include another person's statements that occurred during the exciting event [*People v. Arias* (1996) 13 C4th 92, 51 CR2d 770 (victim of kidnapping/rape recounted defendant's admission that he had recently killed another person)].

A young child's hearsay declarations that a certain person sexually abused her are inadmissible, but spontaneous statements are admissible even if the declarant is incompetent to testify because of infancy [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803 (four-year-old's spontaneous statement to teacher admissible regarding molestation); *People v. Daily* (1996) 49 CA4th 543, 56 CR2d 787 (six-year-old's spontaneous statements regarding molestation admissible though child incompetent); *In re Damon H.* (1985) 165 CA3d 471, 211 CR 623 (statement of two-year-old still in pain describing sexual molestation was spontaneous); *In re Cheryl H.* (1984) 153 CA3d 1098, 200 CR 789 (hearsay declaration occasionally admitted as "fresh complaints" under *Evid Code* § 1240); *People v. Orduno* (1978) 80 CA3d 738, 145 CR 806 (complaint of three-year-old regarding sexual molestation).

Statements made by an unidentified person may qualify as excited utterances where it appears "in some way, at least, and with some persuasive force" that the declarant was a witness to the event to which his utterance relates" [*People v. Anthony O.* (1992) 5 CA4th 428, 6 CR2d 794 (declarant need not be identified for statement to be admissible under excited utterance exception to the hearsay rule); *People v. Provencio* (1989) 210 CA3d 290, 258 CR 330 (statement of child among crowd of local residents, chasing burglary suspect, "There goes Angel," was admissible because it could be argued "with some degree of persuasive force" that the declarant was referring to the defendant when the statement was made); *Ungefug v. D'Ambrosia* (1967) 250 CA2d 61, 58 CR 223 (statements made by an unidentified declarant concerning a traffic accident were untrustworthy because there was no evidence that the declarant had actually witnessed the accident)].

Idiomatic and idiosyncratic language may meet requirements of admission as spontaneous utterance [*People v. Raley* (1992) 2 C4th 870, 8 CR2d 678, 830 P2d 712] .

Excited utterance declarant need not satisfy witness qualifications for statement to be admissible [*People v. Anthony O.* (1992) 5 CA4th 428, 6 CR2d 794] .

Accomplice declarant requires no corroboration for statement to be admissible [*People v. Anthony O.* (1992) 5 CA4th 428, 6 CR2d 794] .

[a] Constitutional Considerations

The trial court's admission of a police officer's testimony about what a threat victim told him violated the *Sixth Amendment*, notwithstanding that California courts found that it fell within the spontaneous statement exception to the hearsay rule. The victim had five hours between the threat and the arrival of police to reflect, to forget, to embellish, to be distracted, and to talk with her daughter, her mother, and perhaps others. She made a 911 call, several hours after the threat, in which she was relatively calm and hardly referred to the threat. The state court failed to apply the standard for reliability set forth by the U.S. Supreme Court. No other exception appearing, and with no other particularized guarantee of the truthfulness of the victim's statement, its admission violated the *Confrontation Clause* [*Winzer v. Hall* (9th Cir 2007) 494 F3d 1192, 1200 (granting writ of habeas corpus)].

In a prosecution for first-degree arson and murder, the victim's statements to police ("my husband threw gas on me and burned me") came within the spontaneous statement hearsay exception. The statements also did not violate defendant's right to confrontation, since they were neither testimonial nor the product of a formal police interrogation. The officers encountered the victim during an ongoing emergency. At the time, the home was still actively burning and the badly injured victim had not yet received medical care. By asking what happened, the officers could determine whether they were at the scene of an accident or a crime, and whether there was a potentially dangerous suspect nearby. Second, the officers' conversations with the victim were brief. One officer asked her one question; a second officer asked her two. A third spoke to the victim for approximately five minutes, but the length of the conversation was due, in part, to the victim's difficulty in speaking, and the officer did not spend the entire time questioning the victim. Third, the statements were hardly taken under the calm circumstances of a formal interrogation. Nor did the statements describe events long past [*People v. Pedroza* (2007) 147 CA4th 784, 54 CR3d 636] .

Even statements made while under police detention but before the issuance of *Miranda* warnings may be admissible as excited utterances [*People v. O'Sullivan* (1990) 217 CA3d 237, 265 CR 784 (during strip search for drugs, the spontaneous "oh, oh" of suspect made after deputy had commented that "I believe I have something here" was admissible even in absence of *Miranda* warnings)].

The excited utterance exception does not violate the *confrontation clause* because a truly excited declarant has little opportunity or incentive to speak falsely while making a statement about a recently perceived event [*People v. Brown* (2003) 31 C4th 518, 3 CR3d 145 (spontaneous utterance exception to hearsay rule did not violate *Sixth Amendment confrontation clause*); *People v. Dennis* (1998) 17 C4th 468, 71 CR2d 680 (spontaneous statements are "firmly rooted" exception to hearsay rule and do not violate *Sixth Amendment confrontation clause*); *People v. Gallego* (1990) 52 C3d 115, 276 CR 679, 802 P2d 169 (in multiple-murder death penalty case, statements by friend of victims made immediately after seeing them abducted from shopping center parking lot were admissible); *People v. Farmer* (1989) 47 C3d 888, 254 CR 508] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureInterrogationGeneral OverviewCriminal Law & ProcedureAppealsStandards of ReviewAbuse of DiscretionGeneral OverviewEvidenceRelevanceGeneral Overview



31 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.29

21.29 Contemporaneous Statement--Evid Code § 1241

[1] Evid Code § 1241 Text

- *Evid Code § 1241.*

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.**

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

Evid Code § 1241 makes statements accompanying a person's relevant but ambiguous conduct admissible to explain such conduct [Leg Com Comment].

[3] Case Notes

Any statements admitted under this section must be incidental to and explanatory of the main fact [*People v. Finkelstein* (1950) 98 CA2d 545, 220 P2d 934] .

Statements identifying suspect over telephone before crime may not be admissible under state law as a contemporaneous statement, but may be admissible under federal law as a present sense exception to the hearsay rule [*People v. Hines* (1997) 15 C4th 997, 64 CR2d 594 (error to admit, but harmless); *Alhambra Bldg. & Loan Assn. v. DeCelle* (1941) 47 CA2d 409, 118 P2d 19 (letters sent at same time as land conveyance)].

If a declaration forms part of a transaction which is itself the fact in dispute, or evidence of the fact, such declaration is admissible as part of the transaction [*Mecchi v. Picchi* (1966) 245 CA2d 470, 54 CR 1 (grantor's verbal or written acts directly connected with transfer concerning conditions of escrow admissible as part of the transaction)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsPresent Sense ImpressionGeneral OverviewEvidenceHearsayRule
ComponentsStatementsEvidenceRelevanceGeneral Overview



32 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.30

21.30 Statement by Dying Person--Evid Code § 1242

[1] Evid Code § 1242 Text

■ *Evid Code § 1242.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 1242 broadens the scope of the dying declaration exception to the hearsay rule, derived from former *CCP § 1870(4)*, by providing that the hearsay exception applies in civil as well as criminal actions [Cal Law Rev Com Comment].

This section makes the dying declaration exception to the hearsay rule applicable in all actions because there is no rational basis for differentiating between civil and criminal actions or among various types of criminal actions for the purpose of admissibility [Cal Law Rev Com Comment].

A dying declaration is admissible only if the declarant bases his statement on his personal knowledge (*i.e.*, not on his opinion) [Cal Law Rev Com Comment].

Consider:

Dying declarations should be received with the greatest of caution; the court should carefully scrutinize the foundation facts. No person is entirely exempt from a disposition to excuse and justify his own conduct, or to inflict vengeance upon one who has grievously harmed him [*People v. Taylor (1881) 59 C 640* (statements as to state of mind made after naming alleged murderer viewed with great caution); *People v. Hodgdon (1880) 55 C 72* ("I may not recover" is insufficient expression of abandonment of hope under circumstances); *People v. Sanchez (1864) 24 C 17* (loss of hope may be shown by circumstances in which declaration was made)].

[3] Case Notes

The abandonment of hope, the expectation of certain and imminent death, and the belief that a man who is about to be called to account before his Maker will tell the truth are all factors justifying the reception of dying declarations [*People v. Smith* (1913) 164 C 451, 129 P 785 (previous statement repeated when declarant believed he was dying); *People v. Sanford* (1872) 43 C 29 (belief in a supreme being not essential for dying declaration); *People v. Sanchez* (1864) 24 C 17 (loss of hope may be shown by circumstances in which declaration was made)].

A dying declaration may include only the cause and circumstances of the declarant's death, not former and distinct transactions (e.g., prior events indicating a motive for killing) [*People v. Gatson* (1998) 60 CA4th 1020, 70 CR2d 729 ("They shot me, they kicked me, they beat me, they robbed me" was a comprehensive description of what caused the victim's injuries and ultimate death); *People v. Farmer* (1886) 77 C 1, 18 P 800 (declarations relating to past transactions are subject to motion to strike); *People v. Fong Ah Sing* (1886) 70 C 8, 11 P 323 (declarations not relating to res gestae inadmissible); *People v. Taylor* (1881) 59 C 640 (declarant's guess as to who tried to kill him is inadmissible opinion)].

A decedent is a "dying person" regardless of the passage of time between his making the statement and his dying so long as he makes the statement under a sense of immediately impending death [*People v. Monterroso* (2004) 34 C4th 743 22 CR 3d 1, 101 P3d 956 (victim lingered for 11 days); *People v. Gatson* (1998) 60 CA4th 1020, 70 CR2d 729 (several days); *People v. Tahl* (1967) 65 C2d 719 56 CR 318, 423 P2d 246 (several days); *People v. Cord* (1910) 157 C 562, 108 P 511 (two weeks)].

A declarant's knowledge of his or her impending death 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. In the present case, although there was no direct evidence of declarant's belief as to his impending death, there was abundant circumstantial evidence to that effect. Declarant was shot multiple times from close range, suffering 11 gunshot wounds to his back, arms, legs, and hips, two of which proved fatal. As he lay bleeding, declarant told someone he felt really hot and wanted a fan to cool himself down. Declarant also asked whether he had been shot in the head. The bystander feared that declarant was going into shock. Under the circumstances, the trial court did not abuse its discretion in determining that declarant believed he was going to die from his wounds at the time he made the statements [*People v. Mayo* (2006) 140 CA4th 535, 553-554, 44 CR3d 497] .

The sense of immediately impending death may be shown from the declarant's statements, from his conduct, from his knowledge of his grave condition, from his physical condition, from his evident danger, or from other circumstances in the case, all of which are resorted to in order to ascertain the state of declarant's mind [*People v. Tahl* (1967) 65 C2d 719 56 CR 318, 423 P2d 246 ; *People v. Gonzales* (1948) 87 CA2d 867 198 P2d 81 (abandonment may be shown by language of declarant, dangerous situation, opinions of medical attendants); *People v. Wilson* (1942) 54 CA2d 434 (death predicted by three doctors; administration of last rites)].

Mere speculation or opinion is not admissible under this section [*People v. Lanagan* (1889) 81 C 142, 22 P 482 (declarant's opinion as to character of his injuries not admissible); *People v. Wasson* (1884) 65 C 538, 4 P 555 (language such as "I think" indicates opinion and is not admissible); *People v. Taylor* (1881) 59 C 640 (speculation as to motive inadmissible)].

Plea for medical attention is not incompatible with witness's belief that he is dying and dying declaration is therefore admissible [*People v. Sims* (1993) 5 C4th 405, 20 CR2d 537, 853 P2d 992] .

Whether declarations were made under sense of immediately impending death must be determined preliminarily by trial court and ruling is not disturbed unless there has been apparent abuse of discretion [*People v. Bagwell* (1974) 38

CA3d 127 113 CR 122] .

[a] Constitutional Considerations

The dying declaration exception to the hearsay rule does not fall within the scope of the constitutional rule requiring the confrontation of witnesses [*Pointer v. Texas* (1964) 380 US 400 85 S Ct 1065, 13 L Ed2d 923 (situation doesn't fall within scope of constitutional rule requiring confrontation); *Mattox v. United States* (1892) 146 US 140 13 S Ct 50, 36 L Ed 917 (admissible as to the fact of the homicide and the person by whom it was committed)].

A defendant's right to confrontation is not violated by the admission of a witness's dying declaration made after the witness's refusal to be placed on artificial life support systems. [*People v. Adams* (1990) 216 CA3d 1431, 265 CR 568 (state has no power, and consequently no duty to ensure a witness's presence at a preliminary examination by compelling him to be placed on a life-support respirator until after the opportunity to confront the witness has passed)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay Constitutional Law Bill of Rights Fundamental Rights Criminal Process Right to Confrontation Criminal Law & Procedure Appeals Standards of Review Abuse of Discretion General Overview



33 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.31

21.31 Existing State of Mind, Emotion, Physical Sensation--Evid Code § 1250

[1] Evid Code § 1250 Text

■ *Evid Code § 1250.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

Evid Code § 1250 restates the substance of prior decisional law with one exception: *Evid Code § 1250(b)* repudiates the doctrine of *People v. Merkouris* (1959) 52 C2d 672 344 P2d 1, which permitted the admission of the victim's statements of memory or belief in murder cases to prove the occurrence of the facts remembered or believed [Leg Com Comment].

Evid Code § 1250 provides an exception to the hearsay rule for statements of the declarant's then existing mental or physical state [Leg Com Comment].

A statement of a declarant's then existing state of mind is admissible when relevant to prove the declarant's state of mind at a time prior to, contemporaneous with, or subsequent to the statement [Leg Com Comment].

A statement of a declarant's then existing pain or other bodily condition is admissible when relevant to prove the existence of such condition [Leg Com Comment].

A statement of a declarant showing he intends to do an act is admissible to support an inference he did the act, providing proof of the act is relevant to a material issue in the case [Leg Com Comment].

This subdivision does not permit a statement of memory or belief to be used to prove the fact remembered or believed despite the fact that such a statement represents the declarant's then existing state of mind concerning the past event. If such evidence were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred [Leg Com Comment].

No hearsay problem is involved, of course, if the declarant's statements are used as circumstantial evidence of his mental state rather than as proof of their contents [Leg Com Comment].

Distinguish:

There is a distinction between (1) using an out-of-court declarant's assertion of his state of mind (e.g., X testifies that he heard the declarant Y say "I am afraid of Z.") to prove that mental state directly, and (2) using his assertion of other facts (e.g., X testifies that he heard Y say, "Z threatened to kill me.") to prove the same mental state indirectly. The first is hearsay because it is used testimonially, that is, offered to prove the truth of the matter asserted. The second is not hearsay because it is used circumstantially, that is, offered as evidence of conduct on the part of declarant from which the trier of fact is asked to draw an inference as to the declarant's state of mind at the time (Y fears Z) [*People v. Green* (1980) 27 C3d 1, 164 CR 1] .

[3] Case Notes

When state of mind is in issue in the action, evidence of a statement by the declarant is admissible to prove the declarant's state of mind [*People v. Cox* (2003) 30 C4th 916, 135 CR2d 272 (defendant's claim that witness fabricated story of defendant's confession put witness's state of mind in issue, so statements regarding her fear of defendant were admissible to explain her failure to come forward earlier); *People v. Hernandez* (2003) 30 C4th 835, 134 CR2d 602 (victim's hearsay statements to witnesses that tended to prove victim's fear of defendant were inadmissible hearsay when offered to prove murderer's identity); *People v. Sword* (1994) 29 CA4th 614, 34 CR2d 810 (in outpatient status hearing under *Pen Code* § 1026, defendant, by placing his mental state in issue, essentially waived any objection to evidence concerning his state of mind, and his state hospital records that noted conversations with defendant or statements defendant made to others were admissible under state of mind exception)].

For purposes of the state-of-mind exception to the hearsay rule, a statement of state of mind is one that (1) reflects the declarant's mental state, and (2) is offered, among other purposes, to prove the declarant's conduct, including the declarant's future conduct in accordance with his or her expressed intent, unless the statement was made under circumstances indicating lack of trustworthiness [*People v. Griffin* (2004) 33 C4th 536, 15 CR3d 743 (victim's statement was not made under circumstances indicating lack of trustworthiness, there being no hint of any motive to misrepresent or to manufacture evidence or any similar circumstance); but see *Crawford v. Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed2d 177 (if hearsay statement offered for its truth is testimonial in nature, its admission violates *Confrontation Clause* unless defendant had prior opportunity to cross-examine declarant)].

Victim's statements that she believed defendant came into her house as she napped and that she was afraid of him were clearly probative of her lack of consent to sexual intercourse in the attempted rape. Therefore, her state of mind was relevant to prove the attempted-rape felony murder and the attempted-rape special-circumstance allegation, and thus fell within the state-of-mind exception [*Evid Code* § 1250(a)(2)]. Defendant argued that even if the victim's state of mind

was at issue, the statements were unreliable. To the extent the incident the victim described was a dream or hallucination, for example, it would not be trustworthy to explain her state of mind. But the court admonished the jury the statements were not to be considered as proof defendant was actually in the victim's house when she awakened from her nap, but as circumstantial evidence of her belief that he was there. In addition, although the court recognized the victim might have dreamed defendant was in her house or she may have spoken falsely about the incident, such a possibility, without more, was insufficient to render her statements unreliable [*People v. Guerra* (2006) 37 C4th 1067, 1114, cert denied, 127 S Ct 1149, 166 L Ed2d 998] .

A crime victim's statement of her then-existing state of mind (e.g., fear of the accused) is admissible when relevant to prove or explain the victim's own subsequent acts, when such acts are in issue in the case. However, such statements are not admissible to prove that the defendant did the acts charged in the statement, for example, threatened the victim [*People v. Griffin* (2004) 33 C4th 536, 15 CR3d 743 (victim's statement fell within state-of-mind exception, specifically to prove the victim's future conduct in confronting defendant, in accordance with intent expressed in her statement); *People v. Crew* (2003) 31 C4th 822, 3 CR3d 733 (victim's statement, "If you don't hear from me in two weeks, send the police," was relevant to her state of mind about going away with defendant and whether she disappeared of her own volition); *People v. Ramos* (1982) 30 C3d 553, 180 CR 266, 639 P2d 908 (robbery victim's statement admissible to show fear of force); *People v. Spencer* (1969) 71 C2d 933, 80 CR 99, 458 P2d 43 (admissible); *People v. Ireland* (1969) 70 C2d 522, 75 CR 188, 450 P2d 580 (inadmissible); *People v. Romero* (2007) 149 CA4th 29, 56 CR3d 678 (victim's stated fear of defendant's jealousy was relevant to defense theory of self-defense); *People v. Garcia* (1986) 178 CA3d 814, 224 CR 198 (victim's last words of fear that defendant "has gone crazy" and was going to shoot him)].

In a personal injury action turning on the property owner's and contractor's removal of safety equipment (hydraulic lifts) that would have prevented a fall by plaintiff, a subcontractor's employee, defendants objected unsuccessfully to related testimony as "hearsay" insofar as it asserted that defendants "wanted" the lifts removed. This testimony may have lacked a foundation in personal knowledge [see *Evid Code* § 702]. The testimony might reflect an admissible lay opinion [*Evid Code* § 800], or it might rest on statements that would themselves be admissible as vicarious statements by a party opponent [*Evid Code* § 1222]. In the absence of a foundational objection there was no occasion to identify the factual basis for the testimony. But it was not hearsay. None of the challenged testimony purported to recount a statement, let alone to prove what was stated. If the witnesses had testified to an extrajudicial statement concerning what defendants wanted, the testimony might well have come within the hearsay exception for a statement of the declarant's then existing state of mind or emotion [*Evid Code* § 1250(a)]. There was no occasion to consider hearsay exceptions, however, because the evidence was simply not hearsay [*Browne v. Turner Construction Co.* (2005) 127 CA4th 1334, 1348-1349, 26 CR3d 433 (affirming trial court's denial of objection)].

The then-existing state of mind of the declarant must be relevant before a statement evidencing such state of mind is properly admissible [*People v. Mendoza* (1992) 8 CA4th 504, 10 CR2d 312 (co-participant's state of mind was irrelevant to factual issue of whether informant was in fact pressuring and manipulating co-participant); *People v. Johnson* (1977) 72 CA3d 52, 139 CR 811 (not relevant to charge of possession of Chinese throwing star)].

In admitting statement of murder victim under *Evid Code* § 1250, there is no particular formula a trial court must follow in indicating that probative value has been weighed against prejudice under *Evid Code* § 352 [*People v. Thompson* (1988) 45 C3d 86, 246 CR 245] .

[a] Statements of Intention

Statements of intention may be admissible under this section [*People v. Majors* (1998) 18 C4th 385, 75 CR2d 684 (murder victim's statements on the night he was killed that he was about to conduct a drug deal with people from Arizona were held to be admissible as circumstantial evidence that he met with people from Arizona later that night); *People v. Weatherford* (1945) 27 C2d 401, 164 P2d 753 (declarations that decedent intended to take a trip); *People v. Alcalde* (1944) 24 C2d 177, 148 P2d 627 (statement that he intended to get rid of blonde girlfriend); *Life Insurance*

Co. of North America v. Cassidy (1984) 35 C3d 599, 200 CR 28 (declarant told business manager he wanted former wife removed as beneficiary of all life insurance policies); *Foss v. Anthony Industries* (1983) 139 CA3d 794, 189 CR 31 (declarant stated he intended to take a job following retirement from Navy); *Estate of Cleaver* (1981) 126 CA3d 341, 178 CR 729 (testator's previously stated intent to provide for Episcopal Home for the Aged); *People v. Peggesse* (1980) 102 CA3d 415, 162 CR 510 (statement of defendant that he was "going to find a woman" made in a casual conversation with police earlier in the same day that rape occurred is admissible)].

A "generic threat" is admissible to prove the declarant's state of mind, "unless the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense" [*People v. Crew* (2003) 31 C4th 822, 3 CR3d 733 (evidence of defendant's generic threat to "kill someone" was admissible and probative of guilt where other evidence connected defendant to victims); *People v. Karis* (1988) 46 C3d 612, 250 CR 659 (defendant's statements that he "would not hesitate to eliminate witnesses" if he committed a crime was admissible to show defendant's homicidal intent where other evidence brought actual victims within the scope of the threat); *People v. Lang* (1989) 49 C3d 991, 264 CR 386 (in trial for murder, defendant's statement made approximately one month prior to charged offenses to explain why he carried a handgun, "I'll waste any m--f-- that screws with me," was admissible to prove his state of mind at the time of the killing)].

[b] Evidence Admissible

Statements made during a 911 emergency call, identifying an assailant and an immediate threat to safety, were not testimonial in nature and thus, not subject to the *Confrontation Clause*. However, answers to subsequent questions by law enforcement or a representative could be testimonial; the proper remedy would be redaction [*Davis v. Washington* (2006) 547 U.S. 813, 126 S Ct 2266, 2277, 165 L Ed 2d 224] .

In a murder prosecution, a witness's testimony that the victim had stated that she preferred African-American men as sexual partners was admissible under the state of mind exception to the hearsay rule [*Evid Code* § 1250]. Because there was evidence that defendant had sexual relations with the victim the night she was killed, the testimony was relevant to the issue whether the victim would have consented to sexual relations with defendant, who was not African-American. The issue of consent was raised by the charge of forcible rape and the special circumstance allegation that the victim was murdered during the commission of a rape, was put into dispute by defendant's plea of not guilty, and remained in dispute until resolved [*People v. Geier* (2007) 41 C4th 555, 586-587, 1 CR3d 580, 161 P3d 104 petition for cert (11/14/2007) (finding no abuse of discretion in admission of evidence)].

In a dispute between decedent's surviving wife and his daughter, arising out of division of the settlement from a wrongful death action, witnesses testified that the decedent previously had said he felt his eight-month marriage was a mistake and he intended to divorce his wife. These statements were not admissible for the truth of their contents and, by themselves, did not support the trial court's factual finding that decedent's marriage would not have lasted much longer, had he lived. Although not admissible on the issue of the surviving spouse's right to support, the statements were admissible as relevant to the issue of the surviving spouse's loss of society and comfort [*Corder v. Corder* (2007) 41 C4th 644, 664, 61 CR3d 660, 161 P3d 172] .

The trial court properly admitted a police officer's testimony about what a woman said to him when he arrived at the apartment and asked her questions to determine the exact nature of the emergency. The officers had approached the apartment to serve an arrest warrant, and they were met with a screaming, hysterical group of people who were wild and incomprehensible even after defendant fled. The police inquiry was directed at determining what had happened, what might happen in the next few minutes, and the nature of the emergency involved. As such, the woman's answers ("he put a knife to my throat") fell under the *Davis* definition of nontestimonial statements [*People v. Chaney* (2007) 148 CA4th 772, 56 CR3d 128 (affirming conviction for kidnapping)].

A statement of the declarant's then-existing emotional or physical condition is admissible under this section [

Bloomberg v. Laventhal (1919) 179 C 616, 178 P 496 (pains in the head; could not sleep); *People v. Wright* (1914) 167 C 1, 138 P 349 (declaration by woman that she is pregnant)].

Statements by crime victims can be admissible under this section [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 (tape recording of call to hostage admitted; statement of present physical and mental condition when victim described how he felt after being shot)].

In a prosecution for first degree murder, an FBI agent's testimony of the victim's statement regarding her fear of the defendant falls within the hearsay exception for a statement of the declarant's then existing state of mind [*People v. Sakarias* (2000) 22 C4th 596, 94 CR2d 596, 995 P2d 152, rehearg. denied (2000), cert denied, *Sakarias v. California*, 531 US 947, 121 S Ct 347, 148 L Ed2d 279 (2000); *Watenpugh v. State Teachers' Retirement* (1959) 51 C2d 675 (oral declarations that plaintiff would receive death benefits)].

In a murder prosecution, notebook and calendar entries by victim containing references to an appointment with defendant were admissible to show victim's state of mind, *i.e.*, that he knew defendant, had a link with him before his death, and expected him on the day he died [*People v. Melton* (1988) 44 C3d 713, 244 CR 867, 750 P2d 741].

[c] Evidence Inadmissible

Hearsay statement by declarant to her mother that declarant was ordering defendant out of her house by the first of the month was erroneously admitted under Section 1250, which actually forbids use of the state of mind exception for the admission of "evidence of a statement of memory or belief to prove the fact remembered or believed" [*People v. Arcega* (1982) 32 C3d 504, 186 CR 94, 651 P2d 338].

A statement of the declarant's memory of an event, such as "He hit me, he beat me," is not a declaration of a then existing or previously existing state of mind or physical condition. A statement of how a condition was caused is hearsay [*People v. Deeney* (1983) 145 CA3d 647, 193 CR 608 (statements not offered to explain declarant's conduct)].

Hearsay statements of victims concerning fears of or threats against them by the accused are not within the exception embodied in *Evid Code* § 1250 [*People v. Noguera* (1992) 4 C4th 599, 842 P2d 1160; *People v. Armendariz* (1984) 37 C3d 573, 209 CR 664 (out-of-court statement by murder victim, made 17 months before his death, that he was threatened by the defendant was, in effect, offered to prove that threat occurred; as such, it was inadmissible hearsay)].

[d] Evidence Not Hearsay

In a murder prosecution, a witness testified that she had noticed the red Mustang defendant drove on a particular date, because a neighbor had told the witness that a similar car was used by the person who torched the neighbor's car. Although defendants objected on hearsay grounds, the witness did not testify about the truth of what her neighbor had seen, but about the reason she noticed and remembered the red Mustang, *i.e.*, a relevant state of mind. This was not impermissible hearsay [*People v. Lewis and Oliver* (2007) 39 C4th 970, 1025-1026, 47 CR3d 467, 140 P3d 775 (no error by trial court in overruling defense objection)].

There is no issue of hearsay when the statements are used to prove something other than the truth of their contents [*People v. Jackson* (1996) 13 C4th 1164, 56 CR2d 49 (codefendant's extrajudicial statements could have been admitted to show his initial attempts to conceal truth and consciousness of guilt, but error was harmless); *People v. Livingston* (1969) 271 CA2d 628, 77 CR 53 (victim's statement that she was not mad at defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceTestimonyGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral
OverviewTortsTransportation TortsGeneral Overview



34 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.32

21.32 Prior State of Mind--Evid Code § 1251

[1] Evid Code § 1251 Text

■ *Evid Code § 1251.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section permits a statement of memory or belief of a past mental or physical state to be used to prove the truth of the matter stated when the previous mental or physical state is itself an issue in the case [Cal Law Rev Com Comment].

This section requires that the declarant be unavailable as a witness; statements of past mental or physical state are more subject to inaccuracy and fabrication and should be used only when the declarant's unavailability necessitates reliance upon his out-of-court statements [Cal Law Rev Com Comment].

A statement is not admissible under this section unless it was made under circumstances indicating that it is trustworthy under *Evid Code § 1252* [Cal Law Rev Com Comment].

If a statement of past mental or physical condition is to be used merely as circumstantial evidence of some other fact, the statement is inadmissible under *Evid Code § 1250(b)* [Cal Law Rev Com Comment].

[3] Case Notes

To be admissible, the statement may not be used merely as circumstantial evidence of some other fact [*People v. Bradford* (1997) 15 C4th 1229 65 CR2d 145 (following defense attempt to use statements to link someone else to the murder, it was not error to exclude victim's statements that she feared "a man"); *Smith v. Slifer* (1969) 1 CA3d 748, 81 CR 871] .

Any statement admitted under this section must have been made under circumstances indicating its trustworthiness under *Evid Code* § 1252 [*People v. Cruz* (1968) 264 CA2d 350, 70 CR 603 (exculpatory tape recording made shortly after killing); *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 C2d 613, 290 P2d 538 (similar characteristics found along the "stream of consciousness")].

Statement of declarant's then-existing mental state is admissible only if the declarant's state of mind is at issue or the statement is relevant to prove or explain the conduct of declarant. In this case, there was no issue raised by the defense as to conduct by the victim immediately preceding her death that in any way provoked or mitigated the homicide. Therefore, it was error to admit victim's hearsay declaration to her mother that defendant was acting "weird" and meant to hurt her [*People v. Arcega* (1982) 32 C3d 504, 186 CR 94, 651 P2d 338] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureDefensesGeneral OverviewEvidenceHearsayRule

ComponentsStatementsEvidenceProcedural ConsiderationsCircumstantial & Direct Evidence



35 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.33

21.33 Statement Under Circumstances Showing Lack of Trustworthiness--Evid Code § 1252

[1] Evid Code § 1252 Text

- *Evid Code § 1252.*

Evidence of a statement is inadmissible under this article ["Statements of Mental or Physical State", *Evid Code* §§ 1250 through 1253] if the statement was made under circumstances such as to indicate its lack of trustworthiness.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code § 1252 limits the admissibility of hearsay statements that would otherwise be admissible under *Evid Code* §§ 1250 and 1251 [Cal Law Rev Com Comment].

If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, it is not sufficiently reliable to warrant its reception in evidence [Cal Law Rev Com Comment].

The Evidence Code does not contain the additional limitations on the admissibility of statements offered to prove the declarant's mental state in a criminal case, mentioned in *People v. Hamilton* (1961) 55 C2d 881, because they are confusing, contradictory and unnecessary [Cal Law Rev Com Comment].

[3] Case Notes

Evid Code § 1252 limits admissibility under circumstances lacking trustworthiness [*People v. Spencer* (1969) 71 C2d 933, 80 CR 99, 458 P2d 43 (this section does not refer to the testimony of the witness who relates the hearsay); *People v. Lew* (1968) 68 C2d 774, 69 CR 102, 441 P2d 942 (evidence was properly excluded when a motive to misrepresent was apparent); *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 C2d 613, 290 P2d 538 (similar characteristics found along the "stream of consciousness")].

Statements made in a natural manner, with no incentive to be untruthful, carry a sufficient probability of trustworthiness

to escape the bar of *Evid Code* § 1252 [*People v. Jones* (1996) 13 C4th 535, 54 CR2d 42 (murder victim's statements admitted under Section 1250 were made in a natural manner and not under circumstances of suspicion); *People v. Edwards* (1991) 54 C3d 787, 1 CR2d 696, 819 P2d 436 (defendant made diary and tape after he killed one person and wounded another); *People v. Milner* (1988) 45 C3d 227, 246 CR 713] .

Evid Code § 1252 refers to the statement made by the hearsay declarant not to the testimony of the witness who relates the hearsay statement to the trier of fact [*People v. Spencer* (1969) 71 C2d 933, 80 CR 99, 458 P2d 43] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay Criminal Law & Procedure Trials Examination of Witnesses General Overview Evidence Hearsay Rule Components Statements



36 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.34

21.34 Statement by Minor of Medical Diagnosis or Treatment Related to Abuse or Neglect--Evid Code § 1253

[1] Evid Code § 1253 Text

■ *Evid Code § 1253.*

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.

LegH: 1995 ch. 87.

[2] Case Notes

This section has withstood due process and ex post facto challenges [*People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154] .

The nonexclusive factors for determining indicia of reliability are: (1) spontaneity and consistent repetition, (2) mental state of the declarant, (3) use of terminology unexpected of a child of similar age, and (4) lack of motive to fabricate [*People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154 ; *In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803] .

A child's statements describing the nature and circumstances of sexual abuse, made in the course of the child's examination for that sexual abuse, are admissible as reasonably pertinent to diagnosis and treatment [*People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154] .

A child's statement to the physician is ordinarily inadmissible; however, it is admissible where the abuser is a member of the victim's family or household where the abuser has such an intimate relationship with the victim that the abuser's

identity becomes reasonably pertinent to the victim's proper treatment [*In re Daniel W.* (2003) 106 CA4th 159, 130 CR2d 412 (in prosecution of juvenile for sodomy, four-year-old victim's statement to doctor for purposes of treatment was admissible under firmly rooted exception to hearsay rule; *People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154 (physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household)].

Persons providing medical diagnoses include doctors, psychologists, psychotherapists, and even unlicensed, intern medical diagnostic professionals [*People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154 (indicating that the court may follow the federal view of including hospital attendants, ambulance drivers, or family members that meet the explicit requirements of *FRE 803(4)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral
OverviewEvidenceHearsayExceptionsMedical Diagnosis & TreatmentFamily LawFamily Protection &
WelfareChildrenAbuse, Endangerment & Neglect



37 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.35

21.35 Statement Relating to Wills--Evid Code § 1260

[1] Evid Code § 1260 Text

■ *Evid Code § 1260.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is, of course, subject to the provisions of *Prob Code* §§ 350 and 351, which relate to the establishment of a lost or destroyed will [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay



38 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.36

21.36 Statement Relating to Claims Against Estates--Evid Code § 1261

[1] Evid Code § 1261 Text

■ *Evid Code § 1261.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comment

Certain safeguards (*i.e.*, personal knowledge, recent perception, and trustworthiness) are included to provide some protection for the party against whom the statements are offered, for he has no opportunity to test the hearsay by cross-examination [Cal Law Rev Com Comment].

Consider:

This section permits hearsay evidence of a decedent's statements to be admitted in an action upon a claim or demand against his estate to balance the advantage given the claimant by repeal of the Dead Man Statute.

[3] Case Notes

Declarant's statement recalling events that began 40 years before was not sufficiently close in time to be admissible [*Estate of Luke* (1987) 194 CA3d 1006, 240 CR 84] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayRule ComponentsStatements



39 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.37

21.37 Business Defined--Evid Code § 1270

[1] Evid Code § 1270 Text

■ *Evid Code § 1270.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

The definition is sufficiently broad to encompass institutions not customarily thought of as businesses, such as churches [Cal Law Rev Com Comment].

The term "governmental activity" is included to make the article applicable to governmental records [Cal Law Rev Com Comments].

[3] Case Notes

For purposes of this section, a hospital can be considered a business [*People v. Moore* (1970) 5 CA3d 486, 85 CR 194] .

Governmental entities may also be considered to be businesses [*People v. Arauz* (1970) 5 CA3d 523, 85 CR 266 (school records); *Nichols v. McCoy* (1952) 38 C2d 447, 240 P2d 569 (coroner records)].



40 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.38

21.38 Evidence of Writing as Record--Evid Code § 1271

[1] Evid Code § 1271 Text

- *Evid Code § 1271.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates former *CCP* § 1953(e) and (h), the Uniform Business Records as Evidence Act, without substantial change. The trustworthiness requirement in subdivision (d), however, is more specific than the "justifiably admissible" requirement in former *CCP* § 1953(f) [Cal Law Rev Com Comment].

Business records are admissible only if they are based upon the personal knowledge of the reporter or an informant having the business duty to observe and report the transaction [Cal Law Rev Com Comment].

[3] Case Notes

Although similar to the business records exception [*Evid Code* § 1271], the official records exception differs in one important respect. *Evid Code* § 1271 requires a witness to testify as to the identity of the record and its mode of

preparation in every instance. In contrast, *Evid Code* § 1280 permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness. The object of this hearsay exception is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead. Accordingly, for the exception to apply, it is not necessary that the person making the entry have personal knowledge of the transaction [*Bhatt v. State Dept. of Health Services* (2005) 133 CA4th 923, 929, 35 CR3d 335 (Medi-Cal patient's claim); *Gananian v. Zolin* (1995) 33 CA4th 634, 639-640, 39 CR2d 384] .

A homeowner claimed she agreed to an insurance settlement and signed a release only under duress. She objected to admission of records from the insurance company's claims file, purportedly authenticated by a declaration from an insurance claims analyst. First, *Evid Code* § 1271 requires only that a custodian or other qualified witness identify the documents. Second, this was merely the presentation to the court of copies of several pieces of correspondence, the receipt and contents of which were not disputed, and a contract that plaintiff admitted she signed. There was no hearsay issue to which a business records exception might apply. The copies of the settlement agreement and release and the correspondence did not amount to hearsay declarations, but were themselves direct evidence of their undisputed and relevant contents. With respect to the use of copies, plaintiff waived any issue as to the "secondary evidence rule" [*Rosenblum v. Safeco Ins. Co.* (2005) 126 CA4th 847, 862, 24 CR3d 427 (holding that documents were properly received)].

The object of the business records statute is to eliminate the necessity of calling each witness to the act, condition, or event and to substitute the record of the transaction instead [*County of Sonoma v. Grant W.* (1986) 187 CA3d 1439, 232 CR 471 (head of paternity testing department testifying as to identity of HLA blood analysis report); *People v. Crosslin* (1967) 251 CA2d 968, 60 CR 309 (fingerprint card); *Cole v. Ames* (1957) 155 CA2d 8, 317 P2d 662 (Veteran's Administration Appraisal Report); *Nichols v. McCoy* (1952) 38 C2d 447, 240 P2d 569 (coroner's records)].

An accident report filed with the DMV by a party to the accident failed to meet two requirements of the business records exception: (1) it was not made in the regular course of business because, although the DMV received these reports in the regular course of its business, it was not the citizen author's regular business to make such reports; and (2) the DMV, as custodian, was not in a position to testify as to its identity and mode of preparation [*Daniels v. Dept. of Motor Vehicles* (1983) 33 C3d 532, 189 CR 512] .

The business records exception does not make admissible that which would not be admissible by oral testimony [*Hutton v. Brookside Hospital* (1963) 213 CA2d 350, 28 CR 774] .

Statement by vice-president for medical affairs of drug company that "there was no instance in which company's product was ever used by a physician on a female for treatment of the complications of pregnancy" was hearsay. There was no foundation laid for the report upon which he based his statements [*Miles Laboratories, Inc. v. Superior Court* (1982) 133 CA3d 587, 184 CR 98] .

[a] Personal Knowledge and Duty to Report Requirements

In order for the business records to be admissible, their preparer must have personal knowledge of the information reported [*Levy-Zentner Co. v. Southern Pacific Trans. Co.* (1977) 74 CA3d 762, 142 CR 1 (company report indicated probable cause of arson); *Taylor v. Centennial Bowl, Inc.* (1966) 65 C2d 114, 52 CR 561, 416 P2d 793 (police report inadmissible when not based on report of one with duty to report)].

[b] Requirement: Act, Condition, or Event

A conclusion is neither an act, condition, nor event; whether it is based upon observation of an act, condition, or event;

whether it is based upon sound reason; and whether it is formulated by a person qualified to do so and to testify to it can only be established by examination of the declarant under oath [*People v. Arauz* (1970) 5 CA3d 523, 85 CR 266 (school records); *People v. Terrell* (1955) 138 CA2d 35, 291 P2d 155 (testimony of doctor who made record)].

A psychiatric record is merely opinion, not an "act, condition, or event" within the meaning of the statute [*People v. Reyes* (1974) 12 C3d 486, 116 CR 217, 526 P2d 225] .

Trial court may not admit into evidence reports of nontestifying experts who evaluate defendant's mental state or defendant's probation report. Such documents are hearsay and not business records because they contain opinions or conclusions, not records of acts, conditions, or events within the meaning of *Evid Code* § 1271 [*People v. Campos* (1995) 32 CA4th 304, 38 CR2d 113] .

[c] Qualified Witness

A person who directs or supervises the preparation of business records may testify to their contents [*County of Sonoma v. Grant W.* (1986) 187 CA3d 1439, 232 CR 471 (head of paternity testing department testifying as to identity of HLA blood analysis report); *People v. Remiro* (1979) 89 CA3d 809, 153 CR 89 (president of gun club may lay foundation for club's sign-in sheet); *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1970) 8 CA3d 1009, 87 CR 908 (publisher of Beverage Industry News price list); *People v. Schmidt* (1956) 147 CA2d 222, 305 P2d 215 (custodian does not necessarily have to testify)].

[d] Trustworthiness Requirement

The business records statute is based on the recognition that records made and relied upon in the regular course of business may be regarded as trustworthy without verification by all persons who contribute to them [*People v. Crosslin* (1967) 251 CA2d 968, 60 CR 309 (fingerprint card); *People v. Gorgol* (1953) 122 CA2d 281, 265 P2d 69 (fact that they are hearsay does not preclude admission)].

To qualify for admission under the business records exception to the hearsay rule, a determination of the trustworthiness of such evidence must be made from the circumstances surrounding the making of the record [*People v. Aguilar* (1971) 16 CA3d 1001, 1005, 94 CR 492] .

[e] Types of Records Admissible

The following type of records are admissible:

- *Computer printouts* have been held admissible under the business records exception to the hearsay rule [*People v. Lugashi* (1988) 205 CA3d 632, 252 CR 434 ; but see *People v. Hernandez* (1997) 55 CA4th 225, 63 CR2d 769 (criminalist's in-house computer records untrustworthy since based on multiple levels of hearsay and taken from police reports; "that hearsay evidence is put into a log and then again into a computer in the normal course of business does not render such evidence nonhearsay when it is retrieved from the computer, even when most of the requirements of *Evid Code* § 1271 are met")].

- *Bank microfiche records* have qualified as a business records exception [*People v. Jones* (1998) 17 C4th 279, 70 CR2d 793] .

- In a criminal prosecution, trial court does not abuse its discretion by admitting testimony regarding victim's *autopsy report* by a pathologist who does not conduct the autopsy where the court admits report under business record exception [*People v. Beeler* (1995) 9 C4th 953, 39 CR2d 607, 891 P2d 153 (capital homicide prosecution)].

- No error in admitting *business records* when accuracy of data was required by statute and by contract, and was also subject to verification by providers who received payments based on the claims they submitted, in absence of evidence of untrustworthiness [*Bhatt v. State Dept. of Health Services* (2005) 133 CA4th 923, 931, 35 CR3d 335] .
- *Hospital records* may be admissible under this section [*People v. Williams* (1968) 187 CA2d 355, 9 CR 722] .
- Reliability and trustworthiness of *rap sheets* were not established where the custodian of the records neither compiled the information reflected in the rap sheets nor described the mode of preparation of those records [*People v. Matthews* (1991) 229 CA3d 930, 280 CR 134] .
- *Business records prepared in contemplation of litigation* are ordinarily not sufficiently trustworthy to come within this exception to the hearsay rule [*Gee v. Timineri* (1967) 248 CA2d 139, 56 CR 211 (financial statement prepared in anticipation of suit); *Reisman v. Los Angeles City School Dist.* (1954) 123 CA2d 493, 267 P2d 36 (report made after action commenced containing prejudicial material is inadmissible); *Palmer v. Hoffman* (1943) 318 US 109 63 S Ct 477, 87 L Ed 645 (statement given to railroad investigators following train accident not within the regular course of business)].

A declaration summarizing as damages the total amount owed by a delinquent account was not admissible over a hearsay objection where the bills containing the amounts reflected in the figure were not before the court, although they might have come within the business records hearsay objection, had they been offered. No hearsay exception entitled a plaintiff to provide a summary calculation of damages to simplify the presentation. Presumably a written summary of a party's calculation of damages might be admissible to illustrate the computational formulas a party contended should be used to derive total damages from data otherwise established through competent evidence. Such a summary might be admissible for the nonhearsay purpose of proving not the amounts actually due, but the manner in which they were derived from numbers otherwise before the factfinder. There may also be other circumstances in which such a summary could be admitted over a hearsay objection [*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 CA4th 1093, 1107-1108, 27 CR3d 741 (trial court erroneously denied hearsay objection)].

[f] Constitutional Considerations

Evid Code §§ 1270-1272, when properly applied, are without constitutional fault [*People v. Gambos* (1970) 5 CA3d 187, 84 CR 908] .

In a criminal action, affidavits attesting to information contained in properly authenticated business records, or attesting to the absence of entries in such records, are inadmissible hearsay and violative of a defendant's constitutional right to confront witnesses against him [*People v. Dickinson* (1976) 59 CA3d 314, 130 CR 561 (absence of records at alleged places of employment and schooling)].

Rap sheets that are properly certified for admission as prison records to prove a prior conviction under *Pen Code* § 969b may be admissible under an exception to the hearsay rule without violating the defendant's constitutional right to confrontation [*People v. Thomas* (1967) 65 C2d 698, 706, 56 CR 305, 423 P2d 233 ; *People v. Lizarraga* (1974) 43 CA3d 815, 118 CR 208] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorInsurance LawProperty
InsuranceCoverageArson & Intentional LossEvidence of ArsonInsurance LawProperty InsuranceHomeowners
InsuranceBusiness Activities



41 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.39

21.39 Evidence of Absence from Records of Record Event--Evid Code § 1272

[1] Evid Code § 1272 Text

■ *Evid Code § 1272.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Although evidence of the absence of a record may not be hearsay, this section removes any doubt that might otherwise exist by making such evidence not inadmissible under the hearsay rule if the foundation facts are found to exist [Cal Law Rev Com Comment].

[3] Case Notes

Evidence of absence of records has been held admissible [*People v. Gambos* (1970) 5 CA3d 187, 84 CR 908 ; *People v. Trombino* (1967) 253 CA2d 643, 61 CR 634 (forgery--no account in defendant's name)].

In a criminal action, affidavits attesting to information contained in properly authenticated business records, or attesting to the absence of entries in such records, are inadmissible hearsay and violative of a defendant's constitutional right to confrontation of witnesses against him [*People v. Dickinson* (1976) 59 CA3d 314, 130 CR 561 (absence of records at

alleged places of employment and schooling)].

A party who failed to present its opponent's business records (and who offered documents from a legislative service instead) failed to carry its burden of proof to show the opponent did not perform its official duty to publish a wage order [*Small v. Superior Court* (2007) 148 CA4th 222, 55 CR3d 410] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayConstitutional LawBill of RightsFundamental RightsCriminal ProcessRight to ConfrontationEvidenceDocumentary EvidenceWritingsGeneral Overview



42 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.40

21.40 General Provision--Evid Code § 1280

[1] Evid Code § 1280 Text

■ *Evid Code § 1280.*

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.**
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.**

LegH: 1965 ch. 299, 1996 ch. 642.

[2] Legislative Notes

This act [which, in part, amended this section] shall be known and cited as the "Criminal Convictions Record Act" [1996 ch. 642, § 1].

It is the intent of the Legislature to simplify recordkeeping and admission in evidence of records of criminal convictions by establishing a central computer data base of those data, and by authorizing admission in evidence of these computer data. It is anticipated that this will result in considerable savings of time and money by state and county courts and agencies while improving or maintaining the accuracy of the records [1996 ch. 642, § 2].

[3] Commission Comments

The evidence that is admissible under this section is also admissible under *Evid Code § 1271*, the business records exception [Cal Law Rev Com Comment].

Evid Code § 1280(c) explicitly requires the same showing of trustworthiness for public employee records that is required for business records under Section 1271 [Cal Law Rev Com Comment].

Evid Code § 1280, in contrast to *Evid Code § 1271*, permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in a trustworthy manner [Cal Law Rev Com Comment].

[4] Case Notes

Evid Code § 1280 differs from *Evid Code § 1271* in that the former makes admissible an official record or report without necessarily requiring a witness to give testimony concerning the document, so long as the court takes judicial notice or if sufficient independent evidence shows the information in the document to be trustworthy [*Bhatt v. State Dept. of Health Services* (2005) 133 CA4th 923, 929, 35 CR3d 335 (*Medi-Cal patient's claim*); *People v. George* (1994) 30 CA4th 262, 35 CR2d 750 (admission of card used by jail to identify inmate locks and lockers); *People v. Wardlow* (1981) 118 CA3d 375, 173 CR 500 (coroner's autopsy report); *People v. York* (1980) 108 CA3d 779, 166 CR 717 (fundamental fairness required production of reliable, nonconclusionary information); *People ex rel. Stoddard v. Williams* (1883) 64 C 87, 27 P 939 (judicial notice of mode of preparation)].

All three requirements (1) writing made by and within scope of duty of public employee; (2) writing made at or near time of act, condition, or event; and (3) foundation of trustworthiness) must be met, as emphasized by the 1996 amendment adding the phrase, "all of the following applies" [*People v. Martinez* (2000) 22 C4th 106, 91 CR2d 687, 990 P2d 563] .

The rule is that a public employee's report need not be sworn to be admissible. It must only meet the requirements of *Evid Code § 1280* to be admissible, provided no contrary foundational showing is made by the opponent of the evidence. The foundational, method-of-preparation burden to show that the public employee failed in his duty to observe and correctly report the events described is shifted to the opponent of the evidence by the statutory presumption of duty regularly performed (*Evid Code § 664*) [*Jackson v. Dept. of Motor Vehicles* (1994) 22 CA4th 730, 27 CR2d 712 (motorist's admission of driving, contained in officer's unsworn report, was admissible under *Evid Code § 1280* as public employee record); *Santos v. Dept. of Motor Vehicles* (1992) 5 CA4th 537, 7 CR2d 10 (unsworn, uncertified test report of blood-alcohol level on private laboratory's letterhead was admissible; requisite indicia of trustworthiness because report was of firsthand observations and presumption that official duty was regularly performed)].

An arresting officer's sworn statement concerning a drunk driving stop can supply sufficient proof in a formal administrative hearing to suspend or revoke an arrestee's license [*Snelgrove v. Department of Motor Vehicles* (1987) 194 CA3d 1364, 240 CR 281] .

[a] Prerequisites for Admissibility

A party offering evidence under this section is required to produce evidence that satisfies the foundational requirements set forth therein [*In re Shannon C.* (1986) 179 CA3d 334, 224 CR 516 (where the record does not show who, when, or how the writing was prepared, the court cannot use the device of judicial notice to substitute for the foundational requirements)].

A record or report is admissible under this section only if it is *written or prepared by a public employee* [*Burge v. Department of Motor Vehicles* (1992) 5 CA4th 384, 7 CR2d 5; *Pries v. American Indem. Co.* (1990) 220 CA3d 752, 269 CR 617 (postal receipts are admissible under *Evid Code § 1280*); *People v. Lessard* (1962) 58 C2d 447, 25 CR 78, 375 P2d 46 (coroner's inquest transcript of witness's verbatim testimony held inadmissible)].

The scope of duty requirement contained in *Evid Code § 1280(a)* must be satisfied for admission of the writing [*Poland v. Dept. of Motor Vehicles* (1995) 34 CA4th 1128, 40 CR2d 693 (police officer's signature meeting requirements of *Evid Code § 1453* authenticated report, which inferentially, if not presumptively, was made within scope of duty and at or near time of act, condition, or event; trustworthiness satisfied by *Evid Code § 664* presumption); *Reisman v. Los Angeles City School Dist.* (1954) 123 CA2d 493, 267 P2d 36 (no official duty; report held inadmissible)].

The trustworthiness requirement contained in *Evid Code § 1280(c)* is established by a showing that the written report is based on the observations of public employees who have a duty to observe the facts and report and record them correctly. Public employee records based on information obtained from private citizens are not admissible because of a lack of trustworthiness, since, unlike public employees, private citizens have no duty to observe or report observations correctly to a public entity [*People v. Baeske* (1976) 58 CA3d 775, 130 CR 35 (police report of telephone call from private citizen reporting observation of vehicle involved in crime was inadmissible)].

However, when private citizens act as agents of a public entity, they are public employees under *Evid Code § 195* and their writings may be admissible under *Evid Code § 1280* [*Santos v. Dept. of Motor Vehicles* (1992) 5 CA4th 537, 7 CR2d 10 (report of blood test, performed on behalf of law enforcement agency, on private licensed laboratory's letterhead, was admissible; requisite trustworthiness because report was of firsthand observations and presumption that official duty was regularly performed); *Imachi v. Dept. of Motor Vehicles* (1992) 2 CA4th 809, 3 CR2d 478 (dictum in note)].

When a laboratory's report is undated and uncertified, it is inadmissible hearsay because there is no evidence that it was made at or near the time of the reported event [*Downer v. Zolin* (1995) 34 CA4th 578, 40 CR2d 288 (*Evid Code § 664* not applicable)].

Summaries of the medical treatment of 53 people who were bitten by one dog in the canine unit of the sheriff's department did not qualify under the business records exception to the hearsay rule, because they were prepared neither in the ordinary course and scope of a public employee's duties, nor at or near the time of the events [*Thompson v. County of Los Angeles* (2006) 142 CA4th 154, 169, 47 CR3d 702 (civil rights action alleging unreasonable force in use of canine unit, with different dog and handler)].

[b] Basing Report on Direct Observation

Although a written report must be based on the observations of public employees to be admissible hearsay, there is a split of authority as to whether those observations must be firsthand, or whether compound hearsay is admissible, such as a report containing observations of a public employee who relayed his or her observations to another employee, who wrote the report. The vast weight of authority is that only firsthand observations of the public employee making the report are admissible [*People v. Ramos* (1997) 15 C4th 1133, 64 CR2d 892 ("a record based on the statements of third parties, e.g., an auto accident report compiled by the police, is inadmissible"); *Cantrell v. Zolin* (1994) 23 CA4th 128, 28 CR2d 238 (note statement that one officer's report of another officer's observations was hearsay and insufficient alone to support a finding); *Jackson v. Dept. of Motor Vehicles* (1994) 22 CA4th 730, 27 CR2d 712 (motorist's admission of driving to officer, contained in officer's report, was admissible); *Santos v. Dept. of Motor Vehicles* (1992) 5 CA4th 537, 7 CR2d 10 (same appellate panel that decided *Imachi*; blood test report on private laboratory's letterhead was admissible; requisite indicia of trustworthiness because report was of firsthand observations and presumption of official duty regularly performed); *Burge v. Dept. of Motor Vehicles* (1992) 5 CA4th 384, 7 CR2d 5; *Imachi v. Dept. of Motor Vehicles* (1992) 2 CA4th 809, 3 CR2d 478 (police officer's report admissible only to extent it reported his firsthand observations; his sworn statement that he had reviewed chemical test results was inadmissible because tests not performed by officer and not within his personal knowledge)].

However, it also has been held that a public employee's report is admissible to the extent that it reports observations

made by another public employee who has a duty to observe and report facts correctly [*Gananian v. Zolin* (1995) 33 CA4th 634, 39 CR2d 384 (police officer's sworn report admissible even to extent it reported observations of another officer, who observed and stopped DUI suspect; trustworthiness requirement satisfied since other officer, in reporting his observations to reporting officer, had duty as public employee to observe and report facts correctly)].

In the absence of evidence that DMV analysts timely recorded blood alcohol test results on the same day, or that departmental procedures so provided, a driver's license suspension would be reversed [*Glatman v. Valverde* (2006) 146 CA4th 700, 705-706, 53 CR3d 319] .

[c] Types of Public Records Admissible

The following types of public records are admissible:

- *Official acts of courts* are within the official records exception [*People v. Woodell* (1998) 17 C4th 448, 71 CR2d 241 (appellate opinion to prove prior felony conviction); *People v. Reed* (1996) 13 C4th 217, 52 CR2d 106 (certified preliminary hearing transcript)].

- *Uncertified computer printouts reporting criminal history information* are admissible as evidence that a defendant alleged to be an habitual offender under *Pen Code* § 667.7 served prison terms for the prior felony convictions [*People v. Martinez* (2000) 22 C4th 106, 91 CR2d 687, 990 P2d 563 (printouts from California Law Enforcement Telecommunications System and county sheriff's computer system admitted)].

- Cases often accentuate the fact that a *police officer's report* is sworn. However, such cases involve DMV hearings on driver's license suspensions. These are administrative hearings subject to particular Government Code requirements; further, they often involve suspensions for driving under the influence, which must satisfy particular Vehicle Code requirements, including the requirement that a police officer's report be sworn to be admissible [*Snelgrove v. Dept. of Motor Vehicles* (1987) 194 CA3d 1364, 240 CR 281 (police officer's sworn statement made under *Veh Code* § 13353 was admissible under *Evid Code* § 1280; further, the report alone was sufficient to support a license suspension)].

- *Writings made by and within the scope of duty of a public employee* are like business records in that they are prepared to provide a chronicle of some act or event relating to the public employee's duty. Some public records, particularly police records of interrogations, would clearly fit the definition of "testimonial statements" as they are produced to be used in a potential criminal trial or to determine whether criminal charges should issue. But to the extent that public records are not prepared for this purpose, they are subject to the same analysis as business records and would not constitute "testimonial statements." Records that document convictions and imprisonments are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of *Crawford v. Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed2d 177 [*People v. Taulton* (2005) 129 CA 4th 1218, 1225, 29 CR3d 203 (trial court properly admitted records of prior convictions and considered them for statutory sentencing purposes)].

- *An official response to a request under the Freedom of Information Act* [*Christian Research Inst. v. Alnor* (2007) 148 CA4th 71, 55 CR3d 600] .

- In an administrative hearing, an *arrest report* made at the time of the arrest by the arresting officer is admissible as a record by a public employee [*Hildebrand v. Department of Motor Vehicles* (2007) 152 CA4th 1562, 62 CR3d 234 ; *Lake v. Reed* (1997) 16 C4th 448, 65 CR2d 860 (drivers license suspension hearing); *Jackson v. Dept. of Motor Vehicles* (1994) 22 CA4th 730, 27 CR2d 712 (motorist's admission

of driving, contained in police officer's report, was admissible competent evidence under hearsay exception for public employee records); *Burge v. Department of Motor Vehicles* (1992) 5 CA4th 384, 7 CR2d 5 (*Evid Code* § 664 presumes official duty was regularly performed, thus evidence sufficient even though time of test was not stated); *McKinney v. Department of Motor Vehicles* (1992) 5 CA4th 519, 7 CR2d 18] .

- Testing laboratory's *report of blood test results* was admissible in proceeding to suspend motorist's driving privileges under public records exception; absent evidence report was not made [*Santos v. Department of Motor Vehicles* (1992) 5 CA4th 537, 7 CR2d 10] .

- *Testimony of state health official* concerning dangers of silicone as reported by federal agencies was not hearsay because it was based on a record made by a public employee and the witness obtained the information in his official capacity [*Nelson v. Gaunt* (1981) 125 CA3d 623, 178 CR 167] .

- *Coroner's testimony concerning another coroner's report*, who had died before trial, was admissible, as the autopsy report was a public record [*People v. Clark* (1992) 3 C4th 41, 10 CR2d 554, 833 P2d 561] .

- *Laboratory tests on drugs* are admissible without technician's presence or testimony [*People v. Parker* (1992) 8 CA4th 110, 10 CR2d 38] .

[d] Constitutional Considerations

The use of law enforcement reports under the official records exception to the hearsay rule in a criminal proceeding may violate the *Sixth Amendment* right to confrontation. The nature of the proceeding and the type of record sought will affect the admissibility of the reports.

Examples:

- At sentencing hearing, *district attorney's files* would not qualify under *Evid Code* § 1280 even though data in the files may well come from sources qualifying under Section 1280 [*People v. Santana* (1982) 134 CA3d 773, 184 CR 733] .

- California Law Enforcement Telecommunications System computer printout of *defendant's criminal information history* (rap sheet) was properly admitted under *Evid Code* § 1280 to prove prior convictions; see legislative intent to *Evid Code* § 452.5 [*People v. Dunlap* (1993) 18 CA4th 1468, 23 CR2d 204] .

- Recognizing *FRE 803(8)(b)* which, in criminal cases, expressly omits *reports by police officers and law enforcement* from the public records and reports exception to the federal hearsay rule [*Mackler v. Alexis* (1982) 130 CA3d 44, 181 CR 613 (dis. opn of Dalsimer, J.)].

- *Probation report* not admissible under *Evid Code* § 1280 in mentally disordered offender proceeding; report not contemporaneous or trustworthy [*People v. Campos* (1995) 32 CA4th 304, 38 CR2d 113] .

- At criminal trial, *officer's notations on evidence envelopes* admissible under business records exception and *Evid Code* § 1280 to prove chain of custody [*People v. Aguilar* (1971) 16 CA3d 1001, 94 CR 492] .

■ *Probation report* admissible in juvenile delinquency hearing; hearing civil in nature [*People v. James H.* (1981) 121 CA3d 268, 175 CR 141] .

■ *Police reports* admitted at probation revocation hearing; hearing not a criminal prosecution [*People v. Turner* (1975) 44 CA3d 753, 118 CR 924] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawGovernmental InformationGeneral OverviewEvidenceInferences & PresumptionsGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesRevocation & Suspension



43 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.41

21.41 Public Records--Evid Code § 1281

[1] Evid Code § 1281 Text

■ *Evid Code § 1281.*

Evidence or 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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section is broader than *H&S Code § 10577* for it provides a hearsay exception for official records of vital statistics from jurisdictions other than California in addition to those from California [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsFamily Records & StatementsEvidenceHearsayExceptionsPublic RecordsVital Statistics



44 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.42

21.42 Written Finding of Death Under Federal Missing Persons Act--Evid Code § 1282

[1] Evid Code § 1282 Text

■ *Evid Code § 1282.*

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 PL. 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.

LegH: 1965 ch. 299.

[2] Commission Comments

The evidence made admissible under this section is limited to evidence of the fact of death and of the date, circumstances, and place of disappearance [Cal Law Rev Com Comment].

This section does not make admissible the finding of the date of presumed death because the federal employee's determination of the date of death is made for a purpose different from the issues involved in California proceedings [Cal Law Rev Com Comment].

[3] Case Notes

Although most exceptions to the hearsay rule state that the evidence in question "is not made inadmissible by the hearsay rule," this *Evid Code § 1282* states in positive terms that the evidence "shall be received" [*People v. House* (1970) 12 CA3d 756, 90 CR 831 (concurring opinion)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Governments Federal

Government Employees & Officials Military & Veterans Law Servicemembers Enlisted Personnel



45 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.43

21.43 Report of Missing Persons-Evid Code § 1283

[1] Evid Code § 1283 Text

■ *Evid Code § 1283.*

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, or detained in a foreign country against his will, or is dead or is alive.

LegH: 1965 ch. 299.

[2] Case Notes

Although most exceptions to the hearsay rule state that the evidence in question "is not made inadmissible by the hearsay rule," *Evid Code § 1283* states in positive terms that the evidence "shall be received" [*People v. House* (1970) 12 CA3d 756, 90 CR 831 (concurring opinion)].



46 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.44

21.44 Evidence of Search and Failure to Find a Record--Evid Code § 1284

[1] Evid Code § 1284 Text

■ *Evid Code § 1284.*

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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

The exception is justified by the likelihood that such a statement made by the custodian of the records is accurate and by the need for providing a simple and inexpensive method of proving the absence of a public record [Leg Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsPublic RecordsAbsence of Records



47 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.45

21.45 Former Testimony Defined--Evid Code § 1290

[1] Evid Code § 1290 Text

■ *Evid Code § 1290.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

The purpose of this section is to provide a definition of "testimony" for use in the substantive provisions in this article [Cal Law Rev Com Comment].

The use of a deposition taken in the same action is not covered by this article. *CCP § 2016.010 et seq.* (civil depositions) and *Pen Code §§ 1345 and 1362* (criminal depositions) continue to govern the use of depositions in the action in which they are taken [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law Agency Adjudication Alternative Dispute Resolution



48 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.46

21.46 Admissibility of Former Testimony--Evid Code § 1291

[1] Evid Code § 1291 Text

■ *Evid Code § 1291.*

(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.

LegH: 1965 ch. 299.

[2] Reference

Unavailability defined: *Evid Code § 240* (definition of "unavailable as a witness").

[3] Legislative Committee Comments

This section provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given [Leg Com Comment].

Since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine the declarant [Leg Com Comment].

Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence, lack of opportunity to cross-examine the declarant, is not applicable [Leg Com Comment].

The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the party's position in the two cases [Leg Com Comment].

Objections as to the form of questions cannot be interposed as to former testimony for the first time at trial [Leg Com Comment].

Objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given [Leg Com Comment].

[4] Case Notes

Because elderly robbery victim was medically unavailable for the trial, the record of her preliminary hearing testimony was properly admitted. In addition, this section does not allow for objections as to the form of the questions to be made for the first time at trial [*People v. Chavez* (1970) 4 CA3d 832, 84 CR 783] .

This provision significantly broadens the use of former testimony in criminal cases by permitting the use of former testimony given in different actions, in addition to former testimony given in the same action [*People v. Malone* (2003) 112 CA4th 1241, 5 CR3d 741 (defendant's testimony at first trial, including acknowledgment of prior convictions, was properly admitted at second trial after defendant invoked *Fifth Amendment*)].

When a defendant is impelled to testify at a prior hearing or trial, either because of the nature of the proceeding in which he testified or because he was provoked into testifying by the improper introduction of evidence, that testimony may not be used against him in a subsequent hearing or trial. However, defendant's tactical decision to address his present co-defendant's assertions, in defendant's testimony in a prior proceeding, cannot be attributed to legal compulsion rendering that testimony inadmissible in this proceeding. Moreover, the co-defendant's testimony was not admitted against defendant in this proceeding, and the jury was properly instructed [*People v. Coffman and Marlow* (2004) 34 C4th 1, 17 CR3d 710 (murder prosecution)].

When preliminary hearing transcript testimony and court documents, although hearsay, are being offered for the neutral inquiry as to the nature of a prior offense, such evidence is admissible as exceptions to the hearsay rule to explain a defendant's admissions [*People v. Castellanos* (1990) 219 CA3d 1163, 269 CR 93 ; *People v. Reed* (1996) 13 C4th 217, 52 CR2d 106 (reaching same result as *Castellanos* but disagreeing with reasoning)].

In State Bar disciplinary proceedings, transcripts of prior civil proceedings were admissible under *Evid Code* § 1291 as to those actions where petitioner was a nominal party [*Rosenthal v. State Bar* (1987) 43 C3d 612, 238 CR 377] .

Preliminary hearing testimony of four-year-old sex-crime victim, who was disqualified as a witness at time of trial because she was incapable of understanding the duty to tell the truth, was admissible because the trial court found that the ruling of the magistrate that the girl was qualified to testify was based on substantial evidence [*People v. Liddicoat* (1981) 120 CA3d 512, 174 CR 649] .

[a] Unavailability

Definitions of unavailability in *Evid Code* § 240 are not the exclusive circumstances for the prior testimony exception [*People v. Reed* (1997) 13 C4th 217, 52 CR2d 106 ; *People v. Wilson* (2005) 36 C4th 309, 340-341, 30 CR3d 513, 114 P3d 758 (no error in admitting prior testimony of unavailable witness)].

Proponent of exception has burden and must show by competent evidence that declarant is unavailable [*People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610] .

Under *Evid Code* § 1291(a)(2), previously recorded testimony may be offered at trial only if the deponent is unavailable as a witness. *CCP* § 2025.620(b) is an exception to this rule in that it allows the deposition of a party, or one who was an employee of a party at the time the deposition is taken, to be used at trial against the other party, whether or not the deponent is available. In this employment discrimination action, the witness was not employed by defendant at the time her deposition was taken, and the record did not reflect any showing of her unavailability. Thus, it was error to admit the testimony [*Haluck v. Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 60 CR3d 542 , rev den 2007 Cal LEXIS 9416 , petition for cert filed (11/21/2007) (reversed and remanded for new trial on grounds of judicial misconduct)].

When a witness is present but refuses to testify, and the court makes reasonable efforts to induce testimony but finds them unavailing, then the court may declare the witness to be "unavailable," and his prior testimony may be used [*People v. Smith* (2003) 30 C4th 581, 134 CR2d 1 (court had no power to incarcerate witness who refused to testify, and court was not required to find witness in contempt of court before determining that witness was "unavailable"); *People v. Walker* (1983) 145 CA3d 886, 193 CR 812 (court's threats of contempt were unproductive when witness was incarcerated for 60 years)].

The trial court has no obligation to pursue alternative solutions to problem of witness's unavailability in lieu of allowing preliminary hearing testimony from another criminal proceeding to be read to the jury [*People v. Mitcham* (1992) 1 C4th 1027, 5 CR2d 230, 824 P2d 1277] .

In a probation revocation hearing, even though there was no specific showing of unavailability of the witness, it was not error to admit a preliminary hearing transcript of that witness's testimony [*People v. Cambitsis* (1980) 101 CA3d 141, 161 CR 441] .

[i] Due Diligence

The prosecution's making a showing of the unavailability of the declarant is a constitutionally insufficient showing of necessity to resort to hearsay in criminal cases. The prosecution has the heavier burden of demonstrating that it made a good faith effort, with reasonable diligence, to procure the attendance of the declarant at trial [*People v. Sandoval* (2001) 87 CA4th 1425, 105 CR2d 504 (conviction reversed and matter remanded; prosecution was required to make a good faith effort to obtain some category of contemporary, live testimony by contacting the Mexican authorities and determining what options were possible in obtaining the witness's testimony)].

Examples:

- Conviction reversed and matter remanded; prosecution was required to make a good faith effort to obtain some category of contemporary, live testimony by contacting the Mexican authorities and determining what options were possible in obtaining the witness's testimony [*People v. Sandoval* (2001) 87 CA4th 1425, 105 CR2d 504] .
- Search was diligent when commenced two months before trial, included DMV checks, arrest and incarceration checks, interviews with relatives, and trips to alleged

residences [*People v. Lepe* (1997) 57 CA4th 977, 67 CR2d 525] .

- Efforts to round up habitues of skid-row bars who had testified at a preliminary hearing constituted a good faith, if unorthodox, attempt to procure their presence [*People v. Forgason* (1979) 99 CA3d 356, 160 CR 263] .

- Good faith attempt to procure witness who made himself unavailable [*People v. Rinegold* (1970) 13 CA3d 711, 92 CR 12] .

- Out-of-state witness not legally unavailable when interstate process could have been used [*People v. Joines* (1970) 11 CA3d 259, 89 CR 661] .

- Witness was in Vietnam [*People v. Benjamin* (1970) 3 CA3d 687, 83 CR 764] .

Failure to travel out of the country to explore a lead is not by itself a lack of due diligence [*People v. Smith* (1980) 112 CA3d 37, 169 CR 108] .

In *People v. Jackson*, the Supreme Court held that due diligence in procuring an absent witness's attendance is a factual question. Where there is no abuse of discretion, the trial court's ruling will not be disturbed [*People v. Jackson* (1980) 28 C3d 264, 168 CR 603, 618 P2d 149] .

A 1986 decision calls *Jackson* into doubt without resolving the issue, by indicating that due diligence appears to be a mixed question of law and fact. First, the trial court must find the facts. On appeal, the court's findings will be upheld where they are supported by substantial evidence. Then the court must select the proper legal standard and apply it to the facts. On the issue of the application of the law to the facts, the proper standard of review is independent review [*People v. Louis* (1986) 42 C3d 969, 232 CR 110] .

The *Louis* holding was criticized in 1991 by the Court of Appeal where the court adhered to the abuse of discretion standard [*People v. Robinson* (1991) 226 CA3d 1581, 277 CR 504] .

Subsequent decisions of the Supreme Court have followed *Louis* and have suggested, without deciding, that an appellate court should independently review the record [*People v. Cummings* (1993) 4 C4th 1233, 18 CR2d 796, 850 P2d 1 (independent review "might" be appropriate); *People v. Price* (1991) 1 C4th 324, 3 CR2d 106, 821 P2d 610 ; *People v. Hovey* (1988) 44 C3d 543, 244 CR 121, 749 P2d 776] .

Some appellate courts apply both the "abuse of discretion" test and the "independent review" test to determine whether reasonable diligence was shown [*People v. Wise* (1994) 25 CA4th 339, 30 CR2d 413] .

[b] Requirement of Similarity in Interest and Motive

A defendant's interest and motive at a second proceeding was not dissimilar to his or her interest at a first proceeding within the meaning of *Evid Code* § 1291(a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars. The motives need not be identical, only similar. When a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement, regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony [*People v. Harris* (2005) 37 C4th 310, 333, 33 CR3d 509 , citing *California v. Green* (1970) 399 US 149, 90 S Ct 1930, 26 L Ed2d 489 (holding that defendant's interest and motive in cross-examining witness at preliminary hearing

were similar to those at trial: to challenge witness's credibility and discredit his account of shooting)].

It is sufficient that defendant's interest and motive in cross-examination at separate proceedings be similar. They do not have to be identical [*People v. Samayoa* (1997) 15 C4th 795, 64 CR2d 400 (motive to cross-examine need only be "similar," not "identical"); *People v. Zapian* (1993) 4 C4th 929, 17 CR2d 122, 846 P2d 704 (motive at preliminary hearing was sufficiently similar so as to allow its use at trial); *People v. Ogen* (1985) 168 CA3d 611, 215 CR 16 (preliminary hearing testimony of rape victim against defendant used at his trial for her murder)].

Similarity of interest and motive must be determined on practical considerations, not merely the similar position of the parties in the two cases [*Gatton v. A.P. Green Services, Inc.* (1998) 64 CA4th 688, 75 CR2d 523 (not all asbestos defendants have same interest and motive)].

[c] Use of Prior Deposition Testimony

For tactical reasons an attorney may not want to examine her own client at a deposition, whereas at trial the tactical reason favoring examination may be enhanced. Thus it can be said that the party's interest and motive in examination are dissimilar at deposition and at trial and that, therefore, the deposition of a party to a prior proceeding who is unavailable may not be used [*Wahlgren v. Coleco Industries, Inc.* (1984) 151 CA3d 543, 198 CR 715] .

Deposition testimony, even if initially excluded by the trial court, may be subsequently admitted into evidence if the parties stipulate to its admission [*Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 CA4th 650, 33 CR2d 702] .

[d] Confrontation Clause

In a prosecution for pandering, the trial court did not violate the *Confrontation Clause* by admitting the witness's preliminary examination testimony, in advance of trial, under *Evid Code* § 1291, because she was unavailable as a witness. Defendant sought its exclusion on the basis that he had had no meaningful opportunity to confront and cross-examine the witness at the preliminary examination. Defendant's opportunity was truncated by the very nature of a preliminary examination and also because his attorney had no contact information for the witness and only received a tape recording of her interview two days before the preliminary examination. Nevertheless, defendant had an opportunity for cross-examination. *Crawford* does not require that the opportunity for cross-examination be effectively exercised [*People v. Guess* (2007) 158 CA4th 283, 295-297, 69 CR3d 652 (citing *People v. Carter* (2005) 36 C4th 1114, 1173-1174, 32 CR3d 759, 117 P3d 476)].

Evid Code § 1291 requires that the party against whom the former testimony is offered also have been a party to the action or proceeding in which the testimony was given, with the right and opportunity to cross-examine the declarant with an interest and motive similar to that which defendant has at the current hearing, before prior testimony can be admitted in a subsequent proceeding. Here, the prosecutor offered the preliminary hearing transcript from defendant's prior conviction. The issue during that proceeding was whether he negligently discharged a firearm. The witness who testified at the preliminary hearing said that she saw defendant pull a firearm from under his trench coat and fire it into the air. Defendant's interest and motive during cross-examination was to discredit the witness to preclude a finding that he had discharged a firearm, in order to avoid a conviction and prison sentence. At his retrial on the prior conviction allegation, the issue was whether defendant personally used a firearm during the commission of the discharge of a firearm offense. Defendant's interest and motive during the retrial was similar, if not the same, as his interest and motive during the preliminary hearing, *i.e.*, to preclude a finding that he had personally discharged the firearm. Because both proceedings were of the same type, *i.e.*, criminal, the trial strategy (discredit the witness and claim innocence) was the same; the potential penalty (incarceration) was the same; and the issue and parties were the same [*People v. Gonzales* (2005) 131 CA4th 767, 774-775, 32 CR3d 172] .

Nothing in Crawford v. Washington (2004) 541 US 36, 124 S Ct 1354, 158 L Ed2d 177 altered the viability of the

California Supreme Court decision in *People v. Reed* (1996) 13 C4th 217, 52 CR2d 106, interpreting *Evid Code* § 1291 and holding that a witness was legally unavailable to testify to the circumstances of a prior conviction [*People v. Gonzales* (2005) 131 CA4th 767, 775, 32 CR3d 172] .

The extrajudicial statements of declarants who are available for current cross-examination at trial, but who were not cross-examined, need not be excluded under *Crawford* [*People v. Lewis and Oliver* (2006) 39 C4th 970, 1028 n19, 47 CR3d 467, 140 P3d 775] .

It is not enough to show some violation of a constitutional right at the first trial; it must be shown the violation actually interfered with an effective cross-examination [*People v. Jones* (1998) 66 CA4th 760, 78 CR2d 265 (where defendant erroneously denied right of self-representation at first trial, former testimony admissible because prior counsel cross-examined witness and defendant never showed how his own cross-examination would have been any more effective)].

There has traditionally been an exception to the constitutional confrontation requirement under the former testimony exception to the hearsay rule. This exception arises from necessity and is justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes of the requirement [*People v. Rinegold* (1970) 13 CA3d 711, 92 CR 12 (preliminary hearing testimony of unavailable witness); *Barber v. Page* (1967) 390 US 719 88 S Ct 1318, 20 L Ed2d 255 (failure to cross-examine at preliminary hearing does not constitute a waiver of the right of confrontation at trial); *People v. Benjamin* (1970) 3 CA3d 687, 83 CR 764 (contemporaneous cross-examination at prior hearing)].

Actual cross-examination is not required; the fact that the defendant has an opportunity to cross-examine satisfies the *confrontation clause* [*People v. Smith* (2003) 30 C4th 581, 134 CR2d 1 (testimony from preliminary hearing of witness who was unavailable at trial was properly admitted where defendant, against whom evidence was offered, had opportunity to cross-examine witness at preliminary hearing); *People v. Sul* (1981) 122 CA3d 355, 175 CR 893 (former testimony of witness who now refuses to testify); *People v. Green* (1971) 3 C3d 981, 92 CR 494, 479 P2d 998] .

If a criminal defendant is mentally incompetent at a preliminary hearing, testimony from a witness at that hearing is not admissible as "former testimony" at a later hearing, even where the defendant was represented by counsel who cross-examined the witness at the prior hearing. The defendant's constitutional right of confrontation is not vindicated by such cross-examination when the defendant is mentally incompetent [*Stevenson v. Superior Court* (1979) 91 CA3d 925, 154 CR 476] .

When, because of a witness's mental and physical deterioration caused by illness and medication, the witness had great difficulty communicating and restrictions were placed on defense counsel's ability to object, the Supreme Court found that admission of the preliminary hearing testimony of the witness was error, depriving the defense of an opportunity for meaningful cross-examination [*People v. Brock* (1985) 38 C3d 180, 211 CR 122 (terminally ill witness gave nonresponsive answers on cross-examination at preliminary hearing)].

However, the right of confrontation does not protect against "testimony that is marred by forgetfulness, confusion, or evasion." Testimony that is lucid and coherent and affords an adequate basis to evaluate credibility is admissible despite some loss of memory due to injury [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 (victim of gunshot wound)].

Hearsay evidence is admissible in a probation hearing. Where hearsay evidence impacts on the right of the probationer to confront and cross-examine an adverse witness, however, there must be a finding of good cause for the denial of the right [*People v. Winson* (1981) 29 C3d 711, 175 CR 621 (prior testimony of witness not shown to be unavailable)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedurePreliminary ProceedingsGeneral OverviewCriminal Law & ProcedureAppealsGeneral
OverviewLegal EthicsGeneral Overview



49 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.47

21.47 Party with Similar Interest--Evid Code § 1292

[1] Evid Code § 1292 Text

■ *Evid Code § 1292.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section provides a hearsay exception for former testimony offered against a person who was not a party to the proceeding in which the former testimony was given [Leg Com Comment].

The trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine the declarant with an interest and motive similar to that of the present adverse party [Leg Com Comment].

Objections based on competency or privilege are available at the new proceedings and are to be determined by reference

to the time when the former testimony was given [Leg Com Comment].

[3] Case Note

Evid Code § 1292 greatly liberalizes the use of former testimony in civil cases by substituting the current similar interest and motive for cross-examination requirement for the identity of parties and issues requirement of former *CCP § 1870(8)* [*Moore v. American United Life Insurance Co. (1984) 150 CA3d 610, 197 CR 878* (in action for bad faith denial of benefits, testimony of plaintiff from her worker's compensation hearing was admissible because the scope of the hearing included issues of plaintiff's disability)].

For purposes of *Evid Code § 1292*, similarity of interest and motive must be determined on practical considerations, not merely the similar position of the parties in the two cases [*Gatton v. A.P. Green Services, Inc. (1998) 64 CA4th 688, 692, 75 CR2d 523*] .

Expert testimony from a prior lawsuit against defendant's sister company did not meet the requirements for the former testimony exception to the hearsay rule, and was properly excluded, where there was no showing that the experts were unavailable to testify in the instant case, and where defendant's interests were significantly different in the prior case. In the prior case, defendant was interested in pointing to causes of stroke other than that plaintiff's ingestion of a certain drug, so that expert testimony implicating the drug at issue in the instant case as a possible cause of the stroke would thus have been helpful in the that case, but potentially harmful in this one [*O'Neill v. Novartis Consumer Health, Inc. (2007) 147 CA4th 1388, 55 CR3d 551*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayUnavailabilityPrivilegesEvidenceTestimonyExpertsHelpfulnessWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceWitnesses



50 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.48

21.48 Minor Child's Testimony Offered in Dependency Proceeding--Evid Code § 1293

[1] Evid Code § 1293 Text

■ *Evid Code § 1293.*

(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.

LegH: 1989 ch. 322.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Preliminary Proceedings Preliminary Hearings General Overview Criminal Law & Procedure Trials Examination of Witnesses Child Witnesses Family Law Guardians General Overview



51 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.49

21.49 Prior Inconsistent Statements; Former Testimony of Same Criminal Matter--Evid Code § 1294

[1] Evid Code § 1294 Text

■ *Evid Code § 1294.*

(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, at his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness.

LegH: 1996 ch. 560.

[2] Reference

See also *Evid Code § 240* (definition of "unavailable as a witness").

[3] Case Note

The trial court erred in letting jury hear recording of nontestifying accomplice's extrajudicial statement to police, where neither recording nor transcript was offered after accomplice testified at preliminary hearing [*People v. Martinez* (2003) 113 CA4th 400, 7 CR3d 49 (nevertheless, the error was held to be harmless)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Preliminary Proceedings Preliminary Hearings Evidence Criminal Law & Procedure Witnesses Unavailability Evidence Hearsay Exemptions Prior Statements by Witnesses Inconsistent Statements



52 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.50

21.50 Judgment of Felony in Civil Action-Exception--Evid Code § 1300

[1] Evid Code § 1300 Text

■ *Evid Code § 1300.*

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.

LegH: 1965 ch. 299, 1982 ch. 390.

[2] Reference

Plea of nolo contendere, see *Pen Code § 1016*.

[3] Commission Comments

This hearsay exception does not apply in criminal cases [Cal Law Rev Com Comment].

This section applies to final judgments of conviction of any crime punishable as a felony; the fact that a misdemeanor sentence is imposed does not affect admissibility under this section [Cal Law Rev Com Comment].

This type of evidence is peculiarly reliable for the seriousness of the felony charge assures that the facts will be thoroughly litigated, and the no-reasonable-doubt standard of proof assures that the question of guilt will be thoroughly considered [Cal Law Rev Com Comment].

This article does not purport to deal with the doctrines of res judicata and estoppel by judgment; rather, it deals with the evidentiary use of judgments in those cases where the judgments are not given conclusive effect [Cal Law Rev Com Comment].

[4] Case Notes

In a civil action awarding the proceeds of an insurance policy to the murder victim's estate, the victim's husband's conviction of murder was admissible as evidence that he killed her, notwithstanding that his conviction was still on appeal and notwithstanding the language in *Evid Code § 1300* permitting evidence of a "final judgment" [*Principal Life Ins. Co. v. Peterson* (2007) 156 CA4th 676, 67 CR3d 584] .

Evidence of prior conviction for possession of marijuana was admissible [*People v. One 1964 Chevrolet Corvette Convertible* (1967) 251 CA2d 424 ; *Manes v. Wiggins* (1967) 247 CA2d 756, 56 CR 120 (error to admit transcript of prior misdemeanor trial involving the same incident)].

In a civil action against city and police office, the officer's rape conviction was properly admitted [*Miller v. Superior Court* (1985) 168 CA3d 376, 214 CR 125] .

The former exclusion of a nolo contendere plea from this section only applied where the plea was offered against the defendant in a subsequent civil suit. Where the plea was offered against another person, it was admissible, and subsequent to the 1982 changes in *Evid Code § 1300*, a nolo contendere plea to a felony charge is admissible against a hearsay objection [*Atlas Assurance Co., Ltd. v. McCombs Corp.* (1983) 146 CA3d 135, 194 CR 66] .

To come under the exception to the rule for inadmissibility of hearsay evidence, a conviction must be final. A judgment is not final where it is still on appeal [*In re L.S.* (1987) 189 CA3d 407, 234 CR 508 (father's conviction of child molestation that was on appeal was improperly considered as evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Preclusion & Effect of Judgments Res Judicata Evidence Procedural Considerations Exclusion & Preservation by Prosecutor Governments Local Governments Police Power



53 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.51

21.51 Indemnity or Warranty Action by Judgment--Evid Code § 1301

[1] Evid Code § 1301 Text

■ *Evid Code § 1301.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

If a judgment against an indemnitee or person protected by a warranty is not made conclusive on the indemnitor or warrantor (*Civ Code § 2778(5); CCP § 1912*), this section permits the judgment to be used as hearsay evidence in an action to recover on the indemnity or warranty [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsDamages & RemediesGeneral Overview



54 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.52

21.52 Judgment Against Third Person Whose Duty in Issue--Evid Code § 1302

[1] Evid Code § 1302 Text

■ *Evid Code § 1302.*

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.

LegH: 1965 ch. 299.

[2] Case Note

The term "liability, obligation, or duty" in this section does not include tort liabilities of employees that are imputed to their employers under the doctrine of respondeat superior [*Markley v. Beagle* (1967) 66 C2d 951, 59 CR 809, 429 P2d 129] .

Legal Topics:

For related research and practice materials, see the following legal topics:

TortsVicarious LiabilityEmployersGeneral Overview



55 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.53

21.53 Statement by Declarant Whose Family History in Issue--Evid Code § 1310

[1] Evid Code § 1310 Text

■ *Evid Code § 1310.*

(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.

LegH: 1965 ch. 299, 1975 ch. 1244.

[2] Commission Comments

This section and *Evid Code § 1311* restate former *CCP § 1870(4)* without substantial change, with the substitution of the term "parent and child relationship" for the term "legitimacy" in 1975. This section merely substitutes the requirement that the declarant be unavailable as a witness for the former requirement that the declarant be dead, and substitutes the requirement that the statement be made under trustworthy circumstances for the former requirement that the statement be made when there was no controversy about the matters stated [see Cal Law Rev Com Comment].

This section provides a hearsay exception for a statement concerning the declarant's own family history [Cal Law Rev Com Comment].

The language of *Evid Code § 1310* permits the judge to consider the declarant's motives to tell the truth as well as his reasons to deviate therefrom in determining whether the statement is sufficiently trustworthy to be admitted as evidence [Cal Law Rev Comment].

[3] Case Notes

Hearsay statements of family history are admitted to facilitate proof of kinship which otherwise would frequently be impossible; furthermore, the natural effusions of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy [*Estate of Hartman* (1910) 157 C 206, 107 P 105 (declarations of kinship made before controversy arose); *Estate of Monticelli* (1951) 107 CA2d 90 236 P2d 661 (family record); *Estate of Braig* (1941) 43 CA2d 385 110 P2d 1066 (family reputation)].

The places in which a person has resided form an important part of his personal history and may be admitted under this hearsay exception [*Estate of Berg* (1964) 225 CA2d 423, 37 CR 538 (declarations to son regarding residence admissible); *Estate of Strong* (1942) 54 CA2d 604 129 P2d 493 (proof of place made by way of identification of person of family is admissible)].

The "parent and fetus relationship" is a "similar fact" for purposes of the family history exception to the hearsay rule [*People v. Riley* (1996) 46 CA4th 402, 52 CR2d 670 (admission of pregnancy calendar)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsFamily Records & StatementsEvidenceHearsayRule ComponentsStatementsFamily LawMarital Termination & Spousal SupportGeneral Overview



56 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.54

21.54 Statement by Legal Relative or Family Friend--Evid Code § 1311

[1] Evid Code § 1311 Text

■ *Evid Code § 1311.*

(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.

LegH: 1965 ch. 299, 1975 ch. 1244.

[2] Commission Comments

This section provides a hearsay exception for a statement concerning the family history of another [Cal Law Rev Com Comment].

Consider:

This section and *Evid Code § 1310* restate former *CCP § 1870(4)* without substantial change, with the substitution of the term "parent and child relationship" for the term "legitimacy" in 1975. However, this section extends the scope of the privilege to include hearsay statements by intimate associates of the family as well as those by relatives of the family.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsFamily Records & StatementsFamily LawMarital Termination & Spousal SupportGeneral
OverviewFamily LawMarriageGeneral Overview



57 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.55

21.55 Entries in Bible, Books--Evid Code § 1312

[1] Evid Code § 1312 Text

■ *Evid Code § 1312.*

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 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.

LegH: 1965 ch. 299, 1975 ch. 1244.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsFamily Records & StatementsFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageGeneral Overview



58 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.56

21.56 Reputation of Family--Evid Code § 1313

[1] Evid Code § 1313 Text

■ *Evid Code § 1313.*

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.

LegH: 1965 ch. 299, 1975 ch. 1244.

[2] Commission Comments

The family reputation admitted under this section is necessarily multiple hearsay. If, however, such reputation were inadmissible because of the hearsay rule, and if direct statements of pedigree were inadmissible because they are based on such reputation (as most of them are), the courts would be virtually helpless in determining matters of pedigree [Cal Law Rev Com Comment].

Consider:

This section restates former CCP §§ 1852 and 1870(11) without substantial change, with the substitution of the term "parent and child relationship" for the term "legitimacy" in 1975. However, it deletes the requirement that the reputation exist before the controversy.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay Evidence Hearsay Exceptions Family Records & Statements Family Law Marital Termination & Spousal Support General Overview



59 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.57

21.57 Reputation in Community--Evid Code § 1314

[1] Evid Code § 1314 Text

- *Evid Code § 1314.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

This section broadens former *CCP § 1963(30)* by including community reputation evidence of the fact of birth, divorce, or death as well as such evidence of the fact of marriage within the hearsay exception [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

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60 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.58

21.58 Records of Church--Evid Code § 1315

[1] Evid Code § 1315 Text

■ *Evid Code § 1315.*

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 writing made as a record of 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.

LegH: 1965 ch. 299, 1975 ch. 1244.

[2] Commission Comments

Facts of family history, such as birth dates, relationships, and marital histories, that are ordinarily reported to church authorities and recorded in connection with the church's baptismal, confirmation, marriage, and funeral records may be proved under this section [Cal Law Rev Com Comment].

Church records may be authenticated in the same manner that other business records are authenticated [Cal Law Rev Com Comment].

This section permits church records to be used to prove information in addition to that which is admissible under the business records hearsay exception (e.g., facts of family history which are not known personally to the recorder of the information) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceHearsayExceptionsFamily Records & StatementsFamily LawMarital Termination & Spousal SupportGeneral Overview



61 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.59

21.59 Certificates of Sacraments--Evid Code § 1316

[1] Evid Code § 1316 Text

■ *Evid Code § 1316.*

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.

LegH: 1965 ch. 299, 1975 ch. 1244.

[2] Commission Comments

This section provides a hearsay exception for marriage, baptismal, and similar certificates prepared by religious or civil officials [Cal Law Rev Com Comment].

These certificates must meet only the general authentication requirement of Section 1401 [Cal Law Rev Com Comment].

Consider:

This section is broader than former *CCP § 1919(a)* because it includes certificate of civil ceremonies in addition to certificates of religious ceremonies. In 1975 the term "parent and child relationship" was substituted for the term "legitimacy."

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsFamily Records & StatementsFamily LawMarital Termination & Spousal SupportGeneral
OverviewFamily LawMarriageProofCeremonial MarriagesSolemnization of Marriage



62 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.60

21.60 Reputation in Community Concerning Historical Event--Evid Code § 1320

[1] Evid Code § 1320 Text

■ *Evid Code § 1320.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section dispenses with the requirement that the reputation of community history be more than 30 years old, for the important question is whether a community reputation on the matter exists [Cal Law Rev Com Comment].

This section deletes the requirement that the reputation of community history exist previous to controversy, for such a reputation is not likely to be influenced by the existence of a controversy [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsReputationGeneral History



63 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.61

21.61 Interest of Public--Evid Code § 1321

[1] Evid Code § 1321 Text

- *Evid Code § 1321.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section broadens the scope of the rule stated in *Simons v. Inyo Cerro Gordo Co. (1920) 48 CA 524, 192 P 144*, by deleting the requirement that the reputation concerning a public interest in property be more than 30 years old [Cal Law Rev Com Comment].

[3] Case Notes

The interest which the members of a community possess in their common rights is so great as to ensure sufficient discussion and mutual correction to give some probative value to a common reputation concerning such rights [*Simons v. Inyo Cerro Gordo Co. (1920) 48 CA 524, 192 P 144*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence Admissibility Hearsay



64 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.62

21.62 Reputation Relating to Boundaries or Customs of Land--Evid Code § 1322

[1] Evid Code § 1322 Text

■ *Evid Code § 1322.*

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.

LegH: 1965 ch. 299.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsReputationBoundaries



65 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.63

21.63 Statement of Boundaries--Evid Code § 1323

[1] Evid Code § 1323 Text

■ *Evid Code § 1323.*

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.

LegH: 1965 ch. 299.



66 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.64

21.64 General Reputation--Evid Code § 1324

[1] Evid Code § 1324 Text

- *Evid Code § 1324.*

Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.

LegH: 1965 ch. 299.

[2] Commission Comments

The only purpose of this section is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawAgency

AdjudicationHearingsEvidenceAdmissibilityHearsayEvidenceHearsayExceptionsReputationGeneral

OverviewEvidenceRelevanceCharacter Evidence



67 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.65

21.65 Statement in Deed or Will--Evid Code § 1330

[1] Evid Code § 1330 Text

■ *Evid Code § 1330.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

There is sufficient likelihood that statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsRecords of Documents Affecting Property Interests



68 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.66

21.66 Statement in Ancient Writing--Evid Code § 1331

[1] Evid Code § 1331 Text

- *Evid Code § 1331.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Since the age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement, the statement itself must have been generally acted upon as true for at least 30 years by persons having an interest in the matter [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsAncient DocumentsEvidenceHearsayRule ComponentsStatements



69 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.67

21.67 Published Tabulations, Lists, Directories, Registers--Evid Code § 1340

[1] Evid Code § 1340 Text

■ *Evid Code § 1340.*

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.

LegH: 1965 ch. 299.

Consider:

This section generalizes a hearsay exception that was formerly recognized only in specific situations.

[2] Case Notes

For a hearsay statement to be excepted under this section it must be shown either that the published compilation was generally used and relied upon as accurate in the course of business or that the statements are of a class that is generally relied on. This foundational requirement gives a reasonable assurance of trustworthiness [*Miller v. Modern Business Center* (1983) 147 CA3d 632, 195 CR 279 (no foundation laid showing reliance on computer publication's statement concerning introduction of new model)].

Label on spray can identifying hazardous substance as ingredient is admissible as generally used and relied upon as accurate in the course of business [*In re Michael G.* (1993) 19 CA4th 1674, 24 CR2d 260] .

In a product liability and personal injury action against the manufacturer and distributor of a motorcycle side stand, plaintiff's attorney sought to introduce an identical stand as exemplar, and attempted by declaration to use the package label and enclosed instruction sheet to prove that the content of the package was a certain brand and model side stand distributed by a defendant. The product package and enclosed instruction sheet were inadmissible hearsay as offered, because they were extrajudicial assertions offered to prove the truth of the matter asserted, namely, that the box contained a certain brand and model product. The declaration purporting to recite this written information was

inadmissible double hearsay. Neither party argued that any hearsay exception, such as the compilation exception of *Evid Code* § 1340, applied to the label or instructions [*DiCola v. White Brothers Performance Products, Inc. (2008) 158 CA4th 666, 69 CR3d 888*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict

LiabilityEvidenceHearsayExceptionsGeneral OverviewEvidenceHearsayRule ComponentsStatements



70 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.68

21.68 Historical Works, Books of Science, Art-Maps or Charts--Evid Code § 1341

[1] Evid Code § 1341 Text

■ *Evid Code § 1341.*

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.

LegH: 1965 ch. 299.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsFamily Records & StatementsEvidenceHearsayExceptionsLearned TreatisesGeneral Overview



71 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.69

21.69 Admissibility of Statement of Unavailable Witness in Criminal Proceeding--Evid Code § 1350

[1] Evid Code § 1350 Text

■ *Evid Code § 1350.*

(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.

LegH: 1985 ch. 783, 2001 ch. 854.

[2] Reference

See also *Evid Code* § 240 (definition of "unavailable as a witness").

[3] Case Notes

In a murder prosecution, the murder victim's taped statement to police was admissible on the murder charge, not for the truth of the assertions made by the victim, but as evidence that he was a significant potential witness against defendant in a separate attempted murder case, so that defendant had a motive to kill the victim to prevent his testimony [*People v. Zambrano* (2007) 41 C4th 1082, 1144 n17, 63 CR3d 297, 163 P3d 4] .

For purposes of admissibility under *Evid Code* § 1350, evidence that a particular statement to police was trustworthy was very strong. At the time of his statement, the witness was not in custody, nor a suspect in any crime, but a citizen witness. At the outset of the police interview, he agreed that he was at the police station of his own free will and that the police had not made him any promises or guarantees or set any conditions on his statement. The record disclosed no motive for the witness to lie about what his colleague and erstwhile friend had told him. The witness never varied from the substance of what defendant had told him. Moreover, his uncertainty, before going to the police, about what he should do with the information, and his subsequent effort to convince a police officer that newspaper reports had taken his statement out of context, actually support the statement's reliability. The witness spoke to the police despite his deep conflict about his public responsibility, his friendship for defendant, his willingness to give defendant the benefit of the doubt, and his concern for his own safety. Ample evidence thus supported the trial court's implicit finding that the statement was made under circumstances indicating its trustworthiness [*People v. Zambrano* (2007) 41 C4th 1082, 1146-1147, 63 CR3d 297, 163 P3d 4] .

Having surmounted the hurdle of *Evid Code* § 1350, the murdered witness's tape-recorded statement to police about defendant's connection to two beating victims was admissible for its truth, despite its hearsay character, as evidence of defendant's responsibility for the beating attacks. Without regard to the hearsay rule, it was also admissible in the murder case, not for its truth, but to demonstrate defendant's motive to kill the witness [*People v. Zambrano* (2007) 41 C4th 1082, 1147, 63 CR3d 297, 163 P3d 4] .

One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation, subject to several limitations. The forfeiture by wrongdoing doctrine in California only bars a defendant's objection under the *confrontation clause of the federal Constitution* [see *Evid Code* § 1204] and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect [*People v. Giles* (2007) 40 C4th 833, 850, 55 CR3d 133, 152 P3d 433 , cert granted 2008 U.S. LEXIS 748 (Jan. 11, 2008) (Court of Appeal correctly found that there was clear and convincing evidence that defendant procured victim's unavailability through criminal homicide)].

Evid Code § 1350 establishes an independent, narrow hearsay exception in serious felony cases, based on forfeiture by wrongdoing principles. Section 1350, setting forth a higher statutory standard of proof ("clear and convincing") than other jurisdictions ("preponderance"), survives *California Constitution, article I, section 28(d)* (Prop. 8) because it was enacted by a two-thirds vote of the membership in each house of the Legislature [*People v. Giles* (2007) 40 C4th 833, 853, 55 CR3d 133, 152 P3d 433 , cert granted 2008 U.S. LEXIS 748 (Jan. 11, 2008)] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Interrogation Noncustodial Confessions & Statements Evidence Procedural Considerations Objections & Offers of Proof Objections Evidence Testimony Credibility Impeachment Bias, Motive & Prejudice



72 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.70

**21.70 Statement by Minors in Criminal Proceeding of Child Abuse or Neglect; Notice to Adverse Party;
"Abuse," "Neglect" Defined--Evid Code § 1360**

[1] Evid Code § 1360 Text

■ *Evid Code § 1360.*

(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*.

LegH: 1995 ch. 87.

[2] Case Notes

Evid Code § 1360 has withstood due process and ex post facto challenges [*People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154] .

Evid Code § 1360 is too new to be considered a firmly rooted hearsay exception because it does not reflect "longstanding judicial and legislative experience in assessing the trustworthiness" of the statements it covers. The statute must therefore satisfy the "particularized guarantees of trustworthiness" standard under the *Confrontation Clause* [*People v. Eccleston* (2001) 89 CA4th 436, 107 CR2d 440 (the admission into evidence of a statement made by the victim in accordance with the procedure set forth in *Evid Code § 1360* did not violate defendant's right to confront and cross-examine the witnesses against him)].

For purposes of *Evid Code § 1360*, trial begins when the jury is sworn. The text of subsection (b) makes clear that the notice requirement was enacted to give a criminal defendant a fair opportunity to prepare his or her defense. Allowing the prosecution to disclose its intent to introduce this type of evidence after the jury has been sworn, when opening statements and the taking of evidence are imminent, would undermine this policy. As a practical matter, the parties need to know what evidence may be offered in order to make opening statements and to prepare for the examination of witnesses [*People v. Roberto V.* (2000) 93 CA4th 1350, 113 CR2d 804 (in the absence of sufficient indicia of reliability, the admission of hearsay statements of a child abuse victim violated appellant's rights under the *Confrontation Clause*)].

Evid Code § 1360 provides an exception for admission of a statement made by the victim when he or she was under the age of 12 that describes any act of child abuse, and these statements may include the victim's writings [*People v. Hammer* (2002) 94 CA4th 1443, 115 CR2d 144 (no error in admitting the victim's writings as statements)].

The requirements of *Evid Code § 1360* are applicable to admission of child hearsay statements in civil dependency hearings where sexual abuse is alleged [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803 (opinion contains history of Section 1360's origins)].

[a] Indicia of Reliability

The nonexclusive factors for determining indicia of reliability are: (1) spontaneity and consistent repetition, (2) mental state of the declarant, (3) use of terminology unexpected of a child of similar age, and (4) lack of motive to fabricate [*People v. Brodit* (1998) 61 CA4th 1312, 72 CR2d 154 ; *In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803 ; *People v. Roberto V.* (2000) 93 CA4th 1350, 113 CR2d 804] .

Courts have considerable leeway in their consideration of appropriate factors. The unifying principle is that these factors relate to whether the child was particularly likely to be telling the truth when the statement was made. The appellate court independently reviews a trial court's determination that the statements bore sufficient indicia of reliability [*People v. Roberto V.* (2000) 93 CA4th 1350, 113 CR2d 804 (in the absence of sufficient indicia of reliability, the admission of hearsay statements of a child abuse victim violated the appellant's rights under the *Confrontation Clause*)].

In a prosecution for various sex offenses involving a child, the admission into evidence of a statement made by the victim in accordance with the procedure set forth in *Evid Code § 1360* did not violate defendant's right to confront and cross-examine the witnesses against him. The victim met the requirements for competency as a witness, and her statement was consistently repeated. She also had a clear understanding about the basic factual matters she was describing and her advanced level of sexual knowledge pointed to trustworthiness. Also, the victim had no motive to fabricate [*People v. Eccleston* (2001) 89 CA4th 436, 107 CR2d 440] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceCompetencyDisabilityChildrenEvidenceScientific EvidenceBattered Child SyndromeFamily LawFamily
Protection & WelfareChildrenAbuse, Endangerment & Neglect



73 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.71

21.71 Statement of Infliction or Threat of Physical Injury Upon Declarant--Evid Code § 1370

[1] Evid Code § 1370 Text

■ *Evid Code § 1370.*

(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.

LegH: 1996 ch. 416, eff. Sept. 4, 1996, 2000 ch. 1001.

[2] Legislative Note

It is the intent of the Legislature that enactment of *Evid Code* § 1370 shall not affect other evidentiary requirements, including, but not limited to, *Evid Code* §§ 351 and 352, shall not impair a party's right to attack the credibility of the declarant pursuant to *Evid Code* § 1202, 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 [1996 ch. 416, § 1].

[3] Case Notes

Under Ohio v. Roberts (1980) 448 US 56, 66, 100 S Ct 2531, 65 L Ed2d 597, an unavailable witness's hearsay statement could be admitted without violating the *Sixth Amendment's confrontation clause* if the statement bore adequate indicia of reliability, that is, if it either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. However, the U.S. Supreme Court reconsidered this ruling in 2004, concluding that if the hearsay statement offered for its truth were testimonial in nature, its admission would violate the *Confrontation Clause* contained in the U.S. Constitution unless the defendant had had a prior opportunity to cross-examine the declarant [*Crawford v. Washington (2004) 541 US 36, 124 S Ct 1354, 158 L Ed2d 177*]. In light of that decision, the "trustworthiness" prong of *Evid Code* § 1370(a)(4) has been interpreted to require a prior opportunity to cross-examine the declarant [*People v. Price (2004) 120 CA4th 224, 15 CR3d 229* (defendant in domestic violence prosecution vigorously cross-examined spouse at preliminary hearing)].

Crawford does not bar the extrajudicial statements of declarants where the declarant was available for cross-examination at trial, and the defendant could have cross-examined the declarant but did not [*People v. Lewis and Oliver, 39 C4th 970, 1028 n19, 47 CR3d 467, 140 P3d 775*].

In a prosecution for murder, the trial court erred in admitting evidence of a declarant's statements to her doctor and a police officer that defendant had caused her neck injury seven weeks earlier, pursuant to the physical injury exception to the hearsay rule for statements made at or near the time of the injury [*Evid Code* § 1370(a)(3)]. The statements were not made at or near the time of the injury, and the statements to the officer were not made under circumstances indicating their trustworthiness. Thus, none of the statements qualified for admission [*People v. Quitiquit (2007) 155 CA4th 1, 65 CR3d 674*].

Evid Code § 1370 has been found not to violate due process, and the hearsay exception is available for use by both the prosecution and defense [*People v. Hernandez (1998) 67 CA4th 397, 78 CR2d 909* (where domestic violence victim was deceased at time of trial, statements to police officer were admitted since indicia of reliability included a lack of bias and corroborating evidence consisting of bruising, photographs, and statements of defendant)].

In a prosecution for attempted murder, it was reversible error under the *Sixth Amendment confrontation clause* to admit victim's out-of-court identification of defendant in line-up, where statement had no indicia of trustworthiness [*People v. Kons (2003) 108 CA4th 514, 133 CR2d 520*].

Diary entries narrating, describing, or explaining the threat of physical injury on the declarant are admissible [*Guardianship of Simpson (1998) 67 CA4th 914, 79 CR2d 389* (reversible error to exclude diaries of deceased declarant, Nicole Brown Simpson; because diary entries raised sufficient issues of physical violence, the parties should have been given the opportunity to argue the interpretations of the entries; one of the legislative intents of *Evid Code § 1370* was to admit diaries of this type since they were inadmissible in the related murder trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewEvidenceProcedural ConsiderationsExclusion & Preservation by Prosecutor



74 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.72

21.72 Statement by Victim of Elder Abuse--Evid Code § 1380

[1] Text

■ *Evid Code § 1380.*

(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.

(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 as to the availability of the victim as a witness 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.

LegH: 1999 ch. 383.

[2] Case Notes

If a hearsay statement made by an unavailable witness and offered for its truth is testimonial in nature, its admission violates the *Confrontation Clause* contained in the U.S. Constitution, unless the defendant has had a prior opportunity to cross-examine the declarant [*Crawford v. Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed2d 177] .

A videotape made of a victim of elder abuse talking with the police two days before she died was erroneously admitted because the defendant had had no opportunity to cross-examine her [*People v. Pirwani* (2004) 119 CA4th 770, 14 CR3d 673] .

Evid Code § 1380 does not provide a list of factors pertaining to trustworthiness, but California courts can reasonably rely on factors drawn from case law addressing the trustworthiness of hearsay in other circumstances. Note that this case was decided before *Crawford* [*People v. Watson* (2003) 114 CA4th 142, 7 CR3d 295 (determination that elderly declarant was competent to testify at time of statement was not sufficient indication of trustworthiness to justify admission of videotaped statement)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Preliminary Proceedings General Overview Evidence Demonstrative Evidence Visual Formats Family Law Family Protection & Welfare Elderly Persons Abuse, Endangerment & Neglect



75 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

J. Hearsay (Evid Code §§ 1200-1370)

Chapter 21 Hearsay Rule and Exceptions Evidence Code §§ 1200-1380

1-21 California Courtroom Evidence 21.73

21.73 Miscellaneous Exceptions to Hearsay Rule

[1] Child Dependency Cases--Admissibility of Investigation and Social Study Reports

[a] Explanation

A hearsay exception for the admission of social study reports in child dependency cases under *W&I Code* § 300, which are civil in nature, is created by *W&I Code* § 281 and *Cal Rules Ct, Rule 1450(c)*. Due process requires that each party receive a copy of the report, be given an opportunity to cross-examine the investigative officer and to subpoena and examine persons whose hearsay statements are contained in the report, and be permitted to introduce evidence by way of rebuttal. Due process does not require that the county, rather than the parent, call all witnesses mentioned in the social study [*In re Cindy L. (1997)* 17 C4th 15, 69 CR2d 803 (courts have authority to create new hearsay exceptions); *In re Malinda S. (1990)* 51 C3d 368, 272 CR 787, 795 P2d 1244 (exceptions to hearsay rule are not limited to those enumerated in Evidence Code, and may also be found in other codes and decisional law)].

[b] Case Notes

Fam Code § 7851 provides that in proceedings to free a minor from parental custody and control, an investigation report recommending a disposition in the proceeding shall be made to the court. *Fam Code* § 7851(d) provides "The court shall receive the report in evidence and shall read and consider its contents in rendering the court's judgment." Such reports, and hearsay contained within, are admissible over a general hearsay objection and constitute competent evidence so long as a meaningful opportunity to cross-examine and controvert the contents of the report is afforded [*In re Nalani C. (1988)* 199 CA3d 1017, 245 CR 264 (construing former CC § 232)].

The *Fam Code* § 7851(d) hearsay exception makes probation reports admissible in proceedings related to the welfare of children. The probation report is admissible even if it contains multiple hearsay. Further, there is nothing in the statute which indicates a limitation on admissibility to statements of the probation officer relating facts within his own personal knowledge [*In re George G. (1977)* 68 CA3d 146, 137 CR 201 (in proceedings to terminate parent's right to child on grounds of voluntary abandonment, a probation report is admissible); *In re Rose G. (1976)* 57 CA3d 406, 129 CR 338].

Under the social studies report exception, the court must make a determination of the competence of the child at the time the statements were made in order to enter a default judgment [*In re Nemis M. (1996)* 50 CA4th 1344, 58 CR2d

324 (case remanded)].

[2] Child Dependency Cases--Admissibility of Child's Statements in Abuse Cases

[a] Explanation

A "child dependency hearsay exception" was created in 1994 by the Court of Appeals as a species of residual hearsay exceptions found not in statutes but rather in decisional law. In child dependency cases arising from abuse of the child, which are civil in nature, out-of-court statements by young children may be accepted in evidence for the truth of the content of the statements upon a finding that the circumstances meet the test of reliability. Among the circumstances indicating reliability are: (1) the age of the child is such that it is unlikely the accusation was fabricated or the product of imagination; (2) the accusation was spontaneous and not the result of suggestive or leading questioning; (3) the statement, if repeated, was consistent; (3) the physical evidence of the assault is consistent with the statement; (4) the wording of the statement indicates no coaching; (5) no indiscriminate or random accusations appear to have been made; and (6) no evidence exists of motive for the child to lie or exaggerate [*In re Carmen O.* (1994) 28 CA4th 908, 33 CR2d 848] .

[b] Case Notes

In 1997, the California Supreme Court adopted the reasoning of *Carmen O.*, but expressly ruled that the safeguards in the language of *Evid Code § 1360* (child hearsay in criminal proceedings) must be applied to civil child dependency actions in which child hearsay is sought involving sexual abuse [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803] .

The child's incompetence to testify at trial does not prevent a court from finding that various circumstances surrounding the hearsay statements bear special indicia of reliability to admit the statements [*In re Cindy L.* (1997) 17 C4th 15, 69 CR2d 803] .

[3] Bills and Receipts for Repairs

The California Supreme Court articulated a limited exception to the hearsay rule for bills and receipts for repairs [*P.G.&E. Co. v. G. W. Thomas Drayage Co.* (1968) 69 C2d 33, 69 CR 561 (bills and receipts for repairs admissible to prove a party incurred or discharged a liability for repairs, and if charges paid that charges were reasonable); *McAllister v. George* (1977) 73 CA3d 258, 140 CR 702 (dental bill admitted to prove medical expenses incurred); *Jones v. Dumrichob* (1998) 63 CA4th 1258, 74 CR2d 607 (legal bill admitted in motion to tax costs)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsStatements of Child AbuseEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsFamily LawDelinquency & DependencyGeneral Overview



76 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.syn

§ 22.syn Synopsis to Chapter 22: Authentication Evidence Code §§ 1400-1454

22.00 Introduction

22.01 Authentication Defined--Evid Code § 1400

[1] Evid Code § 1400 Text

[2] Commission Comments

[3] Statutory References to Methods of Authentication

[4] Case Notes

22.02 Authentication Required--Secondary Evidence--Evid Code § 1401

[1] Evid Code § 1401 Text

[2] Legislative Committee Comments

[3] Case Notes

22.03 Accounting for Alteration--Evid Code § 1402

[1] Evid Code § 1402 Text

[2] Commission Comments

[3] Case Notes

22.04 General Provisions--Evid Code § 1410

[1] Evid Code § 1410 Text

[2] Commission Comments

[3] Case Notes

22.05 Graffiti Constitutes a Writing--Evid Code § 1410.5

[1] Evid Code § 1410.5 Text

[2] Case Notes

22.06 Subscribing Witness Not Required to Authenticate--Evid Code § 1411

[1] Evid Code § 1411 Text

[2] Commission Comments

22.07 Subscribing Witness Denying or Does Not Recollect Writing-Other Evidence--Evid Code § 1412

[1] Evid Code § 1412 Text

[2] Commission Comments

[3] Case Notes

22.08 Observing Witnesses--Evid Code § 1413

[1] Evid Code § 1413 Text

[2] Legislative Committee Comments

[3] Case Notes

22.09 Authentication by Admission-Action as Authentic by Adverse Party--Evid Code § 1414

[1] Evid Code § 1414 Text

[2] Commission Comment

[3] Case Notes

22.10 Genuineness of Handwriting--Evid Code § 1415

[1] Evid Code § 1415 Text

[2] Commission Comment

[3] Who May Authenticate Handwriting

[4] Case Notes

22.11 Authentication of Handwriting by Knowledgeable Witness--Evid Code § 1416

[1] Evid Code § 1416 Text

[2] Commission Comments

[3] Case Notes

22.12 Authentication of Handwriting by Comparison by Trier of Fact--Evid Code § 1417

[1] Evid Code § 1417 Text

[2] Commission Comment

[3] Case Notes

22.13 Writing Treated as Genuine by Party--Evid Code § 1418

[1] Evid Code § 1418 Text

[2] Commission Comments

[3] Case Notes

22.14 Handwriting-Ancient Writings--Evid Code § 1419

[1] Evid Code § 1419 Text

[2] Commission Comments

[3] Case Notes

22.15 Authentication of Handwriting by Response to Communication--Evid Code § 1420

[1] Evid Code § 1420 Text

[2] Commission Comments

[3] Case Notes

22.16 Authentication of Writing Referring to Matters Unlikely to be Known to Persons Other Than Author--Evid Code § 1421

[1] Evid Code § 1421 Text

[2] Commission Comments

[3] Case Notes

22.17 Presumptions Affecting Burden of Producing Evidence--Evid Code § 1450

[1] Evid Code § 1450 Text

[2] Commission Comments

22.18 Acknowledgments--Evid Code § 1451

[1] Evid Code § 1451 Text

[2] Commission Comments

[3] Case Notes

22.19 Genuineness of Seal--Evid Code § 1452

[1] Evid Code § 1452 Text

[2] Commission Comments

[3] Case Notes

22.20 Genuineness of Signature of Public Employee, Notary Public--Evid Code § 1453

[1] Evid Code § 1453 Text

[2] Case Notes

22.21 Genuineness of Signature of Foreign Official--Evid Code § 1454

[1] Evid Code § 1454 Text

[2] Commission Comments

[3] Case Notes



77 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 1400 through 1454* on authentication.



Cross References:

Discussion of the procedures to introduce evidence at trial, with forms, see California Trial Guide, Unit 12, Introducing Evidence (Matthew Bender).

Detailed discussion of authentication issues, see California Trial Guide, Unit 30, Authentication of Writings (Matthew Bender).

Discussion of authentication from a foundational perspective, see Imwinkelried et al., California Evidentiary Foundations, Ch. 4, Logical Relevance; Personal Knowledge and Authentication (Matthew Bender).



78 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.00

22.00 Introduction

Before a writing may be admitted into evidence it must be authenticated, that is, the proponent of the evidence must establish that the writing is what it is claimed to be [*see Evid Code § 1401*]. There are several ways to authenticate a writing, including testimony by a subscribing witness [*Evid Code §§ 1411, 1412*], testimony of an observing witness [*Evid Code § 1413*], evidence of reliance on the writing by an adverse party [*Evid Code § 1414*], evidence of the genuineness of the handwriting [*Evid Code §§ 1415-1417*], seals [*Evid Code § 1452*], and other circumstantial evidence regarding the writing [*see Evid Code §§ 1419-1421*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



79 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.01

22.01 Authentication Defined--Evid Code § 1400

[1] Evid Code § 1400 Text

■ *Evid Code § 1400.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

When a party wishes to introduce a writing into evidence, he must make a preliminary showing of relevancy. Usually this consists of showing that the writing is authentic, *i.e.*, the writing was made or signed by its purported maker [Cal law Rev Com Comment].

When a judge permits a writing to be admitted in evidence, all that he has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic. In short, he rules on admissibility, not weight of evidence. The trier of fact independently determines the question of authenticity, and, if the trier of fact does not believe the evidence of authenticity, it may find that the writing is not authentic despite the fact that the judge has determined that it was "authenticated" [Cal Law Rev Com Comment].

Where a presumption applies, the trier of fact is required to find that the writing is authentic unless the requisite contrary showing is made (*see Evid Code §§ 600, 604, 606*) [Cal Law Rev Com Comment].

[3] Statutory References to Methods of Authentication

CCP §§ 447, 448 (stipulation or pleadings)

Evid Code §§ 1450-1454, 1530 (presumptions)

Evid Code § 643 (ancient documents rule)

[4] Case Notes

Authentication of a writing is required before it may be received in evidence. A videotape is the equivalent of a writing under the Evidence Code and must comply with the requirements of *Evid Code* §§ 1400, 1401. Under *Evid Code* § 1400, a video recording is authenticated by testimony or other evidence that it actually depicts what it purports to show [*People v. Mayfield* (1997) 14 C4th 668, 747, 60 CR2d 1, 928 P2d 485 ; *McGarry v. Sax* (2008) 158 CA4th 983, 70 CR3d 519] .

In an action for personal injury, arising out of crowd action at a skateboard demonstration, plaintiff offered a videotape and stills from the videotape, apparently without certainty about where the videotape came from and whether it represented the incident in which plaintiff was injured, another incident the same day, or a "typical skateboard toss" at such demonstrations. Plaintiff's failure to offer any testimony to authenticate the video and photo stills rendered the proffered evidence inadmissible at trial [*McGarry v. Sax* (2008) 158 CA4th 983, 70 CR3d 519] .

In construction defect litigation, the trial court erred in finding that documents purporting to establish an agreement between the parties to toll the statute of limitation were not adequately authenticated. All that is required to authenticate a writing is that there be evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is [*Evid Code* § 1400]. Although a more elaborate authentication could have been presented, counsel sufficiently authenticated the documents when he declared that they were true and correct copies of documents sent by and received from prior counsel involved in this litigation. This was not a case in which the record was silent as to the authorship of the documents [*Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 CA4th 1401, 66 CR3d 776] .

Presentation of evidence sufficient to sustain a finding of its authenticity [*Verzan v. McGregor* (1863) 23 C 339] .

A writing may be authenticated by its contents in light of the circumstances [*McAllister v. George* (1977) 73 CA3d 258, 140 CR 702] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewEvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview



80 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.02

22.02 Authentication Required-Secondary Evidence--Evid Code § 1401

[1] Evid Code § 1401 Text

■ *Evid Code § 1401.*

(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.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

This section reflects prior law even though the requirements of this section have never been stated in the California statutes [Legis Com Comment].

The Evidence Code defines the term "authentication" very broadly, so that even if the execution of the writing is not in issue, it is still required to be authenticated because all writings must be authenticated [Legis Com Comment].

The "writing" referred to in *Evid Code § 1401(a)* is any writing offered in evidence; although it may be either an original or a copy, it must be authenticated before it can be introduced into evidence [Legis Com Comment].

Evid Code § 1401 requires that an otherwise admissible writing be authenticated before it may be received in evidence. This means that a writing may be excluded by some other rule of evidence (e.g., relevancy, hearsay rule, best evidence rule, or rule excluding a coerced confession) [Legis Com Comment].

Even when a writing is not offered in evidence but is instead sought to be proved by a copy or by testimony as to its content (allowable under *Evid Code §§ 1500-1510*), this section requires the writing to be authenticated (see *Evid Code § 1401(b)*) [Legis Com Comment].

If a person offers in evidence a copy of a writing, he must make a sufficient preliminary showing of the authenticity of

both the copy and the original. In certain instances this would not be necessary (e.g., copy of recorded deed, see *Evid Code* §§ 1530, 1600) [Legis Com Comment].

[3] Case Notes

Generally, under former law and *Evid Code* § 1400 *et seq.*, documents must be authenticated in some fashion before they are admissible in evidence [*Penny v. Wilson* (2004) 123 CA4th 596, 20 CR3d 212 (trust document was authenticated by testimony of attorney who prepared it, as well as by his secretary's testimony)].

In a wrongful termination action, a letter that was not properly authenticated was an important piece of evidence. Although plaintiff's opposition papers included a copy of this letter, plaintiff's declaration did not mention the letter. Plaintiff's attorney merely submitted his own declaration that the attached copy was a true and correct copy, which was not sufficient for authentication. Nevertheless, since both parties had submitted a copy of the letter with their moving papers for the truth of the matters stated in the letter, and neither party had objected at any time, the appellate court would consider the letter for the truth of the matters stated in it [*Claudio v. Regents of Univ. of Calif.* (2005) 134 CA4th 224, 244, 35 CR3d 837 (implicitly approving trial court's consideration of unauthenticated letter)].

The letter by which a Japanese corporation sought to controvert other evidence that the misappropriator of trade secrets was an agent of the corporation was inadmissible for that purpose because it was not authenticated [*Magnecomp Corp. v. Athene Co., Ltd.* (1989) 209 CA3d 526, 257 CR 278] .

Secondary evidence of an official record was authenticated by a rubber stamp mark and initials on a copy of a speed survey [*People v. Abelson* (1980) 104 CA3d Supp 16, 164 CR 369] .

Because audio and video recordings are included in the *Evid Code* § 250 definition of a "writing," they are subject to the authentication requirements of *Evid Code* § 1400 *et seq* [*People v. Williams* (1997) 16 C4th 635, 66 CR2d 573 (audiotape); *People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1 (audio or video recording); *People v. Patton* (1976) 63 CA3d 211, 133 CR 533 (tape recording)].

Admissible evidence clearly includes duly authenticated *reports* of committees and officers, at least where the record otherwise shows that the report was adopted by the members or acted on by them. In addition, *tape recordings* of the relevant proceedings, if duly authenticated, may be part of the public record and thus admissible to establish the nature and intent of legislative action. The paramount question is what was the sense of the legislative body as inferred from the public record of, and the circumstances surrounding, the adoption of the measure. So long as evidence goes to this point and not to what an individual legislator wanted or believed, the evidence is material and, if not barred by some other rule of evidence, admissible [*City of King City v. Community Bank of Central California* (2005) 131 CA4th 913, 947-948, 32 CR3d 384 (trial court incorrectly excluded collateral evidence to explain ambiguous public record of municipal transaction)].

Videotapes are classified as writings by *Evid Code* § 250, and *Evid Code* § 1401 makes authentication of a writing necessary before it is used as evidence. Thus, at petitioner's administrative hearing, testimony was required from someone who had personal knowledge of the matters and circumstances depicted on the videotapes. That would be someone who saw the events depicted and could testify as to the dates and times of the events and the identification of those persons participating in them [*Ashford v. Culver City Unified Sch. Dist.* (2005) 130 CA4th 344, 349, 29 CR3d 728 (admission of unauthenticated videotapes was not harmless error)].

In an action for termination of parental rights, a failure to submit properly authenticated evidence of statutory notices required remand to the trial court [*In re Glorianna K.* (2005) 125 CA4th 1443, 1451, 24 CR3d 582 (appellate court refused to accept additional evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceWritingsGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewTrade Secrets LawProtection of SecrecyReasonable MeasuresGeneral Overview



81 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.03

22.03 Accounting for Alteration--Evid Code § 1402

[1] Evid Code § 1402 Text

■ *Evid Code § 1402.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

Since this section restates and supersedes former *CCP § 1982*, case law construing that section should be persuasive authority [see Cal Law Rev Com Comment].

[3] Case Notes

In an action for damages arising from breach of a finance lease for business equipment, the trial court did not abuse its discretion in overruling an objection, based on *Evid Code § 1402*, that an acceptance certificate was incomplete because the offering party had failed to account for the fact that Schedule A was not attached. The claimed alteration went to the legal significance of the document, not its authenticity. There was no dispute that the document offered was the acceptance certificate signed by the objecting party, since it was stipulated that an authorized officer of the objecting party signed the acceptance certificate (along with Schedule A and all of the other lease documents) [*Wells Fargo Bank Minnesota, N.A. v. B.C.B.U* (2006) 143 CA4th 493, 507, 49 CR3d 324] .

The materiality of change in a written instrument does not depend on whether the consenting party will be benefitted or injured by the change, but instead whether it changes the rights or duties of the parties to the instrument [*Consolidated Loan Co. v. Harman* (1957) 150 CA2d 488, 310 P2d 450] .

The material alteration of a contract without the consent of the other party renders the instrument void as to the nonconsenting party [*Consolidated Loan Co. v. Harman* (1957) 150 CA2d 488, 310 P2d 450] .

A unilateral material alteration may be ratified by subsequent consent [*Consolidated Loan Co. v. Harman* (1957) 150 CA2d 488, 310 P2d 450] .

Proof that alteration in body and terms of instrument was authorized by party affected by it must be clear and conclusive in order that such party may be bound thereby [*Dozier v. National Borax Co.* (1917) 35 CA 612, 170 P 638] .

Burden rested on defendant to account for alteration of lease while instrument was in his exclusive possession [*Bishop v. Rainboldt* (1947) 79 CA2d 568, 180 P2d 416] .

Any change made in document after its execution which merely expresses what would otherwise be supplied by intentment is immaterial, and document is, in effect, unaltered by it [*Consolidated Loan Co. v. Harman* (1957) 150 CA2d 488, 310 P2d 450] .

An alteration to correct a written instrument is an immaterial alteration, and if sufficiently explained, the instrument is admissible in evidence [*Davis v. California Motors* (1946) 73 CA2d 241, 166 P2d 52] .

It is only when a material alteration was made after execution that a party is required to explain such change before it is admissible into evidence [*People v. Morris* (1991) 53 C3d 152, 279 CR 720, 807 P2d 949 (rejection of defendant's argument that letter he had written to girlfriend was inadmissible as altered because page was missing); *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 CA4th 1138, 12 CR3d 493 (objection to edited videotape could be overcome at trial through testimony that editing did not alter tape's representation of person's conduct)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsPersonalty LeasesDamagesGeneral OverviewCriminal Law & ProcedureTrialsExamination of WitnessesVideotaped TestimonyEvidenceDocumentary EvidenceWritingsGeneral Overview



82 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.04

22.04 General Provisions--Evid Code § 1410

[1] Evid Code § 1410 Text

■ *Evid Code § 1410.*

Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.

LegH: 1965 ch. 299.

[2] Commission Comments

Evid Code §§ 1410-1421 provide various evidentiary means for authenticating writings. This section supersedes precode statutory expressions of such means and further clearly provides that the means of authentication listed in this code or stated elsewhere in other codes is not the exclusive means of authenticating writings [Cal Law Rev Com Comment].

This is a simple recognition of the fact that it would be impossible to specify all the varieties of circumstantial evidence that may be sufficient in particular cases to sustain a finding of the authenticity of a writing [Cal Law Rev Com Comment].

[3] Case Notes

Manuscripts were properly authenticated because there were clear references to the author being one of defendant's aliases; evidence clearly showed that defendant was operating as a madam, that the manuscripts discussed the prostitution business, and that the locations where the manuscripts were seized were each a residence of defendant [*People v. Gibson (2001) 90 CA4th 371, 108 CR2d 809*).

Content and location of papers identified them as defendant's work [*People v. Olguin (1994) 31 CA4th 1355, 37 CR2d 596*] .

Secondary evidence of an official record was authenticated by a rubber stamp mark and initials on a copy of a speed survey [*People v. Abelson (1980) 104 CA3d Supp 16, 164 CR 369*] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



83 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.05

22.05 Graffiti Constitutes a Writing--Evid Code § 1410.5

[1] Evid Code § 1410.5 Text

■ *Evid Code § 1410.5.*

(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, 1418.

LegH: 1990 ch. 660.

[2] Case Notes

An arrow in a holographic will did not convey a particular meaning [*Estate of Wong (1995) 40 CA4th 1198, 47 CR2d 707*] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWillsHandwritten & Oral WillsRequirements



84 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.06

22.06 Subscribing Witness Not Required to Authenticate--Evid Code § 1411

[1] Evid Code § 1411 Text

- *Evid Code § 1411.*

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

LegH: 1965 ch. 299.

[2] Commission Comments

This section clearly states that the production of a subscribing witness to a witnessed writing is not the law in California unless a statute specifically so requires [Cal Law Rev Com Comment].

The principal statutory requirement is in the proof of wills, yet even in this case authentication by other evidence is permissible in certain situations (*see Evid Code § 1412*) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



85 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.07

22.07 Subscribing Witness Denying or Does Not Recollect Writing--Other Evidence--Evid Code § 1412

[1] Evid Code § 1412 Text

■ *Evid Code § 1412.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1941* [Cal Law Rev Com Comment].

[3] Case Notes

A will may be proved otherwise than by subscribing witnesses, and even in contradiction of their testimony [*Estate of Cecala* (1949) 92 CA2d 834, 208 P2d 436] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



86 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.08

22.08 Observing Witnesses--Evid Code § 1413

[1] Evid Code § 1413 Text

- *Evid Code § 1413.*

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.

LegH: 1965 ch. 299.

[2] Legislative Committee Comments

In addition, this section refers to writings that were "made" as well as "executed" in order to include all kinds of writings not merely those bearing a signature. This section is a restatement of former *CCP § 1940(1), (3)* [Legis Com Comment].

[3] Case Notes

When instrument of corporation is signed by its president and secretary and is attested by corporate seal, there is sufficient prima facie showing of due execution to authorize its admission in evidence as against objection that it was not proved in manner required by section [*Watkins v. Glas (1907) 5 CA 68, 89 P 840*] .

The effect of a corporate seal is evidence of authority of corporation officers to execute instruments on its behalf [*Thomas v. Peterson (1931) 213 C 672, 3 P2d 306* (recording and seal)].

Tape recording of a defendant's jailhouse conversation in Spanish was properly authenticated when the investigator who monitored the conversation testified that the tape was a complete recording of the conversation [*People v. Estrada (1979) 93 CA3d 76, 155 CR 731* (investigator did not speak Spanish)].

Declaration of witness who asserted he executed a client agreement on another party's behalf to open an investment account with a broker was sufficient to authenticate the client agreement under *Evid Code § 1413* [*City of Vista v. Sutro & Co. (1997) 52 CA4th 401, 60 CR2d 488*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsDirectors & OfficersScope of AuthorityCorporate SealsCriminal Law &
ProcedureSearch & SeizureElectronic EavesdroppingSealing RequirementsEvidenceDemonstrative
EvidenceRecordings



87 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.09

22.09 Authentication by Admission-Action as Authentic by Adverse Party--Evid Code § 1414

[1] Evid Code § 1414 Text

■ *Evid Code § 1414.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comment

This section restates and clarifies former *CCP § 1942* (1901 amendment) [Cal Law Rev Com Comment].

[3] Case Notes

A writing that is not physically created by the author's own hand may be authenticated [*City of Vista v. Sutro & Co.* (1997) 52 CA4th 401, 60 CR2d 488 ; *People v. Lynn* (1984) 159 CA3d 715, 206 CR 181] .

In an action for legal malpractice, based on an underlying premises liability action against a landlord, the trial court erred in sustaining general objections to the introduction of excerpts of plaintiff's expert's deposition, where defendants had themselves authenticated the deposition by presenting excerpts of it [*Ambriz v. Kelegian* (2007) 146 CA4th 1519, 1527, 53 CR3d 700] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview



88 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.10

22.10 Genuineness of Handwriting--Evid Code § 1415

[1] Evid Code § 1415 Text

- *Evid Code § 1415.*

A writing may be authenticated by evidence of the genuineness of the handwriting of the maker.

LegH: 1965 ch. 299.

[2] Commission Comment

This section restates and supersedes subdivision (2) of former *CCP § 1940* [Cal Law Rev Com Comment].

[3] Who May Authenticate Handwriting

Evidence of the genuineness of the handwriting of the maker may be given by a layman familiar with the writing or by a handwriting expert.

[4] Case Notes

Where one subscribing witness to a will was dead and the other did not see signing by testatrix, evidence of witness who was acquainted with her handwriting was competent to prove her signature [*Estate of Gray (1948) 89 CA2d 478 201 P2d 392*] .

An entire letter written by a defendant which the defendant alleged was not properly authenticated, because he only admitted to having written part of it, was not erroneously admitted where it was obviously all written in the same hand [*People v. Allison (1966) 245 CA2d 568 54 CR 148* (fabrication of alibi)].

Foundation for introduction of contract of exchange is insufficient where party testified that he had seen other's signature on original copy but admitted that he had not seen him sign it and was not familiar with his handwriting [*Palma v. Leslie (1935) 6 CA2d 702*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Trials Examination of Witnesses General Overview Estate, Gift & Trust Law Will
Contests Testamentary Formalities Witnesses Attestation & Subscription Evidence Authentication General Overview



89 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.11

22.11 Authentication of Handwriting by Knowledgeable Witness--Evid Code § 1416

[1] Evid Code § 1416 Text

■ *Evid Code § 1416.*

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

Since this section restates and supersedes former *CCP* § 1943, cases construing § 1943 should be persuasive [Cal Law Rev Com Comment].

[3] Case Notes

Letter purporting to be from defendant to plaintiff was properly admitted into evidence, when plaintiff testified that she had received the letter through the mail and that she recognized the signature as defendant's [*Risinger v. Anderson* (1935) 10 CA2d 455 51 P2d 1119] .

Opinion of ordinary witness as to a person's handwriting, of which he has knowledge, is permissible [*Clausseneus v. Anderson* (1963) 216 CA2d 171 30 CR 772] .

A brother was competent to identify and testify as to his sister's handwriting [*People v. Remiro* (1979) 89 CA3d 809, 153 CR 89] .

That witness was not personally present at execution of instrument does not negate his knowledge of signature so as to preclude him from swearing to its genuineness [*Bauer v. State* (1904) 144 C 740 78 P 280 (proof of execution not limited to testimony of one who saw it signed)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsEnforcementProof of Signature



90 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.12

22.12 Authentication of Handwriting by Comparison by Trier of Fact--Evid Code § 1417

[1] Evid Code § 1417 Text

■ *Evid Code § 1417.*

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.

LegH: 1965 ch. 299.

[2] Commission Comment

This section restates and supersedes that portion of former *CCP § 1944* that permits the trier of fact to compare questioned handwriting with handwriting the court has found to be genuine [Cal Law Rev Com Comment].

[3] Case Notes

The jury may make a comparison of exemplars in evidence with or without the aid of experts [*People v. Storke* (1900) 128 C 486 60 P 1090 (jurors may differ from expert in their conclusions)].

Under *Evid Code § 1417*, the jury may determine that a criminal defendant signed a document by comparing the handwriting on a questioned document to an authenticated exemplar of the defendant's handwriting [*People v. Rodriguez* (2005) 133 CA4th 545, 554, 34 CR3d 886] .

An application for renewal of insurance was properly authenticated when the insured admitted signing the document on the front, along with the insurance agent, and when it would have been reasonable for the trial judge to compare the writing on the front and the back of the document and conclude that both sides were written by the agent [*Interinsurance Exchange of Auto. Club v. Velji* (1975) 44 CA3d 310, 118 CR 596 (no objection made at trial)].

It was proper to admit an employment application to be used as a comparison handwriting exemplar, when the personnel director testified, without contradiction, that the defendant was present while the form was being filled out,

although the director could not remember having personally seen the defendant fill out the form [*People v. Ramos* (1982) 30 C3d 553, 180 CR 266, 639 P2d 908] .

The judge must be satisfied that a writing is genuine before he is authorized to admit it for comparison with other alleged writings [*People v. Creegan and Becker* (1898) 121 C 554 53 P 1082 (forgery comparison of writings)].

To be admissible into evidence it must be shown that exemplar was made under same conditions as document which it seeks to disprove [*People v. McKenna* (1938) 11 C2d 327 79 P2d 1065 (exemplar made on different type of paper excluded)].

Defendant waived any rights he might have had as to use of his handwriting exemplars when they were made voluntarily after he was advised that he was not required to say anything without advice of counsel and that any statements he made might be used against him [*People v. Gilbert* (1965) 63 C2d 690 408 P2d 365] .

Under cross-examination, when a witness denies that certain handwriting is his, the cross-examiner should be permitted to obtain exemplars from the witness [*People v. Villarino* (1970) 7 CA3d 56 86 CR 338 (signature)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral
OverviewEvidenceScientific EvidenceHandwriting



91 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.13

22.13 Writing Treated as Genuine by Party--Evid Code § 1418

[1] Evid Code § 1418 Text

■ *Evid Code § 1418.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes that portion of former *CCP § 1944* that permits a witness to compare questioned handwriting with handwriting the court has found to be genuine [Cal Law Rev Com Comment].

It should be noted that this section applies to any form of writing, not just handwriting (e.g., typewriting specimens) [Cal Law Rev Com Comment].

[3] Case Notes

The witness's degree of expertise, may be derived from practical experience instead of from technical training [*Estate of Newell* (1925) 75 CA 554 243 P 33] .

To be a competent witness to the genuineness of a signature, one must have been educated in the business about which one testifies, or must have acquired actual skill and knowledge on the subject; it is not enough that one has sometimes compared the signatures of other persons when disagreements as to their genuineness had arisen in course of business [*Goldstein v. Black* (1875) 50 C 462] .

When it is stipulated that witness, by reason of education, study, and experience is qualified as expert in art of handwriting, his testimony respecting handwriting of defendant is admissible [*People v. Bullock* (1958) 166 CA2d 494 333 P2d 88] .

In a prosecution for forging narcotics prescriptions, the court may decide any issue relating to the propriety of the use of defendant's handwriting exemplars by a handwriting expert for comparison purposes without submitting such issue to the jury [*People v. Donovan* (1969) 272 CA2d 426 77 CR 293 (handwriting exemplars are non-testimonial in nature)].

An employment application was admissible when, although the personnel director could not remember seeing defendant filling out the application, her testimony established that the defendant was physically present while the form was filled out [*People v. Ramos* (1982) 30 C3d 553, 180 CR 266 (also, admission of exemplars analyzed by several handwriting experts)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceScientific EvidenceHandwritingEvidenceTestimonyExpertsAdmissibility



92 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.14

22.14 Handwriting-Ancient Writings--Evid Code § 1419

[1] Evid Code § 1419 Text

■ *Evid Code § 1419.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1945* [Cal Law Rev Com Comment].

The purpose of this section is to let the judge be satisfied with a lesser degree of proof of the authenticity of an exemplar when the writing offered is more than 30 years old [Cal Law Rev Com Comment].

[3] Case Notes

A signature on an official document, certified by the secretary of state, could be used to compare with a signature on a 30-year-old document [*Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 CA2d 323, 56 CR 345*] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementProof of Signature



93 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.15

22.15 Authentication of Handwriting by Response to Communication--Evid Code § 1420

[1] Evid Code § 1420 Text

■ *Evid Code § 1420.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section provides a method of authentication recognized in California case law but not previously reflected in California statutes [Cal Law Rev Com Comment].

[3] Case Notes

A telegram received in reply to a telegram addressed to sender is admissible [*House Grain Co. v. Finerman & Sons* (1953) 116 CA2d 485 253 P2d 1034] .

There is proper foundation for admission of Department of Motor Vehicles teletype message regarding defendant's failure to have made application for a duplicate automobile license as he claimed, where an investigator for the Department of Motor Vehicles testified that he telephoned the Department's Sacramento office where duplicate license records are kept and requested the information contained in the teletype, and that the teletype was addressed to him and was received in answer to his request [*People v. Roland* (1969) 270 CA2d 639 76 CR 72] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



94 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.16

22.16 Authentication of Writing Referring to Matters Unlikely to be Known to Persons Other Than Author--Evid Code § 1421

[1] Evid Code § 1421 Text

■ *Evid Code § 1421.*

A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to any. one other than the person who is claimed by the proponent of the evidence to be the author of the writing.

LegH: 1965 ch. 299.

[2] Commission Comments

This section provides a method of authentication recognized in California case law but not previously reflected in California statutes [Cal Law Rev Com Comment].

[3] Case Notes

Handwritten dental bill referring to the same matters testified to by the plaintiff, which only he and the person who made the writing would be likely to know, was authenticated by its contents in the light of the circumstances [*McAllister v. George* (1977) 73 CA3d 258 140 CR 702] .

A writing that is not physically created by the author's own hand may be authenticated [*People v. Lynn* (1984) 159 CA3d 715, 206 CR 181] .

Tape recording of a defendant's jailhouse conversation in Spanish was properly authenticated where the investigator who monitored the conversation testified that the tape was a complete recording of the conversation [*People v. Estrada* (1979) 93 CA3d 76, 155 CR 731 (investigator did not speak Spanish)].

Authentication of a writing is independent of the question of whether the content of the writing is inadmissible as hearsay [*Stockinger v. Feather River Community College* (2003) 111 CA4th 1014, 4 CR3d 385 (transcripts of

investigator's telephone conversations with witnesses contained inadmissible hearsay)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceRecordingsEvidenceDocumentary

EvidenceWritingsGeneral Overview



95 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.17

22.17 Presumptions Affecting Burden of Producing Evidence--Evid Code § 1450

[1] Evid Code § 1450 Text

■ *Evid Code § 1450.*

The presumptions established by this article are presumptions affecting the burden of producing evidence.

LegH: 1965 ch. 299.

[2] Commission Comments

It is presumed that the documents in this article are authentic unless the adverse party introduces sufficient evidence to sustain a finding to the contrary. When there is such evidence disputing the authenticity of a writing, seal, or signature, the trier of fact is required to determine the question of authenticity without regard to any presumption created by this article [Cal Law Rev Com Comment].



96 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.18

22.18 Acknowledgments--Evid Code § 1451

[1] Evid Code § 1451 Text

■ *Evid Code § 1451.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP § 1948*, which provides a method of authenticating private writings [Cal Law Rev Com Comment].

[3] Case Notes

Preliminary proof of signing or delivery is unnecessary to authorize admission of acknowledged instrument in evidence [*Thomas v. Fursman (1918) 177 C 550 171 P 301*] .

Acknowledgment of deed from husband to wife and certification thereof by notary public constitute prima facie evidence of execution thereof and entitle it to be read into record without further proof [*Fares v. Morrison (1942) 54 CA2d 773 129 P2d 735*] .



97 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.19

22.19 Genuineness of Seal--Evid Code § 1452

[1] Evid Code § 1452 Text

■ Evid Code § 1452.

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.**

LegH: 1965 ch. 299.

[2] Commission Comments

This section changes prior law in that formerly official seals were judicially noticed in California. This section safeguards a parties' right to contest the authenticity of official writings when there is a serious dispute as to such authenticity [Cal Law Rev Com Comment].

Under this section and *Evid Code § 1453* all 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 [Cal Law Rev Com Comment].

When this is the case, the trier of fact is required to determine the question of authenticity without regard to any presumption created by this section (*see Evid Code § 604* and comment thereto) [Cal Law Rev Com Comment].

This section and *Evid Code § 1453* eliminate the need for formal proof of the genuineness of certain official seals and signatures when such proof would otherwise be required by the general requirement of authentication [Cal Law Rev Com Comment].

[3] Case Notes

A judgment that was not certified under seal was not properly authenticated [*People v. Cuevas* (1967) 250 CA2d 901, 59 CR 6 (purported prior conviction judgment inadmissible)].

A law enforcement report of a driver's blood alcohol level that lacks authentication because it lacks a signature and a seal is insufficient to support suspension of a driver's license by the DMV [*Jacobson v. Gourley* (2000) 83 CA4th 1331, 100 CR2d 349 (ordering DMV to revoke suspension of plaintiff's driver's license)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsContracts Under SealEvidenceAuthenticationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesRevocation & Suspension



98 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.20

22.20 Genuineness of Signature of Public Employee, Notary Public--Evid Code § 1453

[1] Evid Code § 1453 Text

■ *Evid Code § 1453.*

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.**

LegH: 1965 ch. 299.

[2] Case Notes

A signature on a form that apparently was affixed as that of a public employee in an official capacity furnishes evidence sufficient to sustain a finding that the document is what it is claimed it to be. The presumption created by *Evid Code § 1453*, which affects the production of evidence, requires the fact finder to accept the document as authentic in the absence of evidence to the contrary [*Poland v. Dept. of Motor Vehicles* (1995) 34 CA4th 1128, 40 CR2d 693 (CHP officer's signature on DMV form sufficiently authenticated it for admission at DMV hearing)].

Secondary evidence of an official record was authenticated by a rubber stamp mark and initials on a copy of a speed survey [*People v. Abelson* (1980) 104 CA3d Supp 16, 164 CR 369] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsEnforcementProof of SignatureEvidenceAuthenticationGeneral
OverviewEvidenceScientific EvidenceHandwriting



99 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code
K. Writings (Evid Code §§ 1400-1605)
Chapter 22 Authentication Evidence Code §§ 1400-1454

1-22 California Courtroom Evidence 22.21

22.21 Genuineness of Signature of Foreign Official--Evid Code § 1454

[1] Evid Code § 1454 Text

■ *Evid Code § 1454.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section relates to the authentication of any foreign official writing, whether it be an original or a copy [Cal Law Rev Com Comment].

This section is necessary because a United States foreign service officer may not be able to certify the official position and signature of a particular foreign official. Therefore, under this section the signature of a foreign official can be certified by higher foreign officials until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his certification [Cal Law Rev Com Comment].

[3] Case Notes

Notarized documents and signatures were authenticated by Romanian officials and American vice consul [*Estate of Chichernea* (1967) 66 C2d 83, 57 CR 135, 424 P2d 687] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



100 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.syn

§ 23.syn Synopsis to Chapter 23: Secondary Evidence Evidence Code §§ 1500-1567

23.00 Introduction

[1] Generally

[2] Legislative Note and Application

[3] Commission Comments

23.01 Proof by Original--Evid Code § 1520

[1] Evid Code § 1520 Text

[2] Commission Comments

[3] Prior Law Case Notes

23.02 Secondary Evidence Rule--Evid Code § 1521

[1] Evid Code § 1521 Text

[2] Commission Comment

[3] Case Notes

[4] Prior Law Case Notes

23.03 Additional Grounds for Exclusion in Criminal Actions; Request to Exclude Secondary Evidence--Evid Code § 1522

[1] Evid Code § 1522 Text

[2] Commission Comments

23.04 Use of Oral Testimony--Evid Code § 1523

[1] Evid Code § 1523 Text

[2] Commission Comments

[3] Prior Commission Comments

[4] Case Notes

[5] Prior Law Case Notes

23.05 Copy of Writing in Custody of Public Entity--Evid Code § 1530

[1] Evid Code § 1530 Text

[2] Commission Comments

[3] Case Notes

23.06 Certified Copy--Contents--Evid Code § 1531

[1] Evid Code § 1531 Text

[2] Commission Comments

[3] Case Notes

23.07 Official Record of Writing--Evid Code § 1532

[1] Evid Code § 1532 Text

[2] Commission Comments

23.08 Business Records--Evid Code § 1550

[1] Evid Code § 1550 Text

[2] Commission Comments

23.09 Admissibility of Reproductions of Files, Records, Writings, Photographs, Fingerprints or Other Instruments--Evid Code § 1550.1

[1] Evid Code § 1550.1 Text

23.10 Reproduction of Lost Writing--Evid Code § 1551

[1] Evid Code § 1551 Text

[2] Commission Comments

23.11 Printed Representation of Computer Information or Computer Program--Evid Code § 1552

[1] Evid Code § 1552 Text

[2] Commission Comment

[3] Case Notes

[4] Prior Law Case Notes

23.12 Printed Representation of Images Stored on Video or Digital Medium--Evid Code § 1553

[1] Evid Code § 1553 Text

[2] Commission Comments

[3] Prior Law Case Notes

23.13 Copies--Transmittal--Evid Code § 1560

[1] Evid Code § 1560 Text

[2] Commission Comments

23.14 Business Records-Affidavit of Custodian-Procedure--Evid Code § 1561

[1] Evid Code § 1561 Text

[2] Case Notes

23.15 Copy Records--Affidavits--Presumptions--Evid Code § 1562

[1] Evid Code § 1562 Text

[2] Commission Comments

[3] Case Notes

23.16 Witness, Custodial Fees--Evid Code § 1563

[1] Evid Code § 1563 Text

[2] Case Notes

23.17 Personal Attendance of Custodian or Witness-Production--Evid Code § 1564

[1] Evid Code § 1564 Text

23.18 Custodian Witness of Party Serving First Subpoena--Evid Code § 1565

[1] Evid Code § 1565 Text

23.19 Applicable Proceedings--Evid Code § 1566

[1] Evid Code § 1566 Text

[2] Commission Comments

23.20 Employer-Provided Income and Benefit Information in Domestic Proceeding--Evid Code § 1567

[1] Evid Code § 1567 Text



101 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 1500 through 1567* on the secondary evidence rule.



Cross References:

Further discussion of the rules and procedures regarding the secondary evidence rule, see California Trial Guide, Unit 31, Secondary Evidence of Writings (Matthew Bender), Imwinkelried et al., California Evidentiary Foundations, Ch. 7, Secondary Evidence Rule (Matthew Bender); Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections (Matthew Bender).



102 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.00

23.00 Introduction

[1] Generally

This chapter discusses the ways to prove the content of a writing that may longer exist or has not been produced into evidence. The original document may be used to prove its content [*see Evid Code § 1520*]. But if the original writing is not available, secondary evidence may be used to prove the content of the original [*see Evid Code § 1521*]. Secondary evidence includes oral testimony [*see Evid Code § 1523*], official records [*see Evid Code § 1532*], certified copies [*see Evid Code § 1531*], business records [*see Evid Code § 1550*], and computer-stored documents [*see Evid Code § 1552*]. Under certain conditions, as set forth in the "secondary evidence rule," the court will not allow secondary evidence to be admitted into evidence [*see Evid Code § 1521*].

[2] Legislative Note and Application

Evid Code §§ 1500-1511 were repealed by Statutes 1998, ch. 100, and new *Evid Code §§ 1520-1523* and *1552-1553* were enacted. Pursuant to § 9 of the act:

- (a) This act shall become operative on January 1, 1999.
- (b) This act applies in an action or proceeding commenced before, on, or after January 1, 1999.
- (c) Nothing in this act invalidates an evidentiary determination made before January 1, 1999, that evidence is inadmissible pursuant to former Article 1 (commencing with *Section 1500*) of *Chapter 2 of Division 11 of the Evidence Code*. However, if an action or proceeding is pending on January 1, 1999, the proponent of evidence excluded pursuant to former Article 1 (commencing with *Section 1500*) of *Chapter 2 of Division 11 of the Evidence Code* may, on or after January 1, 1999, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

[3] Commission Comments

1998--Former Section 1500 [Best Evidence Rule Defined] is superseded by Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action) and 1523

(oral testimony of content of writing) [Cal Law Rev Com Comment].

1998--Section 1500.5 [Computer Printout--Admissibility] is repealed to reflect the repeal of the Best Evidence Rule. Subdivisions (c) and (d) are continued in Section 1552 (computer printout) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule [Cal Law Rev Com Comment].

1998--Section 1500.6 [Image Stored on Video or Digital Media--Admissibility] is repealed to reflect the repeal of the Best Evidence Rule. The last three sentences of the second paragraph of Section 1500.6 are continued in Section 1553 (printout of images stored on video or digital media) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to replacement of the Best Evidence Rule with the Secondary Evidence Rule [Cal Law Rev Com Comment].

1998--Section 1501 [Copy of Writing Lost or Destroyed Without Intent of Fraud] is repealed to reflect the repeal of the Best Evidence Rule. As to oral testimony of the content of a writing that is lost or has been destroyed, the combined effect of former Sections 1501 and 1505 is continued in Section 1523 (oral testimony of content of writing) without substantive change [Cal Law Rev Com Comment].

1998--Section 1502 [Copy of Writing Not Reasonably Procurable] is repealed to reflect the repeal of the Best Evidence Rule. As to oral testimony of the content of a writing that was not reasonably procurable, the combined effect of Sections 1502 and 1505 is continued without substantive change in Section 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

1998--Section 1503 [Copy of Writing Opponent Fails to Produce] is repealed to reflect the repeal of the Best Evidence Rule. As to oral testimony of the content of a writing, the combined effect of former Section 1505 and the first sentence of subdivision (a) is continued without substantive change in Section 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

The requirement of the second sentence of subdivision (a) is continued without substantive change in Section 1522 (exclusion of secondary evidence in criminal action), except that Section 1522 applies that requirement to all requests for exclusion of secondary evidence in a criminal action [Cal Law Rev Com Comment].

Subdivision (b) is not continued, because it is subsumed in the general principle that parties are under no obligation to introduce evidence they subpoena. That principle remains unchanged even though the specific language of subdivision (b) is not continued [Cal Law Rev Com Comment].

1998--Section 1504 [Copy of Writing Inexpedient to Require Production] is repealed to reflect the repeal of the Best Evidence Rule. As to oral testimony of the content of a collateral writing, the combined effect of former Sections 1504 and 1505 is continued without substantive change in Section 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

1998--Section 1505 [Secondary Evidence of the Content of Absent Writing Described in Sections 1501-1504] is repealed to reflect the repeal of the Best Evidence Rule. Insofar as Section 1505 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1523 (oral testimony of content of writing). See Comments to former Sections 1501-1504 [Cal Law Rev Com Comment].

1998--Section 1506 [Copy of Writing in Custody of Public Entity] is repealed to reflect the repeal of the Best Evidence Rule. As to oral testimony of the content of a writing in the custody of a public entity, the combined effect of former Sections 1506 and 1508 is continued without substantive change in Section 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

1998--Section 1507 [Writing in Public Record] is repealed to reflect the repeal of the Best Evidence Rule. As to oral testimony of the content of a writing that has been recorded in the public records, the combined effect of former Sections 1507 and 1508 is continued without substantive change in Section 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

1998--Section 1508 [Secondary Evidence of the Content of Absent Writing Described in Sections 1506 and 1507] is repealed to reflect the repeal of the Best Evidence Rule. Insofar as Section 1508 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1523 (oral testimony of content of writing). See Comments to former Sections 1506 and 1507 [Cal Law Rev Com Comment].

1998--Section 1509 [Secondary Evidence of Writing Made Up of Other Writings] is repealed to reflect the repeal of the Best Evidence Rule. To the extent that Section 1509 provided a means of obtaining production of accounts or other writings for inspection, continuation of that aspect is unnecessary because other statutes afford sufficient opportunities for such inspection [*see, e.g., CCP §§ 1985.3, 1987, 2020, 2031; Pen Code §§ 1054.1, 1054.3*]. Insofar as Section 1509 pertains to oral testimony of the content of voluminous writings, it is continued without substantive change in Section 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

1998--Section 1510 [Copy of Writing Produced at Hearing by Adverse Party] is repealed to reflect the repeal of the Best Evidence Rule [Cal Law Rev Com Comment].

1998--Section 1511 [Duplicate Admissible to the Same Extent as Original] is repealed to reflect the repeal of the Best Evidence Rule. Exceptions to the Secondary Evidence Rule are modeled on the exceptions in former Section 1511 [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDemonstrative EvidenceVisual
FormatsEvidenceProcedural ConsiderationsExclusion & Preservation by Prosecutor



103 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.01

23.01 Proof by Original--Evid Code § 1520

[1] Evid Code § 1520 Text

- *Evid Code § 1520.*

The content of a writing may be proved by an otherwise admissible original.

LegH: 1998 ch. 100.

[2] Commission Comments

1998--Section 1520 continues former Section 1500 insofar as it permitted proof of the content of a writing by an original of the writing. See also Sections 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

[3] Prior Law Case Notes

These cases interpreted former *Evid Code § 1500* [Best Evidence Rule Defined]:

- In prosecution for murder of minor, trial court did not err in admitting detective's testimony about sex tapes featuring defendant and consenting adult women, without admitting videotapes as best evidence; evidence "need not be definitive" to be relevant to rebut defense that bodily fluids in bedroom came from other sexual partners [*People v. Panah* (2005) 35 C4th 395, 474-476, 25 CR3d 672, 107 P3d 790] .

- "Slight differences in written words or other symbols may make vast differences in meaning, the possibility for fraud and mistake in proof of the contents of a writing exists unless the writing itself is produced" [*Osswald v. Anderson* (1996) 49 CA4th 812, 57 CR2d 23] .

- If there is a conflict of viewpoint, the opinion of an expert will be disregarded in favor of the writing itself [*Hefner v. County of Sacramento* (1988) 197 CA3d 1007, 243 CR 291] .

- When a witness testifies from personal knowledge, the best evidence rule is inapplicable even if similar information is contained in writing; maintenance engineer's testimony on gutter condition [*Chatman v. Alameda County Flood Control Etc. Dist.* (1986) 183 CA3d 424, 228 CR 257] .
- Photographs of inscribed chattels may be admitted over a best evidence objection; photographs of inscribed guns and knives [*People v. Mastin* (1981) 115 CA3d 978, 171 CR 780] .
- Credit card falls under the best evidence rule as both a writing and an inscribed chattel [*People v. Bizieff* (1991) 226 CA3d 1689, 277 CR 678] .
- If the question is not as to the contents of a writing but whether a writing has been made, the issue may be proved by parol evidence; explanation of checks as loans instead of payment for services [*Ponce v. Marr* (1956) 47 C2d 159, 301 P2d 837] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceParol EvidenceEvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



104 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.02

23.02 Secondary Evidence Rule--Evid Code § 1521

[1] Evid Code § 1521 Text

■ *Evid Code § 1521.*

(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."

LegH: 1998 ch. 100.

[2] Commission Comment

1998--Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), and 1523 (oral testimony of content of writing) replace the Best Evidence Rule and its exceptions. For background, see Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369 (1996). Because of the breadth of the exceptions to the Best Evidence Rule, this reform is not a major departure from former law, but primarily a matter of clarification and simplification. Discovery principles remain unchanged [Cal Law Rev Com Comment].

Subdivision (a) makes secondary evidence generally admissible to prove the content of a writing. The nature of the evidence offered affects its weight, not its admissibility. The normal motivation of parties to support their cases with

convincing evidence is a deterrent to introduction of unreliable secondary evidence. See also Section 412 (if party offers weaker and less satisfactory evidence despite ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust) [Cal Law Rev Com Comment].

Courts may consider a broad range of factors, for example:

- (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated,
- (2) whether the original was suppressed in discovery,
- (3) whether discovery conducted in a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original,
- (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation),
- (5) whether the original is unavailable and, if so, why, and
- (6) whether the writing is central to the case or collateral.

A classic circumstance for exclusion pursuant to subdivision (a)(2) is if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation of evidence otherwise applies [Cal Law Rev Com Comment].

Subdivision (b) explicitly establishes that Section 1523 (oral testimony of the content of writing), not Section 1521, governs the admissibility of oral testimony to prove the content of a writing [Cal Law Rev Com Comment].

Subdivision (c) makes clear that like other evidence, secondary evidence is admissible only if it is properly authenticated. Under Section 1401, the proponent must not only authenticate the original writing, but must also establish that the proffered evidence is secondary evidence of the original. See B. Jefferson, *Jefferson's Synopsis of California Evidence Law*, @ 30.1, at 470-71 (1985) [Cal Law Rev Com Comment].

[3] Case Notes

Trial court did not err in admitting unsigned copy of trust document when there was no dispute as to its contents and competent evidence that the lost original had been properly executed, so that admission would not be unfair [*Penny v. Wilson* (2004) 123 CA4th 596, 20 CR3d 212] .

Various Evidence Code provisions generally permit the use of secondary evidence (including copies) to prove the content of a writing [*Kahn v. Lasorda's Dugout, Inc.* (2003) 109 CA4th 1118, 135 CR2d 790 (court failed to exercise its discretion in deciding whether to accept submission of copies, under *Cal Rules Ct, Rule 234*)].

Evid Code §§ 1521 and 1523 are codifications of the common law rule that lost documents may be proved by secondary evidence. Secondary evidence must comply with the rules governing the admissibility of evidence generally, including relevance and the hearsay rule, but the law does not require the contents of lost documents be proved verbatim [*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 C4th 1059, 124 CR2d 142, 52 P3d 79 (contents of lost insurance policy may be proved by secondary evidence)].

The mandatory exceptions set forth in *Evid Code* § 1521(a)(1) and (2) provide further protection against unreliable

secondary evidence. Those exceptions are modeled on the exceptions to former *Evid Code* § 1511 and to Fed R *Evid* 1003. Cases interpreting those statutes provide guidance in applying *Evid Code* § 1521(a)(1) and (2) [see, e.g., *United States v. Sinclair* (7th Cir. 1996) 74 F3d 753, 760-761 (admitting copies of expense account reports was not unfair);

Examples:

- Tax court did not err in excluding photocopies of canceled checks, "since problems in matching the copies of the backs of the checks with copies of the fronts made them somewhat suspect" [*Ruberto v. Commissioner of Internal Revenue* (2d Cir 1985) 774 F2d 61, 64] .
- Upholding trial court's determination that "admission of the file copy would be unfair because the most critical part of the original conformed copy is not completely reproduced in the 'duplicate' " [*Amoco Production Co. v. United States* (10th Cir. 1980) 619 F2d 1383, 1391] .
- Claim of unfairness "must be based on substance, not mere speculation that the original might contain some relevant difference" [*People v. Garcia* (1988) 201 CA3d 324, 330, 247 CR 94] .

[4] Prior Law Case Notes

These cases interpreted former *Evid Code* § 1511 [Duplicate Admissible to the Same Extent as Original--Genuine Question of Original's Authenticity or Unfairness to Admit Duplicate in Lieu of Original]:

Evid Code § 1521 permits the introduction of otherwise admissible secondary evidence to prove the contents of a writing. It does not excuse the proponent from complying with other rules of evidence, most notably, the hearsay rule. *Evid Code* § 1521 means only that plaintiff could introduce secondary evidence to establish the contents of bills if (1) the contents themselves were admissible, and (2) the secondary evidence was otherwise admissible. In this case the contents of the bills representing delinquent accounts were hearsay. In the absence of a showing that they came within an exception, secondary evidence of their contents was no more admissible than the bills themselves, which was to say, not at all [*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 CA4th 1093, 1108, 27 CR3d 741] .

Burden is on the opponent of duplicate to raise genuine issue of originals' authenticity or unfairness of duplicate; opponent raised genuine issue that copy of deed was fabricated [*Osswald v. Anderson* (1996) 49 CA4th 812, 57 CR2d 23] .

Photograph of police artist's sketch of suspect properly admitted [*People v. Garcia* (1988) 201 CA3d 324, 247 CR 94] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsGeneral OverviewEvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceRelevanceSpoliation



105 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.03

23.03 Additional Grounds for Exclusion in Criminal Actions; Request to Exclude Secondary Evidence--Evid Code § 1522

[1] Evid Code § 1522 Text

■ *Evid Code § 1522.*

(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.

LegH: 1998 ch. 100.

[2] Commission Comments

1998--Subdivision (a) of Section 1522 sets forth a mandatory exception applicable only in criminal cases, which are governed by narrower discovery rules than civil cases. *See Evid Code § 130* ("criminal action" includes criminal proceedings). *See also Pen Code §§ 1054-1054.7* (discovery in criminal cases). Section 1522 does not expand discovery obligations, it simply conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. In determining whether the proponent of secondary evidence has made the original "reasonably

available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may in general suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system [Cal Law Rev Com Comment].

The exceptions in subdivisions (a)(1)-(a)(4) are drawn from exceptions to the former Best Evidence Rule (former Section 1500). Subdivision (a)(1) is drawn from former *Evid Code* § 1511. Subdivision (a)(2) is drawn from former *Evid Code* § 1504. Subdivision (a)(3) is drawn from former *Evid Code* § 1506. Subdivision (a)(4) is drawn from former *Evid Code* § 1507 [Cal Law Rev Com Comment].

Subdivision (b) continues the requirement of the second sentence of former *Evid Code* § 1503(a), but applies it to all requests for exclusion of secondary evidence in a criminal trial [Cal Law Rev Com Comment].

See also Evid Code §§ 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), and 1523 (oral testimony of content of writing) [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Criminal Law & Procedure Discovery & Inspection General Overview Evidence Procedural Considerations Exclusion & Preservation by Prosecutor



106 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.04

23.04 Use of Oral Testimony--Evid Code § 1523

[1] Evid Code § 1523 Text

■ *Evid Code § 1523.*

(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.

LegH: 1998 ch. 100.

[2] Commission Comments

1998--Section 1523 preserves former law governing the admissibility of oral testimony to prove the content of a writing. See former *Evid Code* §§ 1500, 1501-1509.

Subdivision (a) is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing. For background, see Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369 (1996) [Cal Law Rev Com Comment].

Subdivision (b) continues former *Evid Code* §§ 1501 and 1505 without substantive change as to oral testimony of the content of a writing that is lost or has been destroyed [Cal Law Rev Com Comment].

Subdivision (c)(1) continues former *Evid Code* §§ 1502 and 1505 without substantive change as to oral testimony of the content of a writing that was not reasonably procurable. In effect, subdivision (c)(1) also continues former *Evid Code* §§ 1503 and 1505 without substantive change as to oral testimony of the content of a writing that the opponent has, but failed to produce at the hearing despite being expressly or impliedly notified that it would be needed. Under such circumstances, the writing was not reasonably procurable. Finally, subdivision (c)(1) continues former *Evid Code* §§ 1506-1508 without substantive change as to oral testimony of the content of a writing where (1) the writing is in the custody of a public entity and the proponent could not have obtained it or a copy of it in the exercise of reasonable diligence, or (2) the writing has been recorded in the public records, the record or a certified copy of the writing is made evidence of the writing by statute, and the proponent could not have obtained it or a copy of it in the exercise of reasonable diligence. Subdivision (c)(2) continues former *Evid Code* §§ 1504 and 1505 without substantive change as to oral testimony of the content of a collateral writing.

Subdivision (d) continues former *Evid Code* § 1509 without substantive change as to oral testimony of a voluminous writing [Cal Law Rev Com Comment].

[3] Prior Commission Comments

This Law Revision Commission Report commented on former *Evid Code* § 1505 [Secondary Evidence of the Content of Absent Writing Described in Sections 1501-1504]:

[Former] *Evid Code* § 1505 codified the principle that a copy is better evidence of the content of a writing than testimony; hence, when a person seeking to prove such content has a copy in his possession or control, he should be required to produce it. If a copy was not in the proponent's possession or control, [former] *Evid Code* § 1505 did not require a showing of reasonable diligence to obtain a copy of a writing described by [former] *Evid Code* §§ 1501-1504 that was held in private custody before introduction of testimonial evidence. However, [former] Section 1508 required reasonable diligence to obtain a copy of a writing in the custody of a public entity, or a writing recorded in public records, to be shown before testimonial evidence was admitted. See 7 Cal.L.Rev.Comm. Reports 1 (1965).

This Law Revision Commission Report commented on former *Evid Code* § 1508 [Secondary Evidence of the Content of Absent Writing Described in Sections 1506 and 1507]:

Because copies of official writing usually can be readily obtained, [former] *Evid Code* § 1508 required a party to exercise reasonable diligence in obtaining a copy of a writing described in [former] *Evid Code* §§ 1506 and 1507. See 7 Cal.L.Rev.Comm. Reports 1 (1965).

[4] Case Notes

Evid Code §§ 1521 and 1523 are codifications of the common law rule that lost documents may be proved as secondary evidence. Secondary evidence must comply with the rules governing the admissibility of evidence generally, including relevance and the hearsay rule, but the law does not require the contents of lost documents be proved verbatim [*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 C4th 1059, 124 CR2d 142, 52 P3d 79 (contents of lost insurance policy may be proved by secondary evidence)].

In an action involving the disputed payoff of a loan secured by real property then in escrow, the trial court excluded the bank employee's declaration concerning her telephone call with the escrow company, and relied instead on her prior letter to the escrow company. Lender defendants had moved to strike the declaration on the grounds, inter alia, that it was barred by the best evidence rule [*Evid Code* § 1523] and was irrelevant. Although the bank employee could not testify regarding the contents of her letter, testimony of her subsequent communication with the escrow company regarding the status of the loan and the mechanics of reconveying the bank's deed of trust was not properly excluded on these grounds. The evidence was relevant to whether the escrow company and the lender had reasonably relied on the letter to close escrow early [*California Nat. Bank v. Havis* (2004) 120 CA4th 1122, 16 CR3d 245 (applying best evidence rule only to portion of declaration describing contents of letter)].

[5] Prior Law Case Notes

These cases interpreted former *Evid Code* § 1501 [Copy of Writing Lost or Destroyed Without Intent of Fraud] and its predecessor, *CCP* § 1855:

Proof of a lost instrument requires that a reasonable search be made that includes search of last known place and inquiry of persons most likely to know of its whereabouts [*Kenniff v. Caulfield* (1903) 140 C 34, 73 P 803] .

Sufficiency of preliminary proof of lost document is addressed to sound discretion of trial court [*Cheek v. Whiston* (1958) 159 CA2d 472, 323 P2d 1028] .

Government agency's error resulting in loss or destruction of document must be excluded on due process grounds, unless prosecution establishes good faith adherence of agency to rigorous and systematic procedures designed to preserve evidence [*People v. Wojahn* (1984) 150 CA3d 1024, 198 CR 277 (citing *People v. Hitch* (1974) 12 C3d 641, 117 CR 9)].

This case interpreted former *Evid Code* § 1502 [Copy of Writing Not Reasonably Procurable]: [*Osswald v. Anderson* (1996) 49 CA4th 812, 57 CR2d 23 (failure to present evidence of search for original deed at recorder's office or personal papers did not satisfy "other available means" language of *Evid Code* § 1502)].

This case interpreted former *Evid Code* § 1503 [Copy of Writing Opponent Fails to Produce] and its predecessor *CCP* §§ 1853 and 1939: [*Jones v. Jones* (1869) 38 C 584 (secondary evidence of instrument admitted when opposing party, to whom custody rightfully belongs, disclaims all knowledge of it)].

This case interpreted former *Evid Code* § 1506 [Copy of Writing in Custody of Public Entity] and its predecessor *CCP* § 1855: [*In re Application of Connor* (1940) 16 C2d 701, 108 P2d 10 (photostatic copy of letter to district attorney admissible where original was in DA's possession)].

This case interpreted former *Evid Code* § 1507 [Writing in Public Records] and its predecessor *CCP* § 1855:

Copy certified by secretary of state of certified copy of articles on file in his office was admissible to prove corporation's organization [*Boston Tunnel Co. v. McKenzie* (1885) 67 C 485] .

These cases interpreted prior *Evid Code* § 1509 [Secondary Evidence of Writing Made Up of Other Writings] and its predecessor *CCP* § 1855:

Ledger sheets admitted summarizing debits, credits, and balances due [*Michelin Tire Co. v. Coleman & Bentel Co.* (1919) 179 C 598, 178 P 507] .

Summary of books of accounts of partnership prepared by certified accountant admitted *Johnstone v. Morris* (1930)

210 C 580, 292 P 970] .

Summary of purchase orders admitted [*Exclusive Florists, Inc. v. Kahn* (1971) 17 CA3d 711, 95 CR 325] .

Summary of sales invoices admitted [*Vanguard Recording Soc., Inc. v. Fantasy Records, Inc.* (1972) 24 CA3d 410, 100 CR 826] .

Damage summary prepared from underlying invoices of repairs and renovations admitted [*Wolfen v. Clinical Data, Inc.* (1993) 16 CA4th 171, 19 CR2d 684] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Documentary
Evidence Writings General Overview Real Property Law Purchase & Sale Escrow



107 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.05

23.05 Copy of Writing in Custody of Public Entity--Evid Code § 1530

[1] Evid Code § 1530 Text

■ Evid Code § 1530.

(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.

LegH: 1965 ch. 299, 1970 ch. 41, urgency eff. April 3, 1970.

[2] Commission Comments

This section provides a uniform rule that can be applied to copies of all writings in official custody found within the United States and another rule applicable to all copies of writings in official custody found outside the United States [Cal Law Rev Com Comment].

Subdivision (a)(1) provides that an official writing may be proved by a copy purporting to be published by official authority [Cal Law Rev Com Comment].

Subdivisions (a)(2) and (a)(3) set forth the rules for proving the content of writings in official custody by attested or certified copies. The only real difference between the words "attested" and "certified" is that the existing statutory definition of "certified" requires the use of a seal, if the authenticating officer has one, whereas the definition of "attested" does not. Therefore, this section eliminates the requirement of the seal by use of the word "attested" [Cal Law Rev Com Comment].

Subdivision (a)(2) allows copies of all official writings within the United States to be proved by a copy certified or attested by the custodian alone [Cal Law Rev Com Comment].

Subdivision (a)(3) allows copies of all foreign official records to be proved by a copy attested by "a person having authority to make the attestation" [Cal Law Rev Com Comment].

But note that in some foreign countries the person with authority to attest a copy of an official writing is not necessarily the person with legal custody of the writing. If such is the case, this subdivision requires that the attester's signature and official position be certified by another official. If this is a United States foreign service officer stationed in the country, no further certificates are required. If a United States foreign service officer is not able to certify the signature and position of the attester, there must be such certification by higher officials until one is reached as to whom the foreign service officer has adequate final certification [Cal Law Rev Com Comment].

Subdivision (b) provides that when evidence is introduced to sustain a finding that the copy is not a correct copy, the trier of fact is required to determine whether the copy is a correct copy without regard to any presumptions created by this section (*see Evid Code § 604* and comment thereto) [Cal Law Rev Com Comment].

[3] Case Notes

In an action for legal malpractice, based on an underlying premises liability action against a landlord, the trial court abused its discretion in sustaining objections to admission of a copy of a city ordinance that had been certified as a true and correct copy by the deputy city clerk, where the objecting party offered nothing to overcome the presumption that these copies of official records were true and correct copies, as certified by a city official [*Ambroz v. Kelegian* (2007) 146 CA4th 1519, 1530, 53 CR3d 700] .

The Evidence Code does not require an official seal on a document to support the presumption of authenticity [*Ambroz v. Kelegian* (2007) 146 CA4th 1519, 1530 n5, 53 CR3d 700 (city official's certification of copy of city ordinance claimed that seal of city was affixed, but embossed seal did not show on photocopy of certification; plaintiff's counsel offered to show court original document with embossed seal)].

Certification of a copy of a city speed survey as a "true copy" is the equivalent of a "correct copy" as used in the statute [*People v. Abelson* (1980) 104 CA3d Supp 16 164 CR 369] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceInferences & PresumptionsGeneral
OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview



108 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.06

23.06 Certified Copy--Contents--Evid Code § 1531

[1] Evid Code § 1531 Text

■ Evid Code § 1531.

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section modifies former *CCP* § 1923 to the extent that it defines the process of attestation as well as the process of certification. In addition, since *Evid Code* § 1530 permits a writing to be attested or certified without the attachment of an official seal, this section omits the requirement of an official seal [Cal Law Rev Com Comment].

[3] Case Notes

No certain words are necessary to create valid certificate attesting purported copy as "certified copy" of document [*Harting v. Cebrian* (1935) 10 CA2d 10, 51 P2d 195] .

Copy of letter from Register of State Land Office to county recorder, written in pursuance of statute, and certified by county recorder, is admissible in evidence [*People v. Hagar* (1877) 52 C 171] .

Excerpt from minutes of adult authority is acceptably certified where there appears thereon the word "attest," followed by date, person's name, rubber stamp impression that such person is executive secretary of authority, and seal of authority [*In re Smith* (1949) 33 C2d 797, 205 P2d 662] .

If an original or a designated copy was admitted into evidence, the jury may be shown other copies without their being first admitted into evidence [*Bauguess v. Paine* (1978) 22 C3d 626, 150 CR 461, 586 P2d 942] .

Certification of a copy of a city speed survey as a "true copy" is the equivalent of a "correct copy" as used in the statute [*People v. Abelson* (1980) 104 CA3d Supp 16, 164 CR 369] .



109 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.07

23.07 Official Record of Writing--Evid Code § 1532

[1] Evid Code § 1532 Text

■ *Evid Code § 1532.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section allows the official record to be used to prove the content of the original recorded writing [Cal Law Rev Com Comment].

The original recorded writing must be authenticated before the copy can be introduced (*Evid Code § 1401*). This requirement can be fulfilled by showing that it was executed by a public official or by a certificate of acknowledgment or similar proof (*Evid Code §§ 1450, 1451, 1453*) [Cal Law Rev Com Comment].

The presumption created by this section is lost when evidence is introduced to sustain a finding that the original writing is not authentic. In such a case, the trier of fact determines authenticity without regard to any presumption (*Evid Code § 604*) [Cal Law Rev Com Comment].

This section extends to all writings, whereas *Evid Code § 1600* applies only to writings affecting property [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceBest Evidence RuleEvidenceDocumentary EvidenceWritingsGeneral Overview



110 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.08

23.08 Business Records--Evid Code § 1550

[1] Evid Code § 1550 Text

■ *Evid Code § 1550.*

(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.

LegH: 1965 ch. 299, operative January 1, 1967, 1992 ch. 876, 2002 ch. 124.

[2] Commission Comments

This section restates (with certain modifications) and supersedes former *CCP § 1953(i)* [Cal Law Rev Com Comment].

Under this section, as long as the original writing is admissible under any exception to the hearsay rule it will be allowed into evidence if the other requirements are met, i.e., the photographic copy must be made in the regular course of business. It is clear that the original writing need not be a business record (thereby altering this former requirement of former *CCP § 1953(i)*) [Cal Law Rev Com Comment].

If the original is admissible not as an exception to the hearsay rule but as 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 [Cal Law Rev Com Comment].

Since this section restates and supersedes the provisions of former *CCP* § 1953(i), case law construing the unmodified portions of the section should be persuasive authority.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidencePhotographsEvidenceDocumentary EvidenceWritingsGeneral
OverviewEvidenceHearsayExceptionsBusiness RecordsNormal Course of Business



111 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.09

23.09 Admissibility of Reproductions of Files, Records, Writings, Photographs, Fingerprints or Other Instruments--Evid Code § 1550.1

[1] Evid Code § 1550.1 Text

■ *Evid Code § 1550.1.*

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.

LegH: 2004 ch. 65.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidencePhotographs



112 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.10

23.10 Reproduction of Lost Writing--Evid Code § 1551

[1] Evid Code § 1551 Text

■ *Evid Code § 1551.*

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.

LegH: 1965 ch. 299, 1969 ch. 646.

[2] Commission Comments

This section restates and supersedes the substance of former *CCP § 1920b* [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidenceRecordingsEvidenceDemonstrative EvidenceVisual Formats



113 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.11

23.11 Printed Representation of Computer Information or Computer Program--Evid Code § 1552

[1] Evid Code § 1552 Text

■ *Evid Code § 1552.*

(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.

LegH: 1998 ch. 100.

[2] Commission Comment

1998--Subdivision (a) of Section 1552 continues former Section 1500.5(c) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule. See Section 1521 Comment. See also Section 255 (accurate printout of computer data is an "original"). Subdivision (b) continues former Section 1500.5(d) without substantive change [Cal Law Rev Com Comment].

[3] Case Notes

The appellate court would take judicial notice that plaintiff company maintained a web site at a specific URL site. Among other things, the company posted its Securities and Exchange Commission filings on this web site, as well as press releases and letters from the chairman. The trial court erred in ruling that this and other computer records that were attached to defendant's declaration were inadmissible on hearsay and authentication grounds. The various

computer printouts from the plaintiff's web site and the Yahoo message board were offered to show that they existed in the public eye: They were not offered for the truth of the matter asserted and thus were not hearsay statements. The records were self-authenticating as computer printouts under *Evid Code* § 1552(a). However, the appellate court would not disturb the trial court's evidentiary ruling, because defendant did not properly preserve his challenge to it. Nevertheless, to the extent the relevant excluded records "are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" [*Evid Code* § 452(h)], the appellate court would take judicial notice of them [*Ampex Corp. v. Cargle* (2005) 128 CA4th 1569, 1573 & n2, 27 CR3d 863 (defamation action)].

Defendants relied on two computer printouts obtained by counsel from the superior court to show that a motion for reconsideration was premature because it was filed before the written order granting summary judgment. This argument was flawed because the printouts were not properly authenticated. The only evidence of what they contained and represented was the hearsay statement of an unidentified courthouse employee. Further, the printouts themselves did not explain what they reflected [*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 CA4th 187, 195, 26 CR3d 790] .

The presumption in *Evid Code* § 1552 operates to establish only that a computer's print function has worked properly. The presumption does not operate to establish the accuracy or reliability of the printed information. On that threshold issue, on objection the proponent of the evidence must offer foundational evidence that the computer was operating properly [*People v. Hawkins* (2002) 98 CA4th 1428, 121 CR2d 627 (trial court did not err in rejecting defendant's hearsay objection and admitting the printouts reflecting computer's internal operations into evidence)].

[4] Prior Law Case Notes

This case interpreted former *Evid Code* § 1500.5 [Computer Printout-Admissibility]: [*Aguimatang v. California State Lottery* (1991) 234 CA3d 769, 286 CR 57 (although computer printouts are admissible and presumed to be accurate representations of the data, if offered for their truth they must qualify under some hearsay exception)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorTortsIntentional TortsDefamationDefensesFair Comment & Opinion



114 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.12

23.12 Printed Representation of Images Stored on Video or Digital Medium--Evid Code § 1553

[1] Evid Code § 1553 Text

■ *Evid Code § 1553.*

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.

LegH: 1998 ch. 100.

[2] Commission Comments

1998--Section 1553 continues the last three sentences of the second paragraph of former Section 1500.6 without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule [Cal Law Rev Com Comment].

Prerequisite: A videotape is considered to be the equivalent of a writing under California law and therefore must be authenticated under *Evid Code § 1400* and *Evid Code § 1401* [*McGarry v. Sax* (2008) 158 CA4th 983, 70 CR3d 519] .

[3] Prior Law Case Notes

This case interpreted former *Evid Code § 1500.6* [Image Stored on Video or Digital Media--Admissibility]: [*People v. Enskat* (1971) 20 CA3d Supp 1 98 CR 646 (in prosecution for exhibiting obscene movies in public, best evidence rule violated by admitting prosecution photographs taken inside theater of portions of movies; however, secondary evidence might have been admitted had prosecution (1) notified defendant of charges and material alleged to be obscene, and (2) requested production of the material at trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications Law
Related Legal Issues
Indecency & Obscenity
Evidence
Demonstrative Evidence
Visual
Formats
Evidence
Procedural Considerations
Exclusion & Preservation by Prosecutor



115 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.13

23.13 Copies--Transmittal--Evid Code § 1560

[1] Evid Code § 1560 Text

■ *Evid Code § 1560.*

(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 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 witness 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*.

LegH: 1965 ch. 299, operative January 1, 1967, 1969 ch. 199, 1982 ch. 452, 1984 ch. 481, 1986 ch. 603, 1991 ch. 1090, 1997 ch. 442, 1999 ch. 444, 2000 ch. 287, 2004 chs. 162, 182, operative July 1, 2005 (ch. 162 prevails; ch. 182 not effective), 2005 ch. 294, 2006 ch. 538.

[2] Commission Comments

Section 1560 is amended to reflect nonsubstantive reorganization of the rules governing civil discovery. See 2004 Cal. Stat. ch. 182 [2005 Law Rev Com Comment].

Section 1560 is also amended to delete language authorizing the judge to substitute for the clerk if there is no clerk. Every superior court has a clerk. See *Gov't Code* §§ 69840 (court clerk's powers, duties, and responsibilities), 71620 (court executive or administrative officer has authority of a court clerk). See also *Code Civ. Proc.* § 167 (judge may perform any act court clerk may perform) [2005 Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Counsel General Overview
Civil Procedure
Judicial Officers
Judges General Overview
Governments
Courts
Clerks of Court



116 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.14

23.14 Business Records-Affidavit of Custodian-Procedure--Evid Code § 1561

[1] Evid Code § 1561 Text

■ *Evid Code § 1561.*

(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.

LegH: 1965 ch. 299, 1969 ch. 199, 1986 ch. 603, 1987 ch. 19, 1996 ch. 146, 1999 ch. 444.

[2] Case Notes

Evid Code § 1561 is part of a streamlined method for the production of the records of a business in response to a subpoena duces tecum. For the records to be admissible, the affidavit must comply with the foundational requirements of the business records exception, *Evid Code § 1271*. The 1996 amendments to *Evid Code § 1561* (adding subsections (a)(4) and (a)(5)) conformed the affidavit requirements to the foundational elements of *Evid Code § 1271* [*Taggart v. Super Seer Corp.* (1995) 33 CA4th 1697, 40 CR2d 56 (although declaration conformed to *Evid Code § 1561* before 1996 amendments, failure to identify the records, explain how they were prepared, and show the sources on which the information was based, failed to show the records were trustworthy and that they met the requirements of the business records exception to the hearsay rule)].

Hearsay is only admissible when it has sufficient indicia of reliability to be deemed trustworthy. In general, the laying of a foundation to establish that a document is a business record or having it be produced with an accompanying declaration from a custodian of records would tend to increase a document's apparent trustworthiness [*In re Miller* (2006) 145 CA4th 1228, 1240, 52 CR3d 256 (in proceeding on habeas corpus, court noted that hospital record relied on in parole revocation hearing was not certified by custodian)].

A subpoena duces tecum would not be enforced against entity that was not custodian of records requested and could not make attestation required by *Evid Code § 1561* [*Cooley v. Superior Court* (2006) 140 CA4th 1039, 1041, 45 CR3d 183] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceHearsayExceptionsBusiness RecordsGeneral Overview



117 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.15

23.15 Copy Records--Affidavits--Presumptions--Evid Code § 1562

[1] Evid Code § 1562 Text

■ *Evid Code § 1562.*

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.

LegH: 1965 ch. 299, 1989 ch. 1416, 1996 ch. 146.

[2] Commission Comments

It is clear the presumption introduced by this section relates only to the truthfulness of the matters required by *Evid Code § 1561* to be stated in the affidavit [Cal Law Rev Com Comment].

[3] Case Notes

Evid Code § 1561 is part of a streamlined method for the production of records of a business in response to a subpoena duces tecum. For the records to be admissible, the affidavit must comply with the foundational requirements of the business records exception, *Evid Code § 1271*. The 1996 amendments to *Evid Code § 1561* adding subsections (a)(4) and (a)(5) conformed the affidavit requirements to the foundational elements of *Evid Code § 127* [*Taggart v. Super Seer Corp.* (1995) 33 CA4th 1697, 40 CR2d 56 (although declaration conformed to *Evid Code § 1561* (before 1996 amendments), failure to identify the records, explain how they were prepared, and show the sources on which the information was based, failed to show the records were trustworthy and that they met the requirements of the business records exception to the hearsay rule)].

Deposition subpoenas for the production of business records from third parties ordered the deponents to deliver a true, legible, and durable copy of several categories of documents to the deposition officer, identified as proponent's counsel.

The deponents also were directed to provide an affidavit describing the documents being produced or, in the alternative, indicating that the company did not have any of the requested documents [*Evid Code* § 1561]. On the date of production, third parties separately responded by serving the proponent with objections to the subpoenas and declining to produce any documents. The Discovery Act contemplates that discovery conducted by way of a business records subpoena is a "deposition." The objections served in response to the business records subpoenas constituted a record of a deposition for purposes of determining the timeliness of a motion to compel [*Unzipped Apparel, LLC v. Bader* (2007) 156 CA4th 123, 67 CR3d 111] .

Hospital records, if properly authenticated and if a proper foundation is laid, are admissible. The hearsay nature of the records and the fact that the person who made the records has not been called does not make the records inadmissible. Under *Evid Code* § 1560, an affidavit can be used in place of the oral testimony of an authenticating witness [*People v. Blagg* (1968) 267 CA2d 598, 73 CR 93] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral
OverviewEvidenceInferences & PresumptionsPresumptions



118 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.16

23.16 Witness, Custodial Fees--Evid Code § 1563

[1] Evid Code § 1563 Text

■ *Evid Code § 1563.*

(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).

LegH: 1965 ch. 299, 1972 ch. 396, 1981 ch. 1014, 1982 ch. 452, 1986 ch. 603, 1987 ch. 19, urgency eff. May 12, 1987, 1997 ch. 442, 1999 ch. 444.

[2] Case Notes

Language of statute permits only recovery of costs defined in statute, not all costs associated with production [*In re Marriage of Stephens* (1984) 156 CA3d 909, 203 CR 331] (computer costs not recoverable).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Computer & Internet Law Civil Actions Damages Criminal Law & Procedure Witnesses Presentation



119 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.17

23.17 Personal Attendance of Custodian or Witness-Production--Evid Code § 1564

[1] Evid Code § 1564 Text

■ *Evid Code § 1564.*

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."

LegH: 1965 ch. 299, 1984 ch. 603, 1986 ch. 603, 1987 ch. 19, urgency eff. May 12, 1987.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersSubpoenas



120 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.18

23.18 Custodian Witness of Party Serving First Subpoena--Evid Code § 1565

[1] Evid Code § 1565 Text

■ *Evid Code § 1565.*

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.

LegH: 1965 ch. 299, 1969 ch. 199.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersSubpoenas



121 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.19

23.19 Applicable Proceedings--Evid Code § 1566

[1] Evid Code § 1566 Text

■ *Evid Code § 1566.*

This article applies in any proceeding in which testimony can be compelled.

LegH: 1965 ch. 299.

[2] Commission Comments

This section removes *Evid Code §§ 1560-1565* from the limiting provisions of *Evid Code § 300* [Cal Law Rev Com Comment].



122 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 23 Secondary Evidence Evidence Code §§ 1500-1567

1-23 California Courtroom Evidence 23.20

23.20 Employer-Provided Income and Benefit Information in Domestic Proceeding--Evid Code § 1567

[1] Evid Code § 1567 Text

■ *Evid Code § 1567.*

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*.

LegH: 1995 ch. 506.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsModificationGeneral OverviewFamily LawChild

SupportObligationsTerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal

SupportModification & TerminationGeneral Overview



123 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.syn

§ 24.syn Synopsis to Chapter 24: Record of Document Evidence Code §§ 1600-1605

24.00 Introduction

24.01 Record of Document--Evid Code § 1600

[1] Evid Code § 1600 Text

[2] Commission Comments

[3] Case Notes

24.02 Admissible Evidence to Prove Contents of Lost or Destroyed Official Records--Evid Code § 1601

[1] Evid Code § 1601 Text

[2] Commission Comments

[3] Case Notes

24.03 Repealed--Evid Code § 1602

24.04 Deed Executed by Proper Officer Pursuant to Legal Process--Evid Code § 1603

[1] Evid Code § 1603 Text

[2] Commission Comments

[3] Case Notes

24.05 Certificate of Purchase or Location of Lands--Evid Code § 1604

[1] Evid Code § 1604 Text

[2] Commission Comments

[3] Case Notes

24.06 Copies of Spanish Title Papers--Evid Code § 1605

[1] Evid Code § 1605 Text

[2] Commission Comments



124 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence Scope

Scope

Scope

This chapter covers *Evid Code §§ 1600 through 1605* on records of documents.



Cross References:

Discussion of related matters under the secondary evidence rule, *Evid Code §§ 1500 through 1567*, see Ch. 23, Secondary Evidence.

Complete discussion of the procedures to introduce evidence at trial, with forms, see California Trial Guide, Unit 12, Introducing Evidence (Matthew Bender); Imwinkelried et al., California Evidentiary Foundations, Ch. 4, Logical Relevance; Personal Knowledge and Authentication (Matthew Bender).



125 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.00

24.00 Introduction

The record of a writing that affects a property interest may be evidence of the existence of the original recorded document [*Evid Code § 1600*]. Such records include abstracts of title [*see Evid Code § 1601*], deeds of conveyance [*see Evid Code § 1603*], certificates of purchase [*see Evid Code § 1604*], and Spanish title records [*see Evid Code § 1605*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Title Quality Marketable Title Abstracts



126 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.01

24.01 Record of Document--Evid Code § 1600

[1] Evid Code § 1600 Text

■ *Evid Code § 1600.*

(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.

LegH: 1965 ch. 299, 1967 ch. 650.

[2] Commission Comments

This section restates and supersedes the substance of former *CCP § 1951* [Cal Law Rev Com Comment].

The presumption introduced by this section is one affecting the burden of proof, and as such the record title to property will be sustained unless the party attacking it can actually prove its invalidity [Cal Law Rev Com Comment].

Although this section is similar to *Evid Code § 1532*, it gives an added effect to those writings under the provisions of this section, i.e., the presumption affecting the burden of proof [Cal Law Rev Com Comment].

[3] Case Notes

If the presumption is rebutted, a question of fact arises for the trial court to resolve [*Thomas v. Peterson* (1931) 213 C 672 3 P2d 306 ; *Du Bois v. Larke* (1959) 175 CA2d 737, 346 P2d 830] .

Proof of confidential relationship between grantor and grantee does not raise presumption of fraud [*Osterberg v. Osterberg* (1945) 68 CA2d 254 156 P2d 46] .

Deed that was signed, acknowledged, and recorded on day of its date, and produced in evidence by grantee, carries with it presumption that it was delivered on that day [*McGorray v. Robinson* (1902) 135 C 312 67 P 279] .

Deed to real property duly acknowledged, or proved and certified, is prima facie evidence of its execution and of the facts stated in it [*Overton v. Harband* (1935) 6 CA2d 455 44 P2d 484] .

Possession is prima facie proof of delivery of deed [*Rich v. Ervin* (1948) 86 CA2d 386 194 P2d 809] .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceInferences & PresumptionsGeneral OverviewReal Property LawDeedsGeneral Overview



127 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.02

24.02 Admissible Evidence to Prove Contents of Lost or Destroyed Official Records--Evid Code § 1601

[1] Evid Code § 1601 Text

■ *Evid Code § 1601.*

(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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP* § 1855(a) [Cal Law Rev Com Comment].

[3] Case Notes

The fundamental purpose of *Evid Code* § 1601 is to make available as secondary evidence of a record, when the latter has been destroyed, abstracts of record made in such circumstances as to be reasonably reliable. Such secondary evidence, when introduced in a proper case, proves primary record, and record thus proved is as effective as record would be if it were itself used in evidence [Mercantile Trust Co. v. All Persons, etc. (1920) 183 C 369 191 P 691 (abstract of title made 15 years before trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPriorities & RecordingGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstracts



128 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.03

24.03 Repealed--Evid Code § 1602

Enacted 1965. Repealed 1967 ch. 650.



129 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.04

24.04 Deed Executed by Proper Officer Pursuant to Legal Process--Evid Code § 1603

[1] Evid Code § 1603 Text

■ *Evid Code § 1603.*

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.

LegH: 1965 ch. 299, 1967 ch. 650.

[2] Commission Comments

The classification of the presumption in this section as a presumption affecting the burden of proof is consistent with the classification of the similar and overlapping provisions contained in *Evid Code § 664* (official duty regularly performed) and *Evid Code § 1600* (official record of document affecting property). Like the presumption in *Evid Code § 1600*, the presumption in this section serves the purpose of supporting the record chain of title. This section restates and supersedes former CCP § 1928 [Cal Law Rev Com Comment].

[3] Case Notes

Recorded deed under foreclosure proceedings plus possession are prima facie proof of ownership in quiet title action without establishing chain of title precedent to decree of foreclosure [*Krug v. Warden* (1922) 57 CA 563 207 P 696] .

Commissioner's deed issued after foreclosure is within *Evid Code § 1603* [*San Diego Improvement Co. v. Brodie* (1932) 215 C 97 8 P2d 1027] .

Commissioner's certificate of sale and deed was prima facie evidence of title without introduction of underlying judgment and execution [*Wagnor v. Blume* (1945) 71 CA2d 94 161 P2d 1001] .

Deed of conveyance of real property executed by marshal of municipal court pursuant to sale of execution, and recorded, is prima facie evidence that property was thereby conveyed to grantee named therein [*Oakes v. Fernandez* (1951) 108 CA2d 168 238 P2d 641] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Hearings Evidence General Overview Evidence Inferences & Presumptions Presumptions Real Property Law Deeds General Overview



130 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.05

24.05 Certificate of Purchase or Location of Lands--Evid Code § 1604

[1] Evid Code § 1604 Text

■ *Evid Code § 1604.*

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.

LegH: 1965 ch. 299.

[2] Commission Comments

This section restates and supersedes former *CCP* § 1925.

[3] Case Notes

Certificate of purchase or location of lands sold by United States, issued by receiver of land office, was prima facie evidence of ownership [*Saecker v. Cohn* (1919) 180 C 151] .

Although certificate of purchase and of location of public lands is primary evidence that holder or assignee of such certificate is owner of land described in it, this evidence may be overcome by proof that at time of location or time of filing preemption claim on which certificates may have been issued, land was in adverse possession of adverse party or those under whom he claims [*Elliott v. Robbins* (1917) 33 CA 577 165 P 1042] .

Evid Code § 1604 makes certificate primary evidence that holder is owner of land described therein [*Laugenour v. Hennagin* (1881) 59 C 625] .

Word "certify" need not be contained in certificate within this section [*Witcher v. Conklin* (1890) 84 C 499] .

Certificate of sale of mineral land comes under this section [*McTarnahan v. Pike (1891) 91 C 540, 27 P 784*] .

Certificate of location of state school lands entitles holder to recover an ejectment against one not showing better title [*Stanway v. Rubio (1875) 51 C 41*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities LawAdministrative ProceedingsGeneral OverviewReal Property LawMiningLocationReal Property
LawPurchase & SaleGeneral Overview



131 of 131 DOCUMENTS

California Courtroom Evidence

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PART I. California Evidence Code

K. Writings (Evid Code §§ 1400-1605)

Chapter 24 Record of Document Evidence Code §§ 1600-1605

1-24 California Courtroom Evidence 24.06

24.06 Copies of Spanish Title Papers--Evid Code § 1605

[1] Evid Code § 1605 Text

■ *Evid Code § 1605.*

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.

LegH: 1965 ch. 299, 1967 ch. 650.

[2] Commission Comments

This section provides that recorded copies of the original Spanish title papers relating to land claims in this state are admissible as prima facie evidence without proving execution of the originals [Cal Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral Overview



1 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.syn

§ 25.syn Synopsis to Chapter 25: Depositions and Interrogatories CCP §§ 2025.010, 2030.010

25.01 Use of Deposition--CCP § 2025.620 (intro clause)

[1] CCP § 2025.620 (intro clause) Text

[2] Commission Comments

[3] Comment

[4] Case Notes

25.02 Use for Impeachment--CCP § 2025.620(a)

[1] CCP § 2025.620(a) Text

[2] Commission Comments

[3] Comment

25.03 Use for Adverse Parties' Deposition--CCP § 2025.620(b)

[1] CCP § 2025.620(b) Text

[2] Commission Comments

[3] Case Notes

25.04 Objections--CCP § 2025.460(c)

[1] CCP § 2025.460(c) Text

[2] Commission Comments

[3] Comment

25.05 Distant Residence; Privilege; Exceptional Circumstances--CCP § 2025.620(c)

[1] CCP § 2025.620(c) Text

[2] Commission Comments

[3] Case Notes

25.06 Video Recording--CCP § 2025.620(d)

[1] CCP § 2025.620(d) Text

[2] Commission Comments

25.07 Counter-Offer Where Only Part Introduced--CCP § 2025.620(e)

[1] CCP § 2025.620(e) Text

[2] Commission Comments

[3] Case Notes

25.08 Effect of Substitution--CCP § 2025.620(f)

[1] CCP § 2025.620(f) Text

[2] Commission Comments

25.09 Subsequent Action Involving Same Subject Matter; Same Parties--CCP § 2025.620(g)

[1] CCP § 2025.620(g) Text

[2] Commission Comments

25.10 Use of Answer or Part of Answer at Trial or Hearing--CCP § 2030.410

[1] CCP § 2030.410 Text

[2] Commission Comments

[3] Comment

25.11 Introduction of Products of Discovery Into Evidence

[1] Introducing Deposition

[2] Special Uses of Depositions

[3] Use of Depositions From Other Actions

[4] Appeal

[5] Procedure to Use Interrogatories



2 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence Scope

Scope

Scope

This chapter covers the introduction of deposition and interrogatory testimony under *CCP* §§ 2025.010 *et seq.* and 2030.010 *et seq.* The CCP discovery statutes were renumbered, without substantive change, effective July 1, 2005 [see Col Stat 2004 ch. 182].



Cross References:

General coverage of discovery issues, see Matthew Bender(R) Practice Guide: California Civil Discovery.

Discussion of depositions in the evidence context, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.



3 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.01

25.01 Use of Deposition--CCP § 2025.620 (intro clause)

[1] CCP § 2025.620 (intro clause) Text

■ *CCP § 2025.620.*

At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under Section 2025.410, so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions:

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].

[3] Comment

Two key limitations in *CCP § 2025.620* are:

- (1) Use of a deposition "so far as admissible under the rules of evidence"; and
- (2) A deposition may be used against "any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection."

[4] Case Notes

In a premises liability action, the trial court erred in sustaining general objections to the introduction of excerpts of plaintiff's expert's deposition, where defendants had themselves authenticated the deposition by presenting excerpts of it themselves [*Ambriz v. Kelegian* (2007) 146 CA4th 1519, 1527, 53 CR3d 700] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsDepositionsTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview



4 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.02

25.02 Use for Impeachment--CCP § 2025.620(a)

[1] CCP § 2025.620(a) Text

■ *CCP § 2025.620(a).*

Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code.

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].

[3] Comment

Foundation for impeachment by deposition can be a problem to a new practitioner [*see Evid Code §§ 768-770, 780, 1235*]. As with any impeachment, testimony to be impeached must first be drawn from the witness. In so doing, it may be helpful to use the precise questions employed at the deposition, although this is not necessary, and reading from the deposition can warn a witness and allow him the opportunity to blur his or her answer and thus weaken the impeachment.

Once testimony to be impeached is established, ask opposing counsel for either the filing of the deposition of the party or witness, or a stipulation for waiver of the foundation. Whenever possible, this should either be done in private or handled as the perfunctory matter it is.

Thereafter, leave of court should be asked to use the deposition. Once obtained, counsel should identify the deposition, the date, place, and parties present, the fact the deposition was taken under oath, and fully and carefully lay a record for use while informing the jury of the background.

Counsel may request that the court explain the deposition and its effect to the jury [see CACI No. 208]; however, this is not usually done when a deposition is used for impeachment only. If foundation for use is not waived by opposing counsel, the original deposition should be given to the witness. The witness should then be asked to read silently the impeaching passage. Having done so, and this allows opposing counsel to scan the area and pose any appropriate objections, the witness is then asked if those questions were asked and answers given. About now opposing counsel usually stipulates to foundation. If not, the affirmative answer to the last question establishes it for you. In the rare off-chance of neither a waiver nor an affirmative answer, request a recess to call the court reporter.

Jury Instructions:

Deposition as Substantive Evidence, see *Judicial Council of California Civil Jury Instructions, CACI No. 208* (LexisNexis Matthew Bender).

In the usual situation, foundation is waived even before the deposition is shown to the witness.

Counsel should clearly identify the pages and lines to be read, giving a precise starting and stopping point, so opposing counsel, and the court if it so desires, may review the testimony for objectionable matter. Given counsel time to do so, then ask if you may proceed. Technically, this inquiry should be directed to the court, although the need for this will depend on the formality of the particular trial.

Objection that the matter is not impeaching is frequently raised. This can be for effect on the jury, and the court, in its discretion, usually overrules an objection of this nature, leaving it to the jury to determine whether the part read is in fact impeaching. Certainly, when the deponent is a party and the deposition can be used under *CCP § 2025.620(b)* for any purpose, this result seems logical.

Strategic Point:



The actual reading may then proceed and should be precise and untheatrical. The bailiff, or other available person, should be asked to read the witness portion of the transcript in any lengthy reading from a deposition. Opposing counsel, if your impeachment is solid, may look for a way to take the attention off the client. Do not give counsel the opportunity to accuse you of improper emphasis or distortion. Read it straight: you can play with it in argument if you want to, not when offering it.

After the initial use, all subsequent use with that witness will merely involve advising the court you "wish to read from the deposition" giving the precise pages and lines or having the witness read it to himself if the foundation is not waived. Always give counsel an opportunity to read the content before proceeding.

Strategic Point:



It is, in all cases, a tactical decision how far to go with a deposition on impeachment. You may ask the witness if the deposition has refreshed his recollection, and this is preferred when you feel you can lead a witness back to more favorable testimony. When this is not the case, counsel must decide whether to drop it there to argue later, or, to try to force the witness into a choice of testimony or a refutation of one or the other. This can be difficult with a good witness who will then be given the chance to try to explain

his apparent inconsistency. How far to proceed then is an individual tactical decision.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Requests for Instructions Evidence Procedural Considerations Rule Application & Interpretation Evidence Testimony Refreshing Recollection General Overview



5 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.03

25.03 Use for Adverse Parties' Deposition--CCP § 2025.620(b)

[1] CCP § 2025.620(b) Text

■ *CCP § 2025.620(b).*

An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].

[3] Case Notes

There is no limitation on the extent to which a party may use the deposition of an adverse party. It may be used for any purpose (e.g., as substantive evidence to establish a material fact, to prove a prima facie case or the entire case, or to contradict or impeach the credibility of a witness). In addition, no unavailability or diligence foundation need be laid by the party intending to use the deposition of an adverse party [*Mayhood v. LaRosa* (1962) 58 C2d 498, 24 CR 837, 374 P2d 805] .

Use of party's deposition on cross-examination is proper [*Mueller v. Chandler* (1963) 217 CA2d 521, 31 CR 646] .

Adverse party deposition may be used for *any purpose*, not merely impeachment, even though adverse party is at trial, and only a portion of deposition may be read in evidence at option of offering counsel, and it was proper to refuse plaintiff's request to introduce the whole deposition of plaintiff when plaintiff's counsel had previously been allowed to read any portion he wanted to at trial, subject to proper evidentiary objections [*Mayhood v. LaRosa* (1962) 58 C2d 498, 24 CR 837, 374 P2d 805 ; *Alvarez v. Felker Mfg. Co.* (1964) 230 CA2d 987, 41 CR 514 ; *Murry v. Manley* (1959) 170 CA2d 364, 338 P2d 976 ; *Ray v. Henderson* (1963) 212 CA2d 192, 27 CR 847 ; *Robinson v. North American Life & Cas. Co.* (1963) 215 CA2d 111, 30 CR 57 .

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceTestimonyCredibilityImpeachmentGeneral Overview



6 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.04

25.04 Objections--CCP § 2025.460(c)

[1] CCP § 2025.460(c) Text

■ *CCP § 2025.460(c).*

Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition.

LegH: 2004 ch. 182.

[2] Commission Comments

Subdivision (a) of Section 2025.460 continues former Section 2025(m)(1) without change, except to conform the cross-reference. Subdivision (b) continues former Section 2025(m)(2) without change, except to conform the cross-reference. Subdivision (c) continues former Section 2025(m)(3) without change. Subdivision (d) continues former Section 2025(m)(4) without change, except to conform the cross-reference [2004 Law Rev Com Comment].

[3] Comment

Unless the objection relates to matters that are privileged or protected as attorney work product, all objections to receiving in evidence any part of the deposition at trial are not waived by the failure to make them before or during the depositions. Therefore, for matters of privilege or attorney work product, any evidence requiring exclusion of the witnesses who were then present and testifying, applies with equal force to deposition testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryPrivileged MattersWork ProductWaiversEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



7 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.05

25.05 Distant Residence; Privilege; Exceptional Circumstances--CCP § 2025.620(c)

[1] CCP § 2025.620(c) Text

■ *CCP § 2025.620(c).*

Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following:

- (1) The deponent resides more than 150 miles from the place of the trial or other hearing.**
- (2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is any of the following:**
 - (A) Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant.**
 - (B) Disqualified from testifying.**
 - (C) Dead or unable to attend or testify because of existing physical or mental illness or infirmity.**
 - (D) Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process.**
 - (E) Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.**
- (3) Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.**

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP* § 2025.620 continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].

[3] Case Notes

Counsel for the party introducing the deposition of an "unavailable" witness under *Evid Code* § 240 must lay a foundation meeting the requirements of *CCP* § 2025.620(c) [*Topanga Corp. v. Gentile* (1967) 249 CA2d 681, 58 CR 713 (foundation was adequate)].



8 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.06

25.06 Video Recording--CCP § 2025.620(d)

[1] CCP § 2025.620(d) Text

■ *CCP § 2025.620(d).*

Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsDepositions



9 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.07

25.07 Counter-Offer Where Only Part Introduced--CCP § 2025.620(e)

[1] CCP § 2025.620(e) Text

■ *CCP § 2025.620(e).*

Subject to the requirements of this chapter, a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced.

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].

[3] Case Notes

Even though defendant used only part of plaintiff's deposition, it was proper to deny plaintiff the right to introduce in evidence the entire deposition when plaintiff's counsel was allowed to read any part, subject to proper objections of defendant [*Robinson v. North American Life & Cas. Co. (1963) 215 CA2d 111 30 CR 57*] .



10 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.08

25.08 Effect of Substitution--CCP § 2025.620(f)

[1] CCP § 2025.620(f) Text

■ *CCP § 2025.620(f).*

Substitution of parties does not affect the right to use depositions previously taken.

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].



11 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.09

25.09 Subsequent Action Involving Same Subject Matter; Same Parties--CCP § 2025.620(g)

[1] CCP § 2025.620(g) Text

■ *CCP § 2025.620(g).*

When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action. A deposition previously taken may also be used as permitted by the Evidence Code.

LegH: 2004 ch. 182.

[2] Commission Comments

The introductory clause of *CCP § 2025.620* continues the introductory clause of former Section 2025(u) without change, except to conform the cross-reference. Subdivision (a) continues former Section 2025(u)(1) without change. Subdivision (b) continues former Section 2025(u)(2) without change, except to replace "paragraph" with "subdivision" and to conform the cross-reference. Subdivision (c) continues former Section 2025(u)(3) without substantive change. Subdivision (d) continues former Section 2025(u)(4) without change, except to conform the cross-references. Subdivision (e) continues former Section 2025(u)(5) without change, except to replace "section" with "chapter." Subdivision (f) continues former Section 2025(u)(6) without change. Subdivision (g) continues former Section 2025(u)(7) without change [2004 Law Rev Com Comment].



12 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.10

25.10 Use of Answer or Part of Answer at Trial or Hearing--CCP § 2030.410

[1] CCP § 2030.410 Text

■ *CCP § 2030.410.*

At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. It is not ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing.

LegH: 2004 ch. 182.

[2] Commission Comments

Section 2030.410 continues former Section 2030(n) without change [2004 Law Rev Com Comment].

[3] Comment

As with discovery, there are two methods of written questioning:

- A deposition by written questions usable for all purposes as an oral deposition and taken under *CCP § 2028.010 et seq.*; and
- Written interrogatories of the adverse party taken under *CCP § 2030.010 et seq.*

The former, technically a deposition, is subject to deposition rules; the latter will be discussed here. The use of written interrogatories at trial is much more limited than the use of depositions. Because counsel is able to assist in the preparation of the answers, all manner of exceptions to normal evidentiary rules is allowed on discovery. Also, the answers may be used against the responding party only.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureDiscoveryMethodsOral DepositionsCivil
ProcedureDiscoveryMethodsWritten Depositions



13 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 25 Depositions and Interrogatories CCP §§ 2025.010, 2030.010

1-25 California Courtroom Evidence 25.11

25.11 Introduction of Products of Discovery Into Evidence

[1] Introducing Deposition

The deposition should be marked for identification so that if it is not permitted to be read in evidence, it will be part of the record on appeal [*Wulferdinger v. Pickwick Stages System* (1930) 105 CA 509, 288 P 93] .

To have deposition admitted in evidence, it must first be offered [*Ponce v. Black* (1964) 224 CA2d 159, 36 CR 419 ; *Corbett v. Otts* (1962) 205 CA2d 78, 22 CR 849 (failure to offer deposition)].

The court should inspect the deposition and hear objections out of the jury's presence [*Estate of Martin* (1915) 170 C 657, 151 P 138] .

A deposition should be read at the trial so as to give the adverse party the opportunity to object to the items in the deposition that would be excludable [*Robinson v. North American Life & Cas. Co.* (1963) 215 CA2d 111 30 CR 57 (not error for trial court to refuse admission of entire deposition without reading)]. However, at trial, when a deposition is offered in evidence, objections to the admissibility of testimony are controlled by the rules of evidence and are properly made *before* the reading of the deposition; either party may have excluded from the deposition those portions that would be inadmissible if the witness were present and examined in person [*Kritser v. Kuttruff* (1961) 197 CA2d 102, 16 CR 872 (no error)].

Objections should be specific [*Estate of Doyle* (1932) 126 CA 446, 14 P2d 909] . More specifically, objections on the basis of vagueness to deposition are waived unless made at deposition [*Aetna Casualty and Surety Co. v. Aceves* (1991) 233 CA3d 544, 284 CR 477] .

The question of the *validity* of a deposition is a matter for the discretion of the trial court. To reverse the decision of the trial court on appeal, an abuse of discretion by the trial judge must be shown [*Sanchez v. Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 76 CR 372 (trial court did not abuse discretion in refusing to admit deposition of witness who failed to appear at trial); *Topanga Corp. v. Gentile* (1967) 249 CA2d 681, 58 CR 713 (no abuse of discretion in admitting deposition as ample foundation was laid); *Jordan v. Warnke* (1962) 205 CA2d 621, 23 CR 300] (no abuse of discretion in admitting deposition)].

The trial court has the discretion to exclude or include parts of a deposition, when failure to do so would not be in the

interests of justice [*Conderback, Inc. v. Standard Oil Co.* (1966) 239 CA2d 664, 48 CR 901 (court required all of particular answer to be read to avoid distortion); *Roberts v. Permanente Corp.* (1961) 188 CA2d 526, 10 CR 519 (exclusion because of remoteness)].

The court should rule on the admissibility of an offered deposition *before* the close of trial [*Estate of Horman* (1968) 265 CA2d 796, 71 CR 780 (interrogatories); *Riggs v. Riggs* (1963) 223 CA2d 594, 35 CR 793 (deposition); *Margolis v. Teplin* (1958) 163 CA2d 526, 329 P2d 535 (deposition)].

It is proper to exclude entire deposition not offered until case is closed where deposition used for impeachment and admission at that stage would require reopening of case [*Stafford-Lewis v. Wain* (1954) 128 CA2d 614, 276 P2d 157 (after argument); *Gillett v. Gillett* (1959) 168 CA2d 102, 335 P2d 736] (after evidence closed)].

Even though opposing counsel choose not to attend deposition, it is not an abuse of discretion to admit deposition in evidence when it was taken on notice and when the court was satisfied with the signature and other technical aspects of the document [*Lathrop v. Kellogg* (1958) 158 CA2d 220, 322 P2d 572] .

Unsigned, unread depositions were admitted where a proper stipulation for use at trial, without signature, was entered into at the depositions [*Dodd v. Cantwell* (1960) 179 CA2d 727, 4 CR 113] .



Cross Reference:

General coverage of depositions, see Matthew Bender(R) Practice Guide: California Civil Discovery, Chs. 6-8.

[2] Special Uses of Depositions

Unlike documentary exhibits, depositions may not be taken into the jury room [CCP § 612; Pen Code § 1137].

Depositions may be used in support of or in opposition to a motion (e.g., for summary judgment under CCP § 437(c) [*Cosper v. Smith & Wesson Arms Co.* (1959) 53 C2d 77, 346 P2d 409 (foreign corporation); *Estate of Kerner* (1969) 275 CA2d 785, 80 CR 289 (deposition may be treated as affidavit); *Howe v. Pioneer Mfg. Co.* (1968) 262 CA2d 330, 68 CR 617 (deposition, or parts of it, must be connected in some way with the motion by offering it into evidence; filing alone is not enough); *Vallejo v. Montebello Sewer Co., Inc.* (1962) 209 CA2d 721, 26 CR 447 (interrogatories); *Thomson v. Honer* (1960) 179 CA2d 197, 3 CR 791 (deposition, though not affidavit, was before court and properly considered)].

This is not inconsistent with CCP § 437(c), which requires motions for summary judgment to be supported by affidavits. A deposition has all of the significant attributes of affidavits and more. Not only is it a statement in question and answer form, taken under oath, but it also affords the privilege of cross-examination to the opposing party, thus giving it added reliability [*Nizuk v. Gorges* (1960) 180 CA2d 699, 4 CR 565] .

Exhibits attached to a deposition, such as a diagram, are admitted in evidence on proper foundation contained in deposition or if the witness is present at trial [*Augenthaler v. Pinkert* (1934) 138 CA 455, 32 P2d 686] .

[3] Use of Depositions From Other Actions

Depositions taken in another action constitute "former testimony" for purposes of Evid Code § 1290, and their admissibility, as exceptions to the hearsay rule, in another action is determined by Evid Code § 1291, when offered against party to former proceeding, and Evid Code § 1292, when offered against person not a party to former proceeding.

[4] Appeal

Parts of a deposition not offered in evidence at trial may not be considered on appeal [*Ponce v. Black* (1964) 224 CA2d 159, 36 CR 419 ; *Murry v. Manley* (1959) 170 CA2d 364, 338 P2d 976 (no prejudice); *Vivion v. National Cash Register Co.* (1962) 200 CA2d 597, 19 CR 602] .

[5] Procedure to Use Interrogatories

To use a deposition at trial, first identify the questions and answers you want to read, allow counsel and the court to examine and take up any objections, and then ask to read them aloud to the jury. In a court trial, merely ask the court to read them, being precise for your record.

The principal objective of *CCP § 2030.010 et seq.* is to provide a discovery procedure directed to an adverse party and, incidentally, to authorize the use of his answers in lieu of testimony obtained by deposition [*Associates Discount Corp. v. Tobb Co.* (1966) 241 CA2d 541, 50 CR 738 (witness died before instant proceeding)].



Strategic Point:

Interrogatories are a more effective tool when dealing with records, identity, and contentions that a witness might not recall without assistance. For this reason, in practical use at trial, the interrogatory is seldom used for more than technical proof, although this limitation may be more failure of counsel to effectively provide questions of evidentiary value than a limitation on the process itself.

Interrogatories submitted by one party to an adverse party and the answers to the interrogatories cannot be used against a third party because the third party has not had the opportunity to interrogate the witness [*Petersen v. Vallejo* (1968) 259 CA2d 757, 66 CR 776 ; *Associates Discount Corp. v. Tobb Co.* (1966) 241 CA2d 541, 50 CR 738 (witness died before instant proceeding)].

Interrogatory under *CCP § 2030.010 et seq.* may not be used in lieu of deposition as against third party to an action [*Associates Discount Corp. v. Tobb Co.* (1966) 241 CA2d 541, 50 CR 738] .

Answers to interrogatories are nothing more than the affidavits of interested persons. By their very nature such statements contain self-serving facts. A party answering written interrogatories submitted by an adversary cannot secure the admission in evidence of his or her own answers to such interrogatories, largely because there is no opportunity for cross-examination by the opposing party. Also, to countenance the practice would greatly inhibit the use of discovery procedures, thereby thwarting the purpose of the legislature [*Estate of Horman* (1968) 265 CA2d 796, 71 CR 780 (proponents unable to attend hearing)].

The court has discretion to allow or deny a party's motion to amend an interrogatory answer [*Universal Underwriters Ins. Co. v. Superior Court* (1967) 250 CA2d 722, 58 CR 870] .

Interrogatory can ascertain contentions of adverse party on which that party bases denial of liability [*Burke v. Superior Court* (1969) 71 C2d 276, 78 CR 481, 455 P2d 409 ; *Pantzas v. Superior Court* (1969) 272 CA2d 499, 77 CR 354 ; *Sheets v. Superior Court* (1967) 257 CA2d 1, 64 CR 753 ; *Universal Underwriters Ins. Co. v. Superior Court* (1967) 250 CA2d 722, 58 CR 870] .

Motion to compel further answers to interrogatories was deemed not substantially complied with when initial response consisted of several objections and subsequent responses consisted of unverified answers [*Laguna Auto Body v.*

Farmers Ins. Exchange (1991) 231 CA3d 481, 282 CR 530] .

**Cross Reference:**

General coverage of interrogatories, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 9, Interrogatories.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureSummary JudgmentOppositionGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



14 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.syn

§ 26.syn Synopsis to Chapter 26: Documentary Evidence

26.01 Overview

26.02 Contemplating Admissibility of Documentary Evidence

26.03 Use of Documents

26.04 Checklist for Introducing Documentary Evidence

26.05 Introducing Business Records (Including Hospital and Medical Records)

26.06 Introducing Hospital Records by Mail

[1] Securing Admission of Hospital Records by Mail

[2] Establishing a Proper Foundation

[3] Objecting to Admission of Hospital Records by Mail

[4] Using Expert Opinions Based on Hospital Records by Mail

26.07 Introduction of Impeaching Writing

26.08 Past Recollection Recorded



15 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence Scope

Scope

Scope

This chapter serves as a guide for introducing documentary evidence. It includes a checklist for introducing documentary evidence [*see* 26.04] and discusses specific requirements and issues concerning business and hospital records [*see* 26.06, 26.07]. Finally, the chapter discusses how to use documentary evidence to impeach a witness and as past recollection recorded [*see* 26.07, 26.08].

➡ Cross Reference:

Discussion of documentary evidence issues in the context of laying a foundation, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 7, *Secondary Evidence Rule* (Matthew Bender).



16 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.01

26.01 Overview

Documents are writings, "a material substance containing the thoughts of a person," including a map or diagram. There is a standard procedure for introducing these documents, but the details of the foundation differ and should be checked in each case until counsel is thoroughly familiar with the subject.

Fundamentally, the problems in documentary evidence fall into two categories:

- The admissibility of the proffered document; and
- The use of the document.



17 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.02

26.02 Contemplating Admissibility of Documentary Evidence

Four basic evidence questions must be considered when contemplating the admissibility of documentary evidence such as a writing:

- Is it a writing? "Writing" is broadly defined by *Evid Code* § 250.
- How can the writing be authenticated? "Authentication" requires a foundational showing under *Evid Code* § 403 or 405 on the basis of the rules set forth in *Evid Code* § 1400 et seq.
- If an original is not used, is the copy the "best evidence"? Secondary evidence requires a Section 405 foundational showing in accordance with the rules set forth in *Evid Code* § 1500 et seq.
- If presented for the truth of the matter asserted therein, is it hearsay? If so, does it fit within an exception? The hearsay rules start with *Evid Code* § 1200 et seq. The identity of the hearsay declarant requires a Section 405 showing to establish a hearsay exception.



Cross Reference:

Discussion of secondary evidence, see Ch. 23, Secondary Evidence.

Discussion of authentication, see California Trial Guide, Unit 30, Authentication (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceGeneral
OverviewEvidenceHearsayExceptionsGeneral Overview



18 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.03

26.03 Use of Documents

Documents are probative of any relevant fact, subject to the discretion of the court under *Evid Code* § 352. Absence of a record of an asserted act from a business or hospital record is proof of nonoccurrence of the act under *Evid Code* § 1272.

Under *Evid Code* § 352, the court may block an attempted use of a hearsay opinion from medical records despite the provisions of *Evid Code* § 804. When allowed, the person whose opinion is relied on may of course be called as a witness and examined as if under cross-examination by the adverse party [*Evid Code* § 804].

Documents can also be used as a prior inconsistent statement.

Strategic Point:



If used for impeachment as a prior inconsistent statement, documents need not now be shown to the witness before examination thereon [*Evid Code* § 769]. What is required, however, is that the witness be given the opportunity to explain the statement. Never excuse a witness against whom you intend to use an inconsistent statement; allow them to leave the stand "subject to recall by any party." They must be given the chance to explain. You do not have to ask the witness to explain the inconsistent statement. The witness must merely be on the stand or subject to call so such an explanation is possible.



Cross Reference:

Further discussion of inconsistent statements, see Ch. 16, Competency, Oath, Confrontation, Experts, Interpreters, Examination, Credibility, and Hypnosis, 16.35.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceHearsayExceptionsBusiness RecordsAbsence of RecordsEvidenceHearsayExemptionsPrior Statements by WitnessesInconsistent StatementsEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent Statements



19 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.04

26.04 Checklist for Introducing Documentary Evidence

The following procedural checklist should be viewed and used as a guide in the admission and utilization of documentary evidence.

- Have a witness take the stand.
- Ask the clerk or court reporter to mark the document for identification. Plaintiff's exhibits are usually by number, defendant's by alphabetical letter. Be sure to use the exhibit number in question whenever thereafter referring to it. Reference to "this document" is inadequate for the record on appeal. Practice and customs vary concerning the marking of trial exhibits; be sure to check local procedure.
- Offer the document to opposing counsel for inspection. Tactics, surprise, and other considerations of a trial attorney will dictate whether to show exhibits to opposing counsel at recess or wait for the presence of the jury.
- Lay the foundation by the testimony of the witness (where not waived by counsel) as to:
 - Authentication [see Ch. 22, Authentication].
 - Best evidence [see Ch. 23, Secondary Evidence].
 - Hearsay exception [see Ch. 21, Hearsay Rule and Exceptions].

Consider:

Foundation is the heart of the matter. If counsel is not familiar with the code on the subject, he or she should refresh his or her memory before laying the foundation.



Cross References:

Detailed coverage of foundations, see Imwinkelried et al., California Evidentiary Foundations (Matthew Bender).

- Offer the document to the judge for inspection.

**Strategic Point:**

The placement of this step varies with the judge. Logically, it should fall here. However, there are courtrooms where every piece of documentary evidence must be inspected by the court before any evidence is taken thereon. Also, if opposing counsel poses an objection even before the attempted foundation (i.e., prejudicial content), then naturally the court must view it at that point. If in doubt, simply inquire of the court before proceeding with the foundation.

- Offer the document into evidence. A chart of exhibits marked and introduced will be necessary in a lengthy trial. Any objection by opposing counsel occurs at this time.

**Strategic Point:**

An exhibit is not received in evidence automatically; *counsel must offer it into evidence affirmatively*. Therefore, keep accurate status records of trial exhibits. Indicate in the records the marking of the exhibit, a description of it, and whether it has been introduced and admitted into evidence. In some courts, the clerk will provide counsel with the status of trial exhibits, indicating whether exhibits have been received in evidence. However, do not rely on such service; keep your own records. Always request to review the clerk's record of exhibits before you rest your case.

- Repel objections. Opposing counsel may at this point ask to take the witness on voir dire on the foundation.

Consider:

Try to restrict closely the extent of this tactic. It is often used to try to discredit the evidence even before introduction and not to challenge the foundation which is the function of voir dire. Do not let counsel move into cross-examination at this stage; counsel is entitled to that later.

If an objection is sustained, determine the grounds, and if correctable, do not hesitate to try to do so. On the other hand, the sight of counsel flaying a dead horse can only bring joy to the opposing counsel. Persistence, not stubbornness, is the hallmark of a fine trial attorney. Extricate yourself as best you can and move on to something productive.

- After admission, the document is, at this time or later, to be read to or given to the jury, as counsel sees fit [see Ch. 28, Demonstrative and Experimental Evidence, 28.01[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jurors Selection Voir Dire Criminal Law & Procedure Appeals Reviewability Preservation for Review Records Evidence Documentary Evidence Writings General Overview



20 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.05

26.05 Introducing Business Records (Including Hospital and Medical Records)

A writing made as a record of an act, condition, or event is admissible as an exception to the hearsay rule. Counsel should follow the procedural checklist outline in 26.03 and must also lay the following specific foundation:

- Call the custodian/qualified witness of the document to authenticate and testify to the record's mode of preparation.
- Establish the writing was made in the regular course of business.
- Establish the writing was made at or near the time of the act.
- Establish the sources of information and method and time of preparation indicate its trustworthiness.



Cross Reference:

For text of *Evid Code* § 1271, see Ch. 21, Hearsay Rule and Exceptions, 21.38.



21 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.06

26.06 Introducing Hospital Records by Mail**[1] Securing Admission of Hospital Records by Mail**

Hospital records, as with other business records, may be produced in response to a subpoena duces tecum by mailing a copy of the records [*Evid Code § 1560*] with an affidavit that complies with *Evid Code § 1561*. The affidavit must state that the affiant is the custodian of the records, the copies are true copies of all the subpoenaed records, and the records were prepared in the ordinary course of business at or near the time of the act, condition, or event [*Evid Code § 1561*]. The affidavit is admissible as evidence of these matters. Also, if the original of the records would be admissible in evidence if the custodian had been present and testified to the matters stated in the affidavit, the copy of the records is admissible, but only if the requirements of *Evid Code § 1271* (business records exception to hearsay rule) have been met [*Evid Code § 1562*].

[2] Establishing a Proper Foundation

The custodian's affidavit does not, in the face of an objection, suffice for a foundation for the business records exception. While *Evid Code § 1271* is an exception to the hearsay rule, *Evid Code § 1561* is not an exception to the hearsay rule. The custodian's affidavit may state all the matters it is required to state under *Evid Code § 1561*, yet fail to provide a sufficient foundation for admission of the records under *Evid Code § 1271*. The declaration is not required to state the "identity" or "mode of preparation" of the records. As a result, it will usually fail to show that "the sources of information and method and time of preparation" of the records indicate their trustworthiness. Hence, in the face of a hearsay objection, the copy of records produced pursuant to *Evid Code §§ 1560-1562* is inadmissible hearsay [*Taggart v. Super Seer Corp. (1995) 33 CA4th 1697, 40 CR2d 56* (although declaration conformed to *Evid Code § 1561*, records failed to qualify under *Evid Code § 1271* because declaration contained no evidence as to what reports were, how prepared, or sources of information based on)]).

**Strategic Point:**

Although in ordinary practice the foundation for the business records exception will be satisfied by stipulation for admission of the records or by the custodian's affidavit, if the matter has not been resolved with opposing counsel beforehand, counsel should have the custodian of the records under subpoena to provide testimony for the proper foundation.

[3] Objecting to Admission of Hospital Records by Mail

Whether medical or hospital records are produced in person or by mail, they are subject to all other objections even though the foundation under *Evid Code § 1271* is properly provided. The exception to the hearsay rule provided by Section 1271 is restricted, however, to proof of an "act, condition or event." Whether an entry relates to an "act, condition or event" or is an objectionable opinion is the key to the admissibility of these records and is largely a question for the court. Also, *Evid Code § 352* may be used to attempt to block prejudicial evidence in this area. Filing of a personal injury lawsuit constitutes a waiver of the doctor-patient privilege [*Evid Code § 990 et seq.*].

Cross Reference:

Further discussion of this objection, see Ch. 18, Privileges.

[4] Using Expert Opinions Based on Hospital Records by Mail

Opinions call for a proper expert foundation of the person giving the opinion [*see Evid Code § 801*]. Doctors' records, despite a Section 1271 foundation, are blocked in this manner. Most courts, even if medical records are admitted, use *CCP § 612* and only allow reading from a record, not physical production of the records in the jury room. When the medical expert is present in the courtroom, the foundation may be laid for this opinion. But the records may still be denied admissibility under *Evid Code § 352* or *CCP § 612*. Of course, their admission is not critical in this case.

Cross Reference:

For detailed coverage of foundations, see Imwinkelried et al., *California Evidentiary Foundations* (Matthew Bender).

On the affirmative side, an expert may use hearsay information as a basis for an opinion. In this manner the opinion of another may be introduced. Defensively, the "opinion" in medical records can be used on cross-examination of the adverse medical expert. Doctors' records involving opinion are frequently inadmissible, but they are still widely used by both parties during the trial. Hospital records, subject to the same restrictions on opinion content may be blocked in part as well, although their "act, condition or event" content would not be affected. The line, however, is a hard one to draw.

Cross Reference:

Discussion of opinion evidence, see Ch. 17, Opinion Evidence, 17.05; Ch. 29, Expert Testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDocumentary EvidenceWritingsGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral Overview



22 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.07

26.07 Introduction of Impeaching Writing

Introducing an impeaching writing can be accomplished in some cases through the witness to be impeached. If successful, it is the most dramatic method. When the signature or the statement is that of the witness, this should, in most cases, be attempted. When that is not the case, however, withhold the impeaching document from evidence (asking questions generally of the witness if you deem it advisable as noted above), until your case, or until the foundation witness, is available.

Then authenticate the writing [*Evid Code §§ 403, 405*] and if dealing with a business or medical record, make a proper showing [*Evid Code § 1271*]. After admission, read the inconsistent statement in evidence.

Strategic Point:



Never intentionally refer to a question from a prior statement unless you are reasonably certain you can subsequently obtain its introduction. To do so is not only questionable ethically, but can be turned against you by adroit counsel. Obviously, a good faith effort that does not succeed is not subject to this same criticism.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsEnforcementProof of SignatureEvidenceRelevanceCharacter Evidence



23 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 26 Documentary Evidence

1-26 California Courtroom Evidence 26.08

26.08 Past Recollection Recorded

Foundational questions to obtain introduction of past recollection recorded under *Evid Code § 1237* may be necessary when the witness has no present memory of the event and all efforts to refresh his or her memory fail. The steps for an *Evid Code § 405* foundation are as follows:

- After marking and inspection by counsel, show document to the witness and ask him/her to read it.
- Elicit affirmative answers to the following questions:
 - Do you have any memory of the events recorded therein?
 - Does reading the document fail to refresh your recollection?
 - Do you recognize the document?
 - Was it prepared either by yourself or under your direction and control and while facts were fresh in your mind?
 - Was the statement accurate at the time the witness made it?
- Establish the following:
 - How was it prepared?
 - By whom?

- How long after the event or when?

- Are there any details of method of preparation that will indicate its accuracy and authenticity?

- Request leave of court to read it to the jury.

**Cross References:**

For discussion of codified requirements, see Ch. 21, Hearsay Rule and Exceptions, 21.26.

Detailed coverage of foundations, see Imwinkelried et al., California Evidentiary Foundations (Matthew Bender).

Because the purpose of the offer is actually the recorded testimony of the witness, the writing itself may only be read to the jury as if it were oral testimony and the document itself is not offered in evidence--unless the adverse party offers the document--in which event it is admissible as an exhibit.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyRefreshing RecollectionMemory AidsWritings



24 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence

1-27 California Courtroom Evidence 27.syn

§ 27.syn Synopsis to Chapter 27: Demonstrative and Experimental Evidence

27.01 Introducing and Managing Demonstrative Evidence

- [1] General Considerations
- [2] Offering Demonstrative Exhibits in Evidence
- [3] Managing Jurors' Inspection of Exhibits in Evidence
 - [a] Inspection of Exhibits When They Are Admitted
 - [b] Inspection of Exhibits During Deliberations

27.02 Introducing Evidence of Experiments

- [1] Checklist for Introducing Evidence of Experiments
- [2] Establishing Proper Foundation for Experimental Evidence
- [3] Admissibility Also Rests With Discretion of Court
- [4] Experiment Must be Conducted Under at Least "Substantially Similar" Conditions

27.03 Objecting to Introduction of Demonstrative and Experimental Evidence

27.04 Physical Objects

27.05 Photographs

- [1] Requirements for Admission
- [2] Role of Judicial Discretion

27.06 Videotape

- [1] Requirements for Admission

[2] Level of Judicial Review Depends on Circumstances

27.07 View of Scene

27.08 Polygraph Examinations

27.09 Scientific Evidence

[1] Introducing Evidence Based on New Scientific Techniques (Kelly-Frye Rule)

[a] In General

[b] "General Acceptance" Clarified

[c] Effect of Daubert on Kelly-Frye Rule

[2] Determining Whether Daubert and Kelly Tests Apply

[3] Admissible Scientific Evidence

[4] Inadmissible Scientific Evidence

27.10 Psychological Tests and Syndromes

[1] Expert Opinions Based on Psychological Tests Generally Not Subject to Kelly-Frye

[2] Using Expert's Personal Examination and Analysis of Tests in Trial

[3] Expert Opinions Based on Syndromes

[a] Rape Trauma Syndrome

[b] Child Sexual Abuse Accommodation Syndrome

[c] Battered Women's Syndrome

27.11 Collection and Preservation of Evidence in Criminal Cases

[1] Prosecutor's Duty to Preserve Evidence

[2] Failure to Preserve Evidence



25 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence

1-27 California Courtroom Evidence Scope

Scope

Scope

This chapter contains both a practice and legal guide for understanding demonstrative and experimental evidence.

The first part is a procedural guide that includes general considerations and checklists for introducing and managing demonstrative evidence [see 27.01] and evidence of experiments [see 27.02]. The procedural guide also discusses framing proper objections to demonstrative and experimental evidence, as well as responding to those objections [see 27.03].

The second part considers legal issues involved in introducing various types of demonstrative evidence, including physical objects [see 27.04], photographs [see 27.05], videotape [see 27.06], view of scene [see 27.07] and polygraph test results [see 27.08]. The scientific evidence and psychological tests sections focus on rules concerning expert testimony based on both well-established and new scientific techniques [see 27.09, 27.10]. Finally, the legal guide discusses preserving evidence in criminal cases [see 27.11].

Cross References:

Practical discussion of issues related to demonstrative and experimental evidence, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.



26 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation Chapter 27 Demonstrative and Experimental Evidence A. Practice Guide

1-27 California Courtroom Evidence 27.01

27.01 Introducing and Managing Demonstrative Evidence

[1] General Considerations

Modern trial techniques place great emphasis on demonstrative evidence. In civil cases, the plaintiffs' counsel in particular has made substantial use of this form of proof to dramatize the case. On proper foundation subject only to the simple rule of relevancy under *Evid Code* § 350 or exclusion on discretion of the court under *Evid Code* § 352, the field is almost limitless.

Although the Evidence Code does not define "demonstrative" evidence, *Evid Code* § 140 states that "evidence means ... material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

"Evidence" is broadly defined to include tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof [see *Evid Code* § 140, Cal Law Rev Com Comment].

Cross Reference:

Discussion of what constitutes "evidence," and other definitions, see Ch. 2, Words and Phrases Defined, 2.09.

[2] Offering Demonstrative Exhibits in Evidence

For legal issues affecting specific types of evidence, see 27.04-27.10. The following are the usual steps used in offering demonstrative exhibits in evidence:

- Show the exhibit to the opposing counsel and to the court.
- Request permission of the court that the exhibit be marked for identification.
- On receiving permission from the court, have the clerk mark the exhibit for identification.
- Record the clerk's identification marking on your exhibit index sheet in pencil.

- Lay the foundation for having the exhibit admitted into evidence.

Practice Tip:

The foundational facts will vary from exhibit to exhibit. Counsel should be thoroughly prepared for producing the proper foundational evidence and for meeting any objection which might be made concerning a particular exhibit [see 27.04-27.10].

- Offer the exhibit in evidence.
- State for the record that the exhibit has been received in evidence.
- Record the clerk's in-evidence number/letter on your exhibit index sheet.

[3] Managing Jurors' Inspection of Exhibits in Evidence

[a] Inspection of Exhibits When They Are Admitted

After the exhibit has been admitted in evidence, counsel will often want to pass the exhibit to the jury so that each juror can examine and inspect it. Passing every exhibit to the jury is not necessary. If every exhibit is passed, the impact on an important exhibit can be lost because the jurors begin to believe that this is the usual procedure, and they become mechanical in examining and passing the exhibit. The passing to the jurors of lengthy or detailed exhibits should be avoided. Thorough explanation of the lengthy or detailed exhibit by a witness will be much more effective.

[b] Inspection of Exhibits During Deliberations

Counsel should also consider and decide whether or not a particular exhibit should be sent to the jury room during the jury's deliberations. *CCP § 612* provides that "(U)pon retiring for deliberations the jury may take with them all papers which have been received as evidence in the case, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them any exhibits which the court may deem proper... ." If an exhibit has been admitted in evidence, the court will normally allow it to be sent to the jury room for examination by the jury during deliberations. However, there are exceptions and if counsel believes an exhibit might be confusing or unduly prejudicial, counsel can object to its being sent to the jury room.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jurors General Overview Evidence Procedural Considerations Objections & Offers of Proof Objections Governments Courts Clerks of Court



27 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
A. Practice Guide

1-27 California Courtroom Evidence 27.02

27.02 Introducing Evidence of Experiments

[1] Checklist for Introducing Evidence of Experiments

When introducing evidence of experiments performed out of court:

- Have witness to the experiment take the stand. If the witness is to testify as an expert (i.e., express expert opinion) as well, then he or she must be qualified as an expert.



Cross Reference:

Further discussion, see Ch. 29, Expert Testimony.

- Through witness's testimony, lay a foundation as to similarity of conditions [*see* 27.02[4]]:
 - Probe witness's familiarity with accident or event in issue.
 - Establish witness's familiarity with apparatus or other objects used in the experiment.
 - Ask witness whether or not witness compared the experiment with the actual event.
 - Ask witness whether or not conditions of the experiment were "substantially similar" to the event in question; give reasons.
- Ask witness to present evidence of the experiment.

[2] Establishing Proper Foundation for Experimental Evidence

Experimental evidence generally refers to evidence produced as the result of an experiment conducted either out of court or in court. Admission of experimental evidence depends on proof of the following foundational items:

- The experiment must be *relevant*;

- It must have been conducted under at least *substantially similar conditions*, although not necessarily absolutely identical conditions, as those of the actual occurrence [see 27.02[4]];
- The *qualifications* of the individual testifying concerning the experimentation must be demonstrated with some particularity; and
- Evidence of the experiment will not *consume undue time, confuse the issues, or mislead the jury* [*People v. Turner (1994) 8 C4th 137, 32 CR2d 762, 878 P2d 521*] (sound experiment regarding gunshots); *People v. Bonin (1989) 47 C3d 808 254 CR 298, 765 P2d 460*].



Cross Reference:

Discussion of laying foundation for experiments, see Imwinkelried et al., California Evidentiary Foundation, Ch. 8, Opinion Evidence (Matthew Bender).

[3] Admissibility Also Rests With Discretion of Court

Because experiments frequently present serious questions concerning similarity of conditions, accuracy of observations, and tendency to confuse the issues by introducing collateral or extraneous issues, the admissibility of the results of such experiments largely rests in the sound discretion of the trial court, whose ruling will be sustained in the absence of a clear abuse of discretion [*People v. Brandon (1995) 32 CA4th 1033 38 CR2d 751* (no error in excluding defense identification experiment involving mock lineup); *Grupe v. Glick (1945) 26 C2d 680 160 P2d 832* (running of oil refining machine); *People v. Guillebeau (1980) 107 CA3d 531 166 CR 45* (difference in ridges on soles of shoes)].

Discretion must be employed with considerable caution in the area of the experimental evidence, bearing in mind the weighing process of *Evid Code* § 352. The balance that must be made between the probative value of the evidence and the danger of prejudice, confusion, and undue time consumption, is particularly delicate and critical where what is at stake is a criminal defendant's liberty [*People v. Roehler (1985) 167 CA3d 353, 213 CR 353*].

[4] Experiment Must be Conducted Under at Least "Substantially Similar" Conditions

Although the court has discretion relative to the admissibility of an experiment, the conditions of the experiment, while not identical, must have been conducted under one of the following conditions:

- "Substantially similar" [*Shabshin v. Pacifici (1961) 196 CA2d 192, 16 CR 440* (capacity of flash tube of broiler to be clogged by matches); *Beresford v. Pacific Gas & Elec. Co. (1955) 45 C2d 738, 290 P2d 498*] (effect of excess voltage on Kellogg arrester); *Ortega v. Pacific Greyhound Lines, Inc. (1937) 20 CA2d 596, 67 P2d 702*] (effect of bicycle reflectors)].
- "Sufficiently similar" [*People v. Miller (1966) 245 CA2d 112, 53 CR 720* (car accident); *Yecny v. Eclipse Fuel Engineering Co. (1962) 210 CA2d 192, 26 CR 402* (effect of burning of vapor); *People v. Roberts (1953) 40 C2d 483, 254 P2d 501* (identification of persons)].
- "Substantially identical" [*Andrews v. Barker Brothers Corp. (1968) 267 CA2d 530, 73 CR 284*] (strength of chair); *Garcia v. Hoffman (1963) 212 CA2d 530, 28 CR 98* (type of skid mark)].
- "Sufficient similarity to show that logical relevancy exists" [*Odell v. Frueh (1956) 146 CA2d 504, 304 P2d 45*] (cause of adhesion of concrete slabs)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Appeals Standards of Review Abuse of Discretion General Overview Energy & Utilities
Law Refining & Processing General Overview Evidence Relevance Confusion, Prejudice & Waste of Time



28 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
A. Practice Guide

1-27 California Courtroom Evidence 27.03

27.03 Objecting to Introduction of Demonstrative and Experimental Evidence

The following bases for objections should be considered:

- The probative value of the evidence is outweighed by the probability that its admission will:
 - Necessitate undue consumption of time, or create substantial danger of undue prejudice (e.g., evidence is unduly inflammatory);
 - Confuse the issues; or
 - Mislead the jury [*see Evid Code § 352*].
- The evidence is not relevant [*see Evid Code § 350*].
- The evidence has not been properly authenticated [*see Evid Code § 1400 et seq*].
- Experiment or demonstrative evidence is not adequately similar to the actual events depicted [*see 27.04*].



Cross Reference:

Detailed discussion of demonstrative evidence, see California Trial Guide, Unit 65, Presentation of Demonstrative Evidence (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Evidence Demonstrative Evidence Admissibility Evidence Procedural Considerations Objections & Offers of Proof Objections Evidence Relevance Confusion, Prejudice & Waste of Time



29 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation Chapter 27 Demonstrative and Experimental Evidence Part B. Legal Guide

1-27 California Courtroom Evidence 27.04

27.04 Physical Objects

Physical objects are admissible only if they are relevant to the issues in the case [*People v. Vaiza* (1966) 244 CA2d 121, 52 CR 733 (admission of gun error because of lack of proper foundation)].

Physical objects that constitute a part of the transaction, or that serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation [*People v. Wilson* (1965) 238 CA2d 447, 48 CR 55 (plastic strips used as burglary tools found in defendant's possession); *People v. Trujillo* (1948) 32 C2d 105, 194 P2d 281 (instruments of crime); *People v. Bannon* (1922) 59 CA 50, 209 P 1029 (passbook with bullet hole, taken from pocket of victim)].

Practice Tip:

In this general discussion of a few possibilities to act as guides, foundation for the evidence is the major stumbling block. Always ask that physical evidence be marked for identification while the foundation is laid so that the exhibit can be properly referred to by number or letter.

Except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of a crime is admissible despite its prejudicial tendency [*People v. Adamson* (1946) 27 C2d 478, 165 P2d 3 (stocking tops in defendant's possession)].

It is proper to use objects similar to those connected with the commission of a crime for purposes of illustration [*People v. Barnett* (1998) 17 C4th 1044, 74 CR2d 121, 954 P2d 384 (prosecutor was permitted to use similar knife and fish hook during closing argument)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesCriminal Instruments & ToolsGeneral OverviewCriminal Law & ProcedureCriminal OffensesWeaponsUseGeneral Overview



30 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation Chapter 27 Demonstrative and Experimental Evidence Part B. Legal Guide

1-27 California Courtroom Evidence 27.05

27.05 Photographs

[1] Requirements for Admission

A photograph may be authenticated by simple testimony that "it is an accurate representation of what it purports to show" [*Smith v. ACandS, Inc.* (1994) 31 CA4th 77 37 CR2d 457 , *overruled in part on other grounds by Camargo v. Tjaarda Dairy* (2001) 25 C4th 1235, 108 CR2d 617 (testimony that photographs represented working conditions at plant during its construction, notwithstanding no testimony as to exact dates and places portrayed); *People v. Vaiza* (1966) 244 CA2d 121, 52 CR 733 ; *People v. Bowley* (1963) 59 C2d 855 (testimony of person present when film was made); *Berkovitz v. American River Gravel Co.* (1923) 191 C 195, 215 P 675 (automobile accident photograph was correct representation of object)].

A photograph may be illustrative of the testimony of a witness or it may constitute independent evidence apart from the witness's testimony [*South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 CA2d 388, 41 CR 846 (aerial photographs taken from too high up to be useful in determining existence of water course); *People v. Bowley* (1963) 59 C2d 855, 31 CR 471, 382 P2d 591 (photograph as probative evidence is "silent" witness)].

A photocopy of a photograph may be admissible in place of a lost original [*People v. Yeoman* (2003) 31 C4th 93, 2 CR3d 186 (no error in admission of poor-quality black and white photocopy of lineup, where no evidence suggested prosecution's loss of original color photograph was intentional or showed bad faith, and trial court gave limiting instruction)].



Cross Reference:

Discussion of what is "best evidence," see Ch. 23, Secondary Evidence.

[2] Role of Judicial Discretion

Whether the probative value of photographs offered into evidence outweighs the possible prejudicial effect is a question for the trial court in the exercise of its judicial discretion [*People v. Taylor* (2001) 26 C4th 1155, 113 CR2d 827, 34 P3d 937 (trial court did not abuse its discretion in admitting the photographs of the victims and a videotape of the crime scene despite their possible prejudicial effect); *People v. Kipp* (2001) 26 C4th 1100, 113 CR2d 27, 33 P3d 450 (death penalty was affirmed for murder, rape, and robbery because admitting photograph showing the position of the victim's

clothing on her body, some of her injuries, and the position of her body in the small hatchback area behind the rear seat of the car, was relevant to assist the jury in assessing the aggravating force of the murder and rape or attempted rape of another); *People v. Staten* (2000) 24 C4th 434, 101 CR2d 213, 11 P3d 968 (trial court did not abuse its discretion in admitting autopsy photographs of the victim in the penalty phase of a capital prosecution); *People v. Carpenter* (1997) 15 C4th 312, 6 CR2d (photos of murder victim admitted despite ravages of wild animals, relevant to similarity of crimes); *People v. Stanworth* (1969) 71 C2d 820, 80 CR 49, 457 P2d 889 (photographs relevant to issue of aggravation of crime is a penalty); *People v. Talbot* (1966) 64 C2d 691, 51 CR 417 (color photograph admitted to aid pathologist's testimony); *People v. Mathis* (1965) 63 C2d 416, 46 CR 785, 406 P2d 65 (gruesome color photographs with great evidentiary value)].



Cross Reference:

Discussion of prejudicial impact of evidence, see Ch. 7, Discretion of Court to Exclude, 7.01.

The admissibility of photographs that evoke sympathy in civil cases is a matter for the discretion of the trial court [*Westberg v. Willde* (1939) 14 C2d 360, 94 P2d 590 (admission not reversible error); *Packard v. Moore* (1937) 9 C2d 571, 71 P2d 922 (properly admitted showed plaintiff's true condition); *O'Meara v. Haiden* (1928) 204 C 354, 268 P 334 (error to admit; identification not disputed)].



Cross Reference:

Discussion of excluding evidence under *Evid Code* § 352 *et seq.*, see Ch. 7, Discretion of Court to Exclude Evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesHomicideMurderAttempted MurderPenaltiesCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultRapeElementsEvidenceRelevanceGeneral Overview



31 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
Part B. Legal Guide

1-27 California Courtroom Evidence 27.06

27.06 Videotape

[1] Requirements for Admission

To be admissible in evidence, a videotape recording must be authenticated as required by *Evid Code* § 1401, since it is a "writing" under *Evid Code* § 250 [*People v. Mayfield* (1997) 14 C4th 668, 60 CR2d 1] .

In ruling on the admissibility of a videotape, a trial court must determine whether [*People v. Rodriguez* (1994) 8 C4th 1060, 36 CR2d 235, 885 P2d 1] :

- (1) The videotape is a reasonable representation of that which it is alleged to portray; and
- (2) The use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them.

Within these limits, the physical conditions that existed at the time the event occurred need not be duplicated with precision nor is it required that no change occurred between the happening of the event and the time the videotape was taken.

A court does not err in failing to compel prosecution to accept a defendant's proposed stipulation to introduce contents of statement, rather than the videotape itself, when the court determines that defendant's demeanor when making the statement is relevant, thus the videotape contains information not covered by the proposed stipulation [*People v. Cain* (1995) 10 C4th 1, 40 CR2d 481 (penalty phase of a capital prosecution)].

A court may admit videotape reenactment of a witness's view of assailants fleeing crime scene against defendant's claim that some scenes in the tape were inaccurate, since once the witness testifies that tape accurately shows the area where witness was and where witness saw the assailants the trial court may correctly conclude that the tape is a reasonable representation of the physical layout of the area in question [*People v. Rodriguez* (1994) 8 C4th 1060, 36 CR2d 235, 885 P2d 1 (prosecution for capital murder)].

In an attempted murder prosecution, the trial court did not err in showing the jury three minutes of a videotape recorded by a reality TV show, *COPS*, accompanying the police rescue of a by-then unconscious victim from defendant. The

videotape was probative of defendant's intent, the victim's condition after the attack, and the force police needed to exert to rescue her [*People v. Ibarra* (2007) 151 CA4th 1145, 61 CR3d 22 (conviction affirmed)].

[2] Level of Judicial Review Depends on Circumstances

A court may exercise reasonable discretion in determining which portions of videotape may be excluded [*People v. Stanley* (1995) 10 C4th 764, 42 CR2d 543, 897 P2d 481 (penalty phase of a capital prosecution)].

The court has broad discretion to admit or exclude reenactment videos [*Emerson Elec. Co. v. Superior Court* (1997) 16 C4th 1101, 68 CR2d 883] .

The court has discretion to admit or exclude videotape of a crime scene [*People v. Taylor* (2001) 26 C4th 1155, 113 CR2d 827, 34 P3d 937 (trial court did not abuse its discretion in admitting the photographs of the victims and a videotape of the crime scene despite their possible prejudicial effect)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceDemonstrative EvidenceRecordingsEvidenceDemonstrative EvidenceVisual FormatsEvidenceScientific EvidenceCrime Scene



32 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
Part B. Legal Guide

1-27 California Courtroom Evidence 27.07

27.07 View of Scene

A view of the premises may or may not be admissible (or probative of an issue), depending on whether it is relevant [*Sylva v. Kuck* (1966) 240 CA2d 127, 49 CR 512 (view held irrelevant due to lack of proper foundation)]. A view of the scene by the trier of fact is, singly or in connection with other proof, considered as independent evidence on which a finding may be made and sustained [*City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (jury view of premises being condemned); *Sylva v. Kuck* (1966) 240 CA2d 127, 49 CR 512 (view of easement); *Key v. McCabe* (1960) 54 C2d 736, 8 CR 425 (view may be substantial evidence in support of findings)].

► Cross Reference:

Further discussion, see Ch. 2, Words and Phrases Defined, § 2.23, Ch. 6, Relevancy, § 6.01.

Whether the jury should be permitted to view the premises is a matter within the discretion of the trial judge [*City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (jury view of premises being condemned); *Akins v. County of Sonoma* (1967) 67 C2d 185, 60 CR 499 (photograph sufficient substitution for view)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDiscretionReal Property LawLimited Use RightsEasementsCreationEasements
Through Eminent Domain



33 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
Part B. Legal Guide

1-27 California Courtroom Evidence 27.08

27.08 Polygraph Examinations

Absent a stipulation from all parties, the results of a polygraph examination are not admissible in evidence at trial.

This firm and broad exclusion is justified by the unreliable nature of polygraph results [*see* 27.09] and the concern that jurors will attach unjustified significance to the fact of or the outcome of this type of examination, and because the introduction of polygraph evidence can negatively affect the jury's appreciation of its exclusive power to judge credibility [*People v. Basuta* (2001) 94 CA4th 370, 114 CR2d 285 (improper mention of a polygraph test in combination with the error in excluding evidence that defendant's mother had jerked or shaken the child was prejudicial in a child abuse case; defendant's mother's action would have been probative that another person had committed the crime)].

Cross Reference:

Further discussion, see Ch. 6, Relevancy, 6.03.

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceProcedural ConsiderationsExclusion & Preservation by ProsecutorEvidenceScientific EvidencePolygraphs



34 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
Part B. Legal Guide

1-27 California Courtroom Evidence 27.09

27.09 Scientific Evidence

[1] Introducing Evidence Based on New Scientific Techniques (*Kelly-Frye* Rule)

[a] In General

Under the *Kelly-Frye* rule (now known in California simply as the *Kelly* rule), proponents of evidence based on a new scientific technique, process, or theory must show:

- (1) The scientific technique or method is sufficiently established to have gained general acceptance in its field [see 27.09[1][b]];
- (2) Testimony with regard to the technique and its application is offered by a properly qualified expert; and
- (3) Correct scientific procedures have been used in the particular case [*People v. Bolden* (2002) 29 C4th 515, 127 CR2d 802, 58 P3d 931], cert den. 538 US 1016 (electrophoresis multisystem testing of blood stains); *People v. Leahy* (1994) 8 C4th 587, 34 CR2d 663, 882 P2d 321 (testimony by police officers regarding mere administration of HGN testing is insufficient to meet general acceptance standard); *People v. Morris* (1991) 53 C3d 152, 279 CR 720, 807 P2d 949 (electrophoresis technique for blood typing); *People v. Kelly* (1976) 17 C3d 24, 130 CR 144, 549 P2d 1240 ; *Frye v. United States* (DC Cir 1923) 293 F. 1013 (superseded by Federal Rules of Evidence, per *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 113 S Ct 2786, 125 L Ed2d 469); *People v. Bui* (2001) 86 CA4th 1187, 103 CR2d 908].

Although the *Kelly-Frye* test is usually applied to novel devices or processes involving the manipulation of physical devices, it has also been applied to less tangible new procedures that carry an equally undeserved "aura of certainty." In *People v. Shirley* (1982) 31 C3d 18, 181 CR 243 , the California Supreme Court applied the *Kelly-Frye* rule to, and barred admission of, post-hypnotic testimony of a rape victim. Explicitly rejecting the argument that the *Kelly-Frye* rule was limited to techniques analyzing "physical evidence," the court noted that given the rule's prophylactic purpose, nothing precludes its application to "a new scientific process operating on purely psychological evidence" [*People v. Shirley* (1982) 31 C3d 18, 181 CR 243 ; *People v. Stoll* (1989) 49 C3d 1136, 265 CR 111, 783 P2d 698] .

The *Kelly-Frye* rule tests the fundamental validity of a new scientific methodology, not the degree of professionalism with which it is applied [*People v. Farmer* (1989) 47 C3d 888, 254 CR 508 (although better photographs could have been taken, footprint evidence met the *Kelly-Frye* requirements)].

The *Kelly-Frye* test was unaffected by the enactment of the "Truth in Evidence" provision in Proposition 8 in 1982 [*Cal Const*, art I, § 28, subd (d); *People v. Harris* (1989) 47 C3d 1047, 255 CR 352, 767 P2d 619] .

Cross Reference:

Further discussion of *Kelly-Frye*, see *California Trial Guide*, Unit 50, *Extrinsic Policies*, § 50.80 (Matthew Bender).

[b] "General Acceptance" Clarified

"General acceptance" means a consensus drawn from a typical cross-section of the relevant, qualified scientific community. The trial court must qualitatively weigh the respective expert testimony, not just look at the number of experts on each side of the question [*People v. Leahy* (1994) 8 C4th 587, 34 CR2d 663, 882 P2d 321 (testimony by police officers regarding mere administration of HGN testing is insufficient to meet general acceptance standard)].

The purpose of the general consensus test is to protect the jury from techniques, which though "new," novel, or "experimental," convey a "misleading aura of certainty." Once a trial court has admitted evidence based on a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control later trials, at least until new evidence is presented reflecting a change in attitude of the scientific community [*Frye v. United States* (1923) 293 F. 1013 (superseded by Federal Rules of Evidence, per *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 113 S Ct 2786, 125 L Ed2d 469); *People v. Venegas* (1998) 18 C4th 47, 74 CR2d 262 ; *People v. Wright* (1998) 62 CA4th 31, 72 CR2d 246 ; *People v. Marlow* (1995) 34 CA4th 460, 41 CR2d 5 (no error in failure to hold admissibility hearing on DNA evidence where trial court considered evidence from preliminary hearing, considered additional testimony and articles, and where RFLP procedures used are generally accepted as reliable); *People v. Smith* (1989) 215 CA3d 19, 263 CR 678] (judicial notice appropriately taken of extensive *Kelly-Frye* hearings and conclusions in another case within the county, regarding evidence of electrophoretic testing of dried blood stains)].

[c] Effect of *Daubert* on *Kelly-Frye* Rule

The *Kelly-Frye* test had been the law in both federal courts and California for over 70 years since the decision in *Frye*. Federal law on the subject dramatically changed in the 1990s. The U.S. Supreme Court decided in 1993 that *Frye* was superseded by the enactment of the Federal Rules of Evidence in 1975. Thus, in federal court new scientific techniques no longer need meet a "general acceptance" standard for admissibility. Instead, admissibility is governed by the Federal Rules of Evidence, particularly Rule 702, as interpreted by the U.S. Supreme Court [*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 113 S Ct 2786, 125 L Ed2d 469 ; *Kumho Tire Co. v. Carmichael* (1999) 526 US 137, 119 S Ct 238, 143 L Ed2d 238] ("The *Daubert* 'gatekeeping' obligation applies not only to 'scientific' testimony, but to all expert testimony. Rule 702 does not distinguish between 'scientific' knowledge and 'technical' or 'other specialized' knowledge, but makes clear that any such knowledge might become the subject of expert testimony.".)]

Fed R Evid 702 was amended in 2000 to reflect the holdings of *Daubert* and *Kumho*.

Cross Reference:

Further discussion of California application of *Daubert* and *Kumho*, see *California Trial Guide*, Unit 60, *Opinion Testimony*, § 60.50 (Matthew Bender).

[2] Determining Whether *Daubert* and *Kelly* Tests Apply

Parts of pre-*Daubert* decisions are still viable in California, although the California Supreme Court has stated that it is now more appropriately known only as the *Kelly* rule, because of *Frye*'s demise. The California Supreme Court held that *Kelly* was unaffected by the U.S. Supreme Court's decision in *Daubert*. The rule continues to represent the standard by which new scientific techniques should be measured before evidence derived therefrom may be admitted [*People v. Leahy* (1994) 8 C4th 587 34 CR2d 663, 882 P2d 321] .

The *Kelly* rule is applicable only to that limited class of expert testimony that is based, in whole or part, on a technique, process, or theory that is new to science and, even more so, the law. In determining whether a scientific technique is "new" for *Kelly* purposes, the most significant factor is routine use in the courtroom or laboratory, rather than by law enforcement. Thus, repeated use, study, testing, and confirmation by scientists or trained technicians may indicate that a scientific technique is not new, as may the use of a technique that is settled in law. Long-standing and persistent use by law enforcement outside the laboratory or courtroom will not prevent a scientific technique from being "new" or "novel" under *Kelly*. Further, a technique may be deemed "scientific" if it appears in both name and description to provide some definitive truth that the expert witness need only accurately recognize and relay to the jury [*People v. Leahy* (1994) 8 C4th 587, 34 CR2d 663, 882 P2d 321 (HGN testing is both new and scientific)].

The *Kelly* rule is applicable to administrative proceedings [*Harris Transportation Co. v. Air Resources Board* (1995) 32 CA4th 1472, 38 CR2d 431 (but petitioner failed to properly present issue)].

Medical expert testimony is not subject to the *Kelly* rule [*People v. McDonald* (1984) 37 C3d 351, 208 CR 236 (medical expert testimony not subject to *Kelly-Frye* test); *Wilson v. Phillips* (1999) 73 CA4th 250, 86 CR2d 804 (*Kelly* not applicable to repressed memory medical testimony); *People v. Ward* (1999) 71 CA4th 368, 83 CR2d 828 (psychological and psychiatrist expert testimony not subject to *Kelly-Frye* rule)].

State law continues to limit the *Kelly* rule to new scientific techniques testimony; however the federal *Daubert* test is gaining wider application [*Texaco Producing, Inc. v. County of Kern* (1998) 66 CA4th 1029, 78 CR2d 433 (*Kelly-Frye* inapplicable to appraisal methods used by expert to value oil property for taxes); *but see Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 143 L Ed2d 238, 119 S Ct 238 ("The *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists. ... The *Daubert* 'gatekeeping' obligation applies not only to 'scientific' testimony, but to all expert testimony. Rule 702 does not distinguish between 'scientific' knowledge and 'technical' or 'other specialized' knowledge, but makes clear that any such knowledge might become the subject of expert testimony.")].

Prior cases' application of *Kelly* represent analyses of the state of science, and state of the law, as of the time the cases were decided. The cases do not stand for the proposition that certain techniques or procedures are subject to *Kelly*'s foundational requirements whenever they arise, forevermore. Thus, while the computation step of DNA analysis fell under the *Kelly/Frye* umbrella in the instant case, the technique of PCR and STR methods of DNA analysis is not new to science or the law, novel, or experimental, so its admissibility need not be tested under *Kelly* [*People v. Johnson* (2006) 139 CA4th 1135, 1149, 43 CR3d 587] .

[3] Admissible Scientific Evidence

Use of evidence derived from the following scientific procedures has been properly admitted:

- Agglutination inhibition testing of dried blood stains [*People v. Yorba* (1989) 209 CA3d 1017, 257 CR 641].
- Ballistics examinations [*People v. Rudolph* (1961) 197 CA2d 739, 17 CR 603].

- *Blood tests concerning intoxication* [*In re Newbern* (1959) 175 CA2d 862, 1 CR 80] .
- *Blood tests concerning paternity* [*Cramer v. Morrison* (1979) 88 CA3d 873, 153 CR 865 ; see *Evid Code* § 895].
- *Breathalyzer test to determine blood alcohol determination* [*People v. Adam* (1976) 59 CA3d 559 131 CR 190 (foundational prerequisites must be met)].
- *Case control study of pharmaceutical side effects on people* [*O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 55 CR3d 551 (*Kelly* standards did not apply, since challenge to study was not based on new scientific methodology but correctness of application of accepted methodology)].
- *DNA (deoxyribonucleic acid) typing--RFLP method.* There are at least two methods of DNA testing, the RFLP method and the PCR method. The older and most common is the RFLP method. The RFLP method involves two general steps in laboratory analysis--processing and matching the DNA material--and a third general step involves statistical calculations that indicate the likelihood that the crime scene sample of DNA would match with the defendant as opposed to some third party. The most common RFLP laboratory techniques for processing and matching the DNA sample are generally accepted as reliable, although two cases have reversed convictions because of a lack of evidence in the record regarding general acceptance of the methodology employed. Also, it is generally agreed that *Kelly's* test of general acceptance in the scientific community applies to the statistical calculations.

In May 1998, the state Supreme Court addressed these issues in *People v. Venegas* [*People v. Venegas* (1998) 18 C4th 47, 74 CR2d 262] . The court upheld the validity of DNA testing using RFLP analysis addressed in *Axell* (Cellmark methodology) to elicit and compare DNA profiles (see *People v. Axell* (1991) 235 CA3d 836, 1 CR2d 411] . The court also ruled another RFLP methodology (FBI crime lab) passes the *Kelly* test because there is no material scientific distinction between the methodologies. Therefore, both FBI and Cellmark DNA analysis are acceptable scientific methods in California.

However, the court ruled that the methodology for generating a statistical probability of a match to DNA evidence may be still subject to a *Kelly* hearing. As the court pointed out, a match of the defendant's DNA to the collected evidence is of little significance if the evidentiary profile also matches that of many or most other human beings. The court reviewed other jurisdictions and scientific literature and concluded that the NRC (National Research Council of the National Academy of Sciences) "modified ceiling" methodology for statistical probability calculations of random matches of DNA profiles is accepted in the relevant scientific communities and is admissible under the *Kelly* test. Part of the basis for this general acceptance is because the NRC calculations are conservative and give a statistical advantage to the defendant.

At issue in *Venegas* was the use of the FBI's "floating bin" statistical methodology that resulted in a disadvantage to the defendant. The court concluded that the narrower procedures involved in the FBI methodology violated the third prong of a *Kelly* analysis, following correct scientific procedures, and the FBI calculations were flawed and prejudicial. The court expressly ruled that on retrial of the case the prosecution could introduce "(1) recalculation of statistical probabilities under the NRC's modified ceiling approach, arrived at through use of correct scientific procedures consistent with the views expressed herein, or (2) recalculation made by using correct scientific procedures under any other statistical methodology that is otherwise demonstrated to have gained general acceptance in the relevant scientific community, within the purview of the *Kelly* test, since the first trial" [*People v. Venegas* (1998) 18 C4th 47, 74 CR2d 262] .

Subsequent to *Venegas*, the Supreme Court in August 1999 revisited the issue of statistical calculations in DNA profiling, and in *People v. Soto* [*People v. Soto* (1999) 21 C4th 512, 88 CR2d 34] held that the unmodified product rule (the multiplication of individual band probabilities to arrive at an overall probability statistic expressed as a simple fraction, such as 1 in 100,000), as applied in DNA forensic analysis, is generally accepted in the scientific community of population geneticists, and that statistical calculations made utilizing the rule meet the *Kelly* standard for admissibility [*People v. Soto* (1999) 21 C4th 512, 88 CR2d 34 (controversy over population substructuring and use of the unmodified product rule has been sufficiently resolved within the scientific community)].

It has been pointed out that, according to *Kelly*, once a trial court has admitted evidence based on a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community. Partially on this basis, a trial court's decision to admit DNA evidence from the RFLP process without a full-blown *Kelly* hearing has been upheld [*People v. Marlow* (1995) 34 CA4th 460, 41 CR2d 5 (no error in failure to hold admissibility hearing where trial court considered *Kelly* evidence from preliminary hearing, considered additional testimony and articles, and where RFLP procedures used by Cellmark Diagnostics generally accepted as reliable)].

The most that DNA RFLP testing can determine is that two profiles are similar enough that they could be the same; it is more accurate to say that the defendant's profile closely resembles, rather than matches, the perpetrator's profile [*People v. Pizarro* (2003) 110 CA4th 530, 3 CR3d 21 (insufficient foundation for DNA evidence under both *Kelly* and *Evid Code* § 403; remanded for more tests and new trial)].

- *DNA (deoxyribonucleic acid) typing--PCR method.* The PCR method of DNA testing for forensic purposes is sufficiently established to have gained general acceptance in its field [*People v. Wright* (1998) 62 CA4th 31, 72 CR2d 246 (PCR method generally accepted; issues of sample contamination go to weight of evidence, not admissibility); *People v. Roybal* (1998) 19 C4th 481 [79 CR2d 487, 966 P2d 521 (PCR method following NCR recommendations generally accepted; test results inconclusive); *People v. Morganti* (1996) 43 CA4th 643, 50 CR2d 837 (PCR method of DNA testing for forensic purposes is generally accepted in the scientific community); *People v. Amundson* (1995) 34 CA4th 1151, 41 CR2d 127 (PCR procedures used by Serological Research Institute generally accepted as reliable)].

The STR (short tandem repeat) type of PCR testing for forensic purposes is sufficiently established in the scientific community [*People v. Allen* (1999) 72 CA4th 1093, 85 CR2d 655q (precedent in California and other jurisdictions)].

- The technique of PCR and STR methods of DNA analysis is not new to science or the law, novel, or experimental, so its admissibility need not be tested under *Kelly* [*People v. Johnson* (2006) 139 CA4th 1135, 1149, 43 CR3d 587] .

- *Dummy.* In a murder prosecution arising from a boating accident, the court properly admitted into evidence experimental tests involving use of a dummy to determine if the victim's head injuries could have been caused by his head being hit by the dory as he rose from the water [*People v. Roehler* (1985) 167 CA3d 353, 213 CR 353 (*Kelly* test not violated by use of correct engineering principles to establish velocity figures before dummy introduced into the experimental process)].

- *Electron microscope.* The use of a scanning electron microscope equipped with an X-ray analyzer, which provides a method of identification of particles, including gunshot residue particles removed from

a hand, has been uniformly embraced in scientific journals. Scientific possibility of error is a possibility that goes to the weight, not the admissibility, of a criminalist's testimony [*People v. Palmer* (1978) 80 CA3d 239, 145 CR 466] .

- *Electrophoresis typing of dried blood stains* [*People v. Cook* (2007) 40 C4th 1334, 1345, 58 CR3d 340, 157 P3d 950 , cert den 128 SCt 443; *People v. Bolden* (2002) 29 C4th 515, 127 CR2d 802, 58 P3d 931, cert denied 538 US 1016 ; *People v. Fierro* (1991) 1 C4th 173, 3 CR2d 426, 821 P2d 1302 (electrophoretic testing of dried blood stains was sufficiently accepted in scientific community to be admissible under the *Kelly-Frye* rule); *People v. Morris* (1991) 53 C3d 152, 279 CR 720] (first degree murder with special circumstances; death penalty case in which the typing of dried blood stains was admitted as scientifically acceptable); *People v. Yorba* (1989) 209 CA3d 1017, 257 CR 641 (single expert may properly testify regarding blood stain analysis as evidence that blood found on victim's bed might have come from the defendant); *People v. Morris* (1988) 199 CA3d 377, 245 CR 52 ; *People v. Reilly* (1987) 196 CA3d 1127, 242 CR 496 ; *People v. Brown* (1985) 40 C3d 512, 230 CR 834 (substantial legal controversy exists over reliability of fluid stain-typing evidence by electrophoresis; however, error was harmless)].

- *Fingerprint analysis* [*People v. Champion* (1995) 9 C4th 879, 39 CR2d 547, 891 P2d 93 (comparison expert permitted to testify regarding report of technician who lifted latent prints, since report itself was admissible as business record); *People v. Johnson* (1989) 47 C3d 1194, 255 CR 569 ; *People v. Riser* (1956) 47 C2d 566, 305 P2d 1] .

- *Hair comparison evidence* [*People v. Huggins* (2006) 38 C4th 175, 200, 41 CR3d 593, 131 P3d 995] .

- *Handwriting comparison* [*People v. Storke* (1900) 128 C 486, 60 P 1090] .

- *Horizontal gaze nystagmus (HGN) test for intoxication* [*People v. Joehnk* (1995) 35 CA4th 1488, 42 CR2d 6 (evidence showed HGN testing satisfies *Kelly* admissibility requirements); *People v. Leahy* (1994) 8 C4th 587, 34 CR2d 663, 882 P2d 321 (HGN testing for intoxication must meet *Kelly* admissibility requirements; no evidence elicited at trial that HGN testing is generally accepted in typical cross-section of relevant scientific community)].

- *Odontology* [*People v. Slone* (1978) 76 CA3d 611, 143 CR 61 ; *People v. Marx* (1975) 54 CA3d 100, 126 CR 350 (admissibility of bite mark identification evidence upheld; marks go to weight rather than admissibility under the *Frye* test)].

- *Urine tests* [*Quesada v. Orr* (1971) 14 CA3d 866, 92 CR 640] .

[4] Inadmissible Scientific Evidence

Scientific techniques that have not been established as reliable include:

- *Blood spatter analysis*. Blood spatter evidence, which showed that murder victim had been sitting upright in her car when her head was hit on the left side, does not have an "aura of scientific infallibility" [*People v. Combs* (2004) 34 C4th 821, 22 CR3d 61 (defendant failed to make proper objection, but objection would have failed on merits)].

- *Electronic penile plethysmograph test for diagnosing sexual deviancy* [*People v. John W.* (1986) 185 CA3d 801, 299 CR 783] .

- *Lie detector/polygraph examination.* See 27.08 and Ch. 6, Relevancy, 6.03, for specific rules concerning this type of evidence.
- *Scent identification lineup (by canine)* [*People v. Mitchell* (2003) 110 CA4th 772, 2 CR3d 49 (trial court erred in admitting evidence that defendant was identified in canine scent identification lineup without first holding *Kelly* hearing, but error was harmless)].
- *Scent transfer device (by canine)* [*People v. Mitchell* (2003) 110 CA4th 772, 2 CR3d 49 (trial court erroneously denied defendant's request to subject scent transfer device to a *Kelly* hearing as "new science," but error was harmless)].
- *Sodium amytal therapy to refresh repressed memories* [*Ramona v. Superior Court (Ramona)* (1997) 57 CA4th 107, 66 CR2d 766 (adult daughter alleged child sexual abuse)].
- *Spectrographic analysis (voiceprint identification)* [*People v. Kelly* (1976) 17 C3d 24, 130 CR 144, 549 P2d 1240] .
- *Truth serum* [*People v. Jones* (1959) 52 C2d 636, 343 P2d 577 , cert denied, 361 U.S. 926, 80 S Ct 364, 4 L Ed2d 350 (results of test made under truth serum not admissible in criminal case); *People v. Cullen* (1951) 37 C2d 614, 234 P2d 1] .

Once a scientific procedure has become generally accepted, mere variations in technique or procedure go to the weight of the evidence, not its admissibility. This rule does not prevent a defendant from showing at trial that an expert's variations amounted to a "material scientific distinction" or material failure to use correct, scientifically accepted procedures. However, in this case defendant made no such showing, and the qualified expert testified at length, justifying his procedures [*People v. Cook* (2007) 40 C4th 1334, 1345, 58 CR3d 340, 157 P3d 950 , cert den 128 SCt 443 (trial court properly admitted evidence of electrophoretic testing of bloodstains in murder trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceGeneral OverviewFamily LawFamily Protection & WelfareChildrenProceedingsGovernmentsCourtsJudicial Precedents



35 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 27 Demonstrative and Experimental Evidence
Part B. Legal Guide

1-27 California Courtroom Evidence 27.10

27.10 Psychological Tests and Syndromes

[1] Expert Opinions Based on Psychological Tests Generally Not Subject to *Kelly-Frye*

Absent some special feature that effectively blindsides the jury, expert opinion testimony is not subject to *Kelly-Frye*. Expert opinion testimony and use of scientific evidence are distinguishable [*Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827 (*Kelly* test did not apply to expert testimony on new theory of medical causation of plaintiff's injury that was based on old methodology; summarizing cases); *People v. McDonald* (1984) 37 C3d 351, 208 CR 236, 690 P2d 709 (court committed prejudicial error in the exclusion of defense expert testimony on the psychological factors undermining the accuracy of eyewitness identification); *People v. Phillips* (1981) 122 CA3d 69, 175 CR 703 (*Kelly-Frye* rule has never been applied to expert medical testimony, even when the witness is a psychiatrist and the subject matter involves reconstitution of a past state of mind, prediction of future dangerousness, or even diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association)].

► Cross Reference:

Discussion of limits on experts' opinions, see Ch. 17, Nonexpert and Expert Opinion, 17.02.

The presence or absence of expert opinion is not a necessary factor in determining the applicability of the *Kelly-Frye* rule [*In re Christie D.* (1989) 206 CA3d 469, 253 CR 619] .

[2] Using Expert's Personal Examination and Analysis of Tests in Trial

Psychological opinions based on personal examination and analysis of accepted psychological tests, such as the MMPI and MCMI, may be admitted as character evidence tending to show that an individual was or was not likely to have committed a particular act, and that the admissibility of such evidence need not be tested under the *Kelly-Frye* standard [*People v. Stoll* (1989) 49 C3d 1136, 265 CR 111, 783 P2d 698] .

Stoll did not, however, hold that "profile" evidence is admissible. In the absence of any evidence that the scientific community has developed any standard "profile" of a population group that would enter into a medical diagnosis of an individual, testimony concerning whether an individual's psychological characteristics matched that of the group is inadmissible [*People v. Ruiz* (1990) 222 CA3d 1241, 272 CR 368 (expert testimony that defendant did not share

certain characteristics commonly shared by pedophiles properly excluded)].

The practice of detecting child sexual abuse by observing a child's behavior with anatomically correct dolls must satisfy the *Kelly-Frye* rule [*In re Amber B.* (1987) 191 CA3d 682, 236 CR 623 ; *In re Christie D.* (1989) 206 CA3d 469, 253 CR 619] .

[3] Expert Opinions Based on Syndromes

[a] Rape Trauma Syndrome

Expert testimony that a complaining witness suffers from rape trauma syndrome is not admissible to prove the witness was, in fact, raped. Because rape defendants often attack the complainant's credibility by suggesting that a delay in reporting the rape is inconsistent with having been raped, however, the use of evidence on rape trauma syndrome to rebut such an inference is permissible [*People v. Bledsoe* (1984) 36 C3d 236, 203 CR 450, 681 P2d 291] .

In an action for libel and intentional infliction of emotional distress, SCWAR (Santa Cruz Women Against Rape), having charged in their publication that the plaintiff had raped a woman, argued that expert testimony regarding rape trauma syndrome was erroneously excluded by the trial court. The appellate court followed *Bledsoe*, stating that rape trauma syndrome was not developed as a truth-finding device but was designed as a therapeutic tool and cannot be used as a gauge of the credibility of the alleged victim, nor could it be used to explain or justify SCWAR's belief that a sexual assault took place [*Carney v. Santa Cruz Women Against Rape* (1990) 221 CA3d 1009, 271 CR 30] .

Furthermore, expert testimony authorized by *Bledsoe* to permit rehabilitation of a complainant's credibility is limited to discussion of victims as a class, supported by references to literature and experience (such as an expert normally relies on) and does not extend to discussion and diagnosis of the witness in the case at hand [*People v. Coleman* (1989) 48 C3d 112, 255 CR 813 ; *People v. Roscoe* (1985) 168 CA3d 1093, 215 CR 45] .

[b] Child Sexual Abuse Accommodation Syndrome

The *Kelly-Frye* standard of reliability is applicable to testimony of an expert regarding the child sexual abuse accommodation syndrome. Expert testimony concerning "hysterical response syndrome," however, refers to a recognized psychological phenomenon and is therefore not subject to the *Kelly-Frye* rule [*People v. Sanchez* (1989) 208 CA3d 721, 256 CR 446] (introduction of victim's long-term hoarseness, which disappeared after she reported molestation, was proper)].

Evidence of the child sexual abuse accommodation syndrome is inadmissible to prove that child abuse occurred, but it may be used to aid the jury in understanding why a victim's behavior is not inconsistent with having been abused [*People v. Patino* (1994) 26 CA4th 1737, 32 CR2d 345 (admission does not violate due process); *People v. Bowker* (1988) 203 CA3d 385, 249 CR 886 (syndrome was developed not to prove abuse but to assist in understanding and treating abused children); *People v. Bergschneider* (1989) 211 CA3d 144, 259 CR 219 (although expert testimony was broader than allowable use of such testimony to eliminate misconceptions regarding victim's behavior, and no limiting instruction was submitted, it did not affect result)].

The prosecutor is not limited to introducing expert testimony aimed at eliminating misconceptions the jury might hold about how a child reacts to abuse on rebuttal if the particular misconceptions are targeted during the case-in-chief [*People v. Patino* (1994) 26 CA4th 1737, 32 CR2d 345 (admissible if issue raised in case-in-chief as to victim's credibility); *People v. Bergschneider* (1989) 211 CA3d 144, 259 CR 219 (during voir dire, jurors had apparently expressed skepticism regarding child's credibility, and defense counsel sought to exploit that skepticism during cross-examination); *People v. Sanchez* (1989) 208 CA3d 721, 256 CR 446] .

[c] Battered Women's Syndrome

In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects [*see Evid Code § 1107*].



Cross Reference:

Discussion of *Evid Code § 1107* and legal issues affecting admission of battered women's syndrome, see Ch. 19, Character, Habit, and Custom, 19.08.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of ChildrenGeneral OverviewCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultRapeGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect



36 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation Chapter 27 Demonstrative and Experimental Evidence Part B. Legal Guide

1-27 California Courtroom Evidence 27.11

27.11 Collection and Preservation of Evidence in Criminal Cases

[1] Prosecutor's Duty to Preserve Evidence

Once material evidence is collected, the prosecution has a duty to preserve it [*People v. Hogan* (1982) 31 C3d 815, 183 CR 817 ; *People v. Harris* (1985) 165 CA3d 324, 211 CR 493].

There is a due process duty to preserve evidence whenever there is a "reasonable possibility" that the evidence would have constituted "favorable evidence on the issue of guilt or innocence." Intentional suppression of any material evidence constitutes a violation of due process, regardless of the good or bad faith on the part of the State [*People v. Hitch* (1974) 12 C3d 641, 117 CR 9].

Although the effort in *Hitch* to define the duty imposed by the federal Constitution was acknowledged in *California v. Trombetta* (1984) 467 U.S. 479, 104 S Ct 2528, 81 L Ed2d 413], the high court formulated its own test describing the contours of the obligation. "Whatever duty the Constitution imposes on the states to preserve evidence that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." To satisfy this standard, evidence must both: (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

The California Supreme Court later concluded in *People v. Johnson* (1989) 47 C3d 1194, 255 CR 569 that *Hitch* had not survived *Trombetta* because it had been based on an interpretation of federal law that had been superseded by *Trombetta* and because the passage of the Truth-in-Evidence provision of Proposition 8, which added *article I, section 28, subdivision (d) to the California Constitution*, compelled such a result.

[2] Failure to Preserve Evidence

Unless a criminal defendant can show bad faith on the part of the police, the state's failure to preserve potentially useful evidence does not constitute a denial of due process of law [*Arizona v. Youngblood* (1988) 488 US 51, 109 S Ct 333, 102 L Ed2d 281]. Although pursuant to *Brady v. Maryland* (1963) 373 US 83, 83 S Ct 1194, 10 L Ed2d 215 due process makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence, a different result is required when "we deal with the failure of the State to preserve evidentiary material of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant." Requiring a defendant to show bad faith "both limits the extent of the police's obligation to

preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves, by their conduct, indicate that the evidence could form a basis for exonerating the defendant." The presence or absence of bad faith on the part of the police thus depends on the police's knowledge of the exculpatory value of the evidence at the time it is lost or destroyed.

There was no *Trombetta* violation where the exculpatory value of the evidence was not readily apparent [*Arizona v. Youngblood* (1988) 488 US 51, 109 S Ct 333, 102 L Ed2d 281 (failure of police to preserve semen sample in sexual assault case); *People v. Gonzales* (1989) 209 CA3d 1228, 257 CR 828 (officer's failure to preserve written notes he had taken at scene of burglary); *People v. Huston* (1989) 210 CA3d 192, 258 CR 393 (loss of defendant's alibi evidence contained in magazine confiscated by jail personnel); *People v. Martinez* (1989) 207 CA3d 1204, 255 CR 691 (police release of car involved in defendant's arrest for hit and run incident to tow company did not constitute bad faith where no effort had been made to conceal the car's whereabouts from defendant to prevent him from testing it for fingerprints and bloodstains)].

In summary, under post-*Trombetta* and post-*Arizona v. Youngblood* decisions, for a defendant to obtain sanctions for the loss of evidence, the defendant must show (1) that it possessed an exculpatory value that was apparent before it was destroyed; and (2) that the police acted in bad faith [*People v. Freeman* (1994) 8 C4th 450, 34 CR2d 558, 882 P2d 249; *People v. Webb* (1993) 6 C4th 494, 24 CR2d 779, 862 P2d 779].

Although the ruling in *Arizona v. Youngblood* does not directly apply to failure to *gather* potentially exculpatory evidence, its reasoning is equally applicable. Because, in the absence of bad faith, the police's failure to preserve evidence that is only potentially exculpatory does not violate due process, then a fortiori neither does the good faith failure to collect such evidence violate due process [*Miller v. Vasquez* (9th Cir 1989) 868 F.2d 1116 (failure of police to obtain assault victim's bloodstained jacket before victim washed it presented colorable bad faith claim)].



Cross Reference:

Discussion of duty to preserve evidence, see California Criminal Practice Guide, Ch. 83, Evidence, § 83.06 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Procedural Due Process General Overview Criminal Law & Procedure Discovery & Inspection Brady Materials Brady Claims Evidence Procedural Considerations Exclusion & Preservation by Prosecutor



37 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.syn

§ 28.syn Synopsis to Chapter 28: Expert Testimony

28.01 Work Product Rule and Discovery Parameters

[1] Levels of Protection Under Work Product Rule

[2] Discoverability of Expert Witness

28.02 Use of Videotaped Expert Depositions

28.03 Preparation of Expert as Witness in Deposition or Trial

28.04 Affirmative Testimony of Expert

28.05 Objections

[1] When to Object

[2] If Objection Is Overruled

[3] If Objection Is Sustained

28.06 Cross-Examination



38 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 28 Expert Testimony

1-28 California Courtroom Evidence Scope

Scope

Scope

This chapter discusses procedures for introducing and limiting expert witness testimony. First, the chapter covers working with and against expert witnesses and consultants during the discovery phase [see 28.01, 28.02]. Next, the chapter discusses expert witness preparation in deposition or trial [see 28.03, 28.04]. Finally, the chapter covers handling direct examination and cross examination of a witness during a trial [see 28.05, 28.06].

➡ Cross References:

Discussion of expert opinion testimony in the context of laying a foundation, see Imwinkelried et al., California Evidentiary Foundations, Ch. 8, Opinion Evidence (Matthew Bender).

Trial-oriented discussion of experts, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections.



39 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.01

28.01 Work Product Rule and Discovery Parameters

[1] Levels of Protection Under Work Product Rule

CCP § 2018.010 et seq. set forth the work product rule in discovery. Pursuant to these rules counsel is able to investigate all aspects of his or her case.

Notes or recorded statements of witnesses taken by a party's counsel are protected by the absolute work product privilege of *CCP § 2018.010 et seq.* because they would reveal counsel's "impressions, conclusions, opinions, or legal research or theories." However, a list of potential witnesses who submit to counsel their independently prepared statements does not constitute qualified work product. Furthermore, parties cannot shield independently prepared witness statements by having their employees submit such statements to the parties' attorney during the attorney's interviews with the employees [*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 CA4th 214, 54 CR2d 575 ; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 CA2d 527, 51 CR 511] .

The work product rule provides absolute protection for any writing that reflects an attorney's impressions, conclusions, opinions, legal research or theories [*CCP § 2018.030(a)*]. All other attorney work product materials are afforded qualified protection, subject to a counter-showing of unfair prejudice that will result in injustice to opposing counsel. On such a showing, discovery by opposing counsel, within limits, will be allowed [*CCP § 2018.030(b)*; *San Diego Professional Asso. v. Superior Court of San Diego County* (1962) 58 C2d 194, 23 CR 384, 373 P2d 448] .

 Cross Reference:

Discussion of work product protection, see *Matthew Bender Practice Guide: California Civil Discovery*, § 2.25 et seq.

[2] Discoverability of Expert Witness

The expert becomes subject to limited discovery when designated as a potential witness in accordance with *CCP § 2034.010 et seq.* At that time the expert's opinion and information on the matter are subject to wide-ranging scrutiny through deposition [*Shooker v. Superior Court* (2003) 111 CA4th 923, 4 CR3d 334] (party designated as expert trial witness does not waive attorney-client privilege until party produces privileged documents or testifies as expert); *Dow Chemical Co. v. Superior Court* (1969) 2 CA3d 1, 82 CR 288 ; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 CA2d 527, 51 CR 511] .

When the expert is originally hired as a consultant and then designated as a potential witness, all of the expert's work becomes discoverable [see *Brokopp v. Ford Motor Co.* (1977) 71 CA3d 841, 856, [139 CR 888, 897] (indicating that disclosure of an expert as a potential trial witness renders the entirety of his or her work on the case subject to discovery); but see *Scotsman Mfg. Co. v. Superior Court* (1966) 242 CA2d 527, 531, 51 CR 511] (opinions reached while in consulting capacity continued to enjoy work-product protection)].

Whether you are designating an expert as a potential witness or seeking discovery from an opposing expert, counsel should presume that the entire spectrum of the expert's activities since the date of retention is discoverable [*Brokopp v. Ford Motor Co.* (1977) 71 CA3d 841, 856, 139 CR 888, 897 ; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 CA2d 527, 51 CR 511] . Of course, opposing counsel has a right to learn the operative facts, but this does not include the right to obtain information which the hiring attorney or his client have imparted to the expert consultant. To do so would violate the work product rule [*Mack v. Superior Court* (1968) 259 CA2d 766 CR 280 ; *Kenney v. Superior Court* (1967) 255 CA2d 106, 63 CR 84], *acq. in result*, New History Cite.

Both *Mack* and *Kenney*, which on their face reveal possibly conflicting concepts, should be read carefully, and fully understood by counsel before the expert is retained.

Practice Tip:

In any major case the opposing experts should be identified and deposed within the preliminary limits of the law. In all cases, therefore, the retention of the expert should expressly state that his or her role will be as a consultant. In this way the expert's report can be complete and still be substantially protected, until or unless the expert is designated as a witness.



Cross Reference:

Discussion of expert witness information, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 13, Exchanging Expert Witness Information.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Counsel
Right to Counsel
General Overview
Evidence
Privileges
Attorney-Client
Privilege
Waiver
Evidence
Testimony
General Overview



40 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.02

28.02 Use of Videotaped Expert Depositions

When the advantages of videotaping outweighs the cost and advance preparation required, counsel should consider having the expert's deposition videotaped. The introduction of a videotaped deposition of a treating physician or expert witness is admissible at the time of trial even if the witness is available, if:

- Notice of the intention to use the deposition at trial was provided in accordance with *CCP* § 2025.620(d); and
- The court, together with all proper parties, are notified of the portions of deposition testimony to be offered in sufficient time for objections to be interposed and entertained by the trial judge in accordance with *CCP* § 2025.340(m).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsDepositionsEvidenceDemonstrative EvidenceVisual
FormatsEvidenceTestimonyExpertsAdmissibility



41 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.03

28.03 Preparation of Expert as Witness in Deposition or Trial

For specific legal issues involved with admitting in evidence the expert's underlying process or theory see Ch. 28, Demonstrative and Experimental Evidence, 28.09, 28.10. The following are steps counsel should consider in preparing an expert witness for trial:

- A full and complete exchange between counsel and expert and full knowledge in both of the factual and opinion possibilities of the case are essential.
- The area of testimony should then be clearly isolated and gone over. This can take hours or even days in a complex case. Working together, a hypothetical question should be drafted. It is essential in a case of any complexity that this be in writing. This serves several functions:
 - Counsel can work to its complete admission in evidence before calling the expert;
 - The expert may have the chance to "live" with the facts; be sure all necessary facts are present. It is generally felt that the narrower the factual premise, the tighter the opinion, and the less there is to attack. Unless it makes good listening to recount all the facts of your case, try to limit it to those essential to the opinion;
 - Counsel can have the confidence of a prepared document for the presentation.
- Work over the factual basis for the opinion carefully. Cross-check it with the facts; look for holes. If a series of opinions are called for, reduce their sequence and content to writing. Build to a strong conclusion, not away from it, and be sure all the essentials of your case are covered.
- When adverse aspects are present, if possible, frame your inquiry away from them altogether, or at least to the extent possible. Limit the possibilities of cross-examination.
- The preparation of the expert can take ten times as long as the time in court. No other aspect of a lawsuit requires more preparation. Try to anticipate cross-examination. If opposing counsel is likely to rehypothetize the facts in his or her own favor, study this possibility. Almost always the factual premise will change the opinion of an honest expert. The key is to find the turning point and prepare your witness

for it. What fact or facts change opinion A to opinion B? Determine how to handle it.

- Preparation for testimony for trial or deposition of an expert should include information on opposing counsel. Counsel's manners, style, background, expertise in the field are vitally important. Will counsel play dumb, cat and mouse, try to force down the expert?

- The scope of cross-examination allowed on deposition varies with the case and circumstances. The rulings of the cases cited earlier in this section should be clearly in the mind of counsel when his or her expert is being deposed. Unless you have made a considered judgment to the contrary, hold the deposing attorney closely to those rules. *Evid Code § 730 et seq.* on experts appointed by the court and *Evid Code § 810 et seq.* on condemnation proceedings are special subjects not covered herein.



Cross References:

Discussion of *Evid Code § 730*, see Ch. 16, Competency, Oath, Confrontation, Experts, Interpreters, Examination and Hypnosis, 16.14.

Discussion of *Evid Code § 810*, see Ch. 17, Nonexpert and Expert Opinion, 17.07.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Eminent Domain Proceedings Experts Evidence Demonstrative

Evidence Admissibility Evidence Testimony Examination Cross-Examination General Overview



42 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.04

28.04 Affirmative Testimony of Expert

Before calling the expert witness to testify, consider the following:

- Before the witness's appearance, check over your hypothetical question to make sure of the direct evidence or evidence necessary for essential inferences before the court.

- Call witness to stand.

- Carefully and deliberately lay foundation by qualifying the witness as an expert in the fields necessary.

- Occupation presently;

- Academic background;

- Occupational history in detail, covering experience in each and related testing or training;

- Licenses or special honors or group associations--explain;

- Publications, if any;

- Any teaching experience; and

- Other special familiarity or experience with the subject matter, including special studies for private or governmental entities.

➡ **Cross Reference:**

Discussion of *Evid Code § 801*, see Ch. 17, Nonexpert and Expert Opinion, 17.02.

For discussion of *Evid Code § 720*, see Ch. 16, Competency, Oath, Confrontation, Experts, Interpreters, Examination and Hypnosis, 16.10.

Ask the witness to relate "without modesty" these facts. Take the sting out of talking about herself or himself. Many counsel ask if the witness has testified before and how many times. This seems of questionable value. The witness's qualifications must, indeed, appear marginal for this to be of value. If the expert has testified frequently, his or her status as a professional expert becomes apparent.

- Proceed to hiring for this case, the perceptual witness experience of the expert. What physical evidence did he see, if he went to the scene of an accident, made tests of parts removed therefrom; develop the factual background for his testimony [*see Evid Code § 801*].

- If opinions are to be drawn from the expert's perceptual experience or tests, develop these carefully:

- "From your tests and examination of the evidence, and based on your skill, experience, training and education, do you have an opinion on ... ?"

- If the opinion is based partially on tests and perceptual knowledge, and partially on a hypothetical set of facts, pose the question:

- "Mr./Ms. Brain, I am now going to ask you to assume certain facts, will you please assume that ... etc. now assuming the above stated facts and further based upon your tests and examinations, and on your skill, experience, training and education, do you have an opinion on ... ?"

- Naturally, if the question is predicated entirely on a hypothetical statement of facts, the query concerning an opinion will follow the statement of hypothetical facts.

- After an affirmative answer, ask the witness for his or her opinion:

"What is that opinion?"



Cross Reference:

Discussion of expert opinion testimony, see California Trial Guide, Unit 60, Opinion Testimony, Pt. C, Expert Opinion Testimony (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
 EvidenceCompetencyInterpretersEvidenceTestimonyExpertsGeneral Overview



43 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.05

28.05 Objections

[1] When to Object

When the expert is asked to give his or her opinion, opposing counsel may object at this time. The opposing counsel may attack the witness's expertise, the hypothetical facts, or that the opinion called for does not requiring an expert [*Evid Code § 801*].

Several points to remember on objecting to expert opinions:

- Wait until the opinion is asked for before posing the objection.
- Be prepared to state your grounds clearly.
- Go to the bench if argument is necessary.
- Take the witness on voir dire only; save your cross-examination until the proper time.
- If you believe the witness will ramble beyond the question, now is the time to start alerting the court by seeking by motion, a restriction, or cautionary instruction.

The usual form of procedure is to pose the objection and possibly approach the bench for argument and a ruling. The court may rule immediately, of course, without argument. As opposing counsel, if the court overrules the objection, and if counsel feels it is possible to block the testimony, ask at this time, before the opinion is given, to take the witness on voir dire. This usually applies to the foundation for the witness's expertise or, in the court's discretion, to the matter on which the opinion is based [*Evid Code §§ 802, 803*].

Evid Code § 802 gives the expert the right to state an opinion and the reasons for it, unless the court requires the expert to "be first examined concerning the matter upon which his opinion is based." Seldom does voir dire go to the hypothetical question. At the conclusion of voir dire opposing counsel renews the objection and, if overruled again, the answer will be given.

➤ Cross Reference:

Discussion of objecting to expert opinion testimony, see *California Trial Guide, Unit 60, Opinion Testimony, § 60.03 et seq.* (Matthew Bender).

[2] If Objection Is Overruled

Offering counsel, after the objection is overruled, will then merely restate:

"What is that opinion?"

If the witness cannot recall the question by now, ask the court to have the reporter re-read the question only, not the hypothetical, unless the witness wishes that as well. Never try to restate the question yourself; the objection procedure will start all over.

[3] If Objection Is Sustained

If the objection is sustained, consider the following:

- Determine the reason that the objection is sustained.
- If the objection is factual and you have done your homework, you will know whether to delete or correct the factual premise without damage.
- If the failure is with the expert's qualification, a subject left to the court's discretion, your problem may be tougher. Using the devices and procedures suggested above, go as far as you can without offense to the court, or boredom to the jury. Frequently, a change in wording of the question will correct the flaw; call for a different type of expertise; give the court a chance to relent from a too hasty ruling. Try it. Try several.

In the extreme you may have to request a recess for a conference, or to put on other testimony. But if it is critical, and if you reasonably feel you can establish the fact, stay with it as long as you can. Here, persistence can pay; a jury respects a fighter, even an inexperienced one.

Continue the examination of the expert, as follows:

- Assuming the opinion is properly received request the witness to state the reasons for his or her opinion. *Evid Code § 802* should be studied for details on this.
- If you feel it is necessary, question the expert on the matter on which the opinion is based, in addition to the reasons. Certain matters are precluded by law, and both counsel should be aware of this.

Cross Reference:

For discussion of *Evid Code § 801 et seq.*, see Ch. 17, Nonexpert and Expert Opinion, 17.02 et seq.

- Subsequent opinion questions can build on the first by incorporating the earlier facts by reference either adding new facts or matters to be considered, or merely posing a new question on the former set of facts. Once past the initial hurdle, the door is usually open unless you stray from the area of expertise.

Within the discretion of the court, it is possible to restate your facts over and over if they are not too lengthy. It becomes almost hypnotic to have your version of the facts repeated over and over. However, most courts don't like it.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Juries & Jurors
Voor Dire
Questions to Venire Panel
Criminal Law & Procedure
Jury Instructions
Cautionary Instructions
Evidence
Testimony
General Overview



44 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 28 Expert Testimony

1-28 California Courtroom Evidence 28.06

28.06 Cross-Examination

The key to cross-examination is preparation in all phases. If time allows, confer with your own expert before cross-examination. Have your expert listen to the opposing expert, make suggestions, and point out the weak spots. But this alone will not achieve the result. Counsel must ask the questions and must fully understand the subject so that he will not be thrown off subject by the first parry [*see Evid Code §§ 720, 721, 722, 802, 803, 804*].

Defending counsel can either:

- Attack the factual premise. This can be done by reframing the hypothetical question on a basis more favorable to the cross-examiner's position. Another means is to take key facts and work them over; emphasize the reliance on what counsel believes are untenable facts. Try to force the expert to declare for key facts from the group. It may be as effective to probe what facts the expert did not feel were important.
- Attack the reasons given from a scientific or expert standpoint; this eventually works to the material relied on and requires considerable expertise on the part of counsel. If source material were considered, or relied on, consider the advantage of asking they be brought to court. This is within court's discretion. Even an author of opinion relied on by the expert can, in turn, be called and examined as if under cross-examination [*Evid Code § 804*].

If it can be developed that the matter relied on is not the proper basis for such an opinion, a motion to strike the testimony should be made. In that event, the witness can consider the question without the improper matter [*Evid Code § 804*].

Practice Tip:

Read *Evid Code §§ 803 and 804* carefully for details on this point.

- Bias can be effectively delved into in some cases. Bear in mind that all cross-examination at trial is a matter of feel for the counsel. The type of witness, any tendency to be loquacious or argumentative, will determine in many cases the most effective approach. Tragically, it is frequently not the qualification or real expertise, but the impression left by the expert, that is important.

 Cross Reference:

Discussion of cross-examination of experts, see *California Trial Guide, Unit 70, Cross-Examination*, § 70.32 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

EvidenceTestimonyExpertsCredibilityImpeachment



45 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation

Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.syn

§ 29.syn Synopsis to Chapter 29: Motions in Limine

29.01 Purpose of Motion in Limine and Points to Consider

[1] Purpose of Motions in Limine

[2] Advantages to Motions in Limine

[3] Disadvantages to Motions in Limine

29.02 Timing of the Motion in Limine

[1] Timing and Form of Motion

[2] Counsel Must Consult Local Rules

29.03 Effects of Motion in Limine Ruling

29.04 Procedure

[1] When Motion Was Not Made in Advance

[2] Offer of Proof--Evidence Out of Presence of Jury

29.05 When Ruling Was Violated

29.06 Subject Matter of Motions in Limine

29.07 Form of Motion in Limine



46 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence Scope

Scope

Scope

This chapter discusses factors to consider when filing a motion in limine. It discusses the advantages and disadvantages of filing the motion as well as its timing [see 29.01, 29.02]. The chapter also discusses the effects of a ruling on a motion [see 29.03] and contains strategies if the motion in limine cannot be made in advance of trial [see 29.04]. Finally, the chapter lists potential subjects of motions in limine [see 29.06] and contains a sample superior court form [see 29.07].



Cross References:

Discussion of motions in limine, see Matthew Bender(R) Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections).

Foundation-related discussion, see Imwinkelried et al., California Evidentiary Foundations, Ch. 2, Objections and Offers of Proof (Matthew Bender).



47 of 53 DOCUMENTS

California Courtroom Evidence

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 PART II. Procedures for Introduction and Limitation
 Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.01

29.01 Purpose of Motion in Limine and Points to Consider**[1] Purpose of Motions in Limine**

The term "motion in limine" derives from the common-law meaning "at the threshold." It has considerable value to the careful practitioner and is a matter directed to the court either before any evidence is received or at least before the evidence under discussion is offered. It is not a general rule of exclusion, but a motion to exclude highly prejudicial evidence on specified grounds. The purpose of the motion is to obtain an advance ruling excluding the evidence before any mention of the subject is made before the jury. Many rulings will be discretionary and depend, not only on the evidence at that point, but also on the attitude of the particular ruling court [*Evid Code* § 352]. There are occasions when evidence is found admissible despite a motion in limine. The motion then assists counsel in allowing before the jury only those matters of evidence that have been properly ruled on by the court.

 Cross References:

Detailed discussion of motions in limine, see *California Trial Guide, Unit 4, Pretrial Evidentiary Motions*, § 4.30 (Matthew Bender); *California Forms of Pleading and Practice, Ch. 373, Motions in Limine*, § 373.12 (Matthew Bender).

A motion in limine, which is a commonly used tool brought at the beginning of trial when evidentiary issues are anticipated by the parties, is designed to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. It serves the same function as a "motion to exclude" under *Evid Code* § 353(a) by allowing the trial court to rule on a specific objection to particular evidence in advance of its introduction [*Schweitzer v. Westminster Investments, Inc.* (2007) 157 CA4th 1195, 69 CR3d 472 (granting motion in limine to exclude evidence relating to claim not properly pleaded)].

[2] Advantages to Motions in Limine

The advantage of a motion in limine is to avoid the futile attempt to "unring the bell" as would be necessary in the event a motion to strike were granted in proceedings before a jury [see *Hyatt v. Sierra Boat Co.* (1978) 79 CA3d 325, 327, 145 CR 47, 54] . The court has authority under *Evid Code* §§ 350 and 352 (relevance and discretion of the court) and *Evid Code* §§ 402, 403, 404, and 405 (determination of foundational and other preliminary facts). Many motions in this area are directed to the court's discretion to exclude matters of evidence when, although conceivably relevant, the probative value is substantially outweighed by the likelihood that it will cause undue prejudice, confuse the issue,

mislead the jury, or simply take too much time. The court likewise has the discretion to apply rules of exclusion to areas of testimony until it has an opportunity to make a decision based on all of the available testimony and the law.

[3] Disadvantages to Motions in Limine

In some cases the mere fact the motion is made will alert opposing counsel to this problem area, allowing him or her to undertake additional investigation during the trial to make sure his or her proof is in order on the point. It could conceivably also alert opposing counsel to a possible area of proof that had not occurred to him or her.

Practice Tip:

For these several reasons, moving counsel should gauge the adversary and the prejudicial nature of the evidence. A motion should be made only when counsel deems it necessary to protect the integrity of his lawsuit. It is a misuse of a motion in limine to attempt to compel a witness or a party to conform his or her trial testimony to a preconceived factual scenerio based on testimony given during pretrial discovery [*Kelly v. New West Federal Savings* (1996) 49 CA4th 659, 672, 56 CR2d 803] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceRelevanceConfusion, Prejudice & Waste of Time



48 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.02

29.02 Timing of the Motion in Limine

[1] Timing and Form of Motion

The time to make a motion in limine is any time before the evidence is actually offered or, preferably, even alluded to in the proceedings. As a practical matter, the earlier in the proceedings the better.

If possible, counsel should *always* view the adversary's potential evidence in advance of trial and make all appropriate motions in limine before the jury is even placed in the box. Thereafter if matters develop, counsel should, at the earliest recess, cover them by appropriate motion. These would, of course, be made orally.

All such motions should be properly placed in the record as a precaution against abuse or misunderstanding. Trial counsel should make every effort to submit a motion in limine in writing [see 29.07 (form of motion)]. If you are dealing with the major evidentiary point of a lawsuit, it deserves this dignity. Besides presenting a more impressive showing to the court, the written motion also causes counsel to exercise that extra effort to be sure of his citation. If time does not allow, the motion can be made orally, but be sure of your law.

➤ Cross References:

Detailed discussion of motions in limine, see *California Trial Guide, Unit 4, Pretrial Evidentiary Motions*, § 4.30 (Matthew Bender).

[2] Counsel Must Consult Local Rules

Counsel should always consult local rules to avoid pitfalls regarding pretrial deadlines for bringing motions in limine. For example, San Francisco Superior Court Rules now provide that no motions in limine will be heard by the trial judge unless they are in writing and copies are mailed to all parties at least ten days before the date set for trial or are hand delivered at least five days before trial [San Francisco Super Ct Rules, Rule 2.8(B)]. Moreover, under the Trial Court Delay Reduction Act of 1986 [Gov Code §§ 68600-68615], "fast track" courts have established various deadlines. San Diego, for example, provides for a pretrial "issue conference" before the judge to whom the case is assigned for trial in which all matters necessary to be resolved before trial will be heard. All motions in limine must be filed and personally served at least three days before the conference [San Diego Super Ct Rules, Rule 10.11]. Los Angeles provides for a final status conference not more than 15 days before trial and requires that parties file briefs on motions in limine with timely notice so as to be heard at the final conference [Los Angeles Super Ct Rules, Rule 1106.5].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersMotions in LimineGeneral Overview



49 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.03

29.03 Effects of Motion in Limine Ruling

A ruling on a motion in limine can have the following effects:

- *Evidence is excluded.* If the rule of exclusion is simple, the court may order a total ruling of exclusion as well as caution counsel not to take the prohibited action, such as addressing a party by her new married name, or make any reference to it [*Wood v. Alves Service Transportation Inc. (1961) 191 CA2d 723, 13 CR 114* (remarriage of widow in wrongful death action); *Benwell v. Dean (1967) 249 CA2d 345, 57 CR 394*, *57 CR 394*; *Cherrigan v. City & County. of San Francisco (1968) 262 CA2d 643, 69 CR 42*] .

- *Informal discussion and preliminary ruling.* Less clear-cut situations may result in an informal discussion and preliminary ruling to avoid reference to the subject of the motion until a final ruling is made at the appropriate time in the trial. Frequently the admissibility will depend on the status of other nonprejudicial testimony [*Evid Code § 402*]. The moving party should, however, go as far as possible in the preliminary discussion to apprise the court of the problem and obtain an absolute rule of exclusion and silence in front of the jury until the matter is decided if the court will so rule.

- *Eventual disposal of lawsuit.* Frequently a properly prepared and resolved matter on a motion in limine can dispose of a lawsuit. Every counsel knows the number of cases he or she must tentatively evaluate until the court rules on a key question of law or fact. Able courts have observed disposing of a series of lengthy court trials over the period of a few hours by the simple process of cutting through to the key point of law or fact, requesting research when necessary, and after preliminary offers of proof, giving tentative or even final rulings. Settlements in jury trials as well are not an infrequent result of early disposition of the critical evidentiary issue.



50 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.04

29.04 Procedure

[1] When Motion Was Not Made in Advance

There are times when a prejudicial subject develops without any advance motion in limine. In those cases, counsel should immediately ask for proceedings out of the presence of the jury and at that time make the motion in limine.

[2] Offer of Proof--Evidence Out of Presence of Jury

Frequently the final decision will call for either an offer of proof or a taking of evidence out of the presence of the jury [*Evid Code* § 402]. From the point of view of the party resisting the motion, the offer of proof is frequently most effective. Many counsel are not sure or are not able to state facts with the particularity necessary to achieve their goal.

On the other hand, from the standpoint of the offering party, good practice would call for a request for an opportunity to review the testimony with the witness before offering it. This not only avoids a frequently embarrassing overstatement but often develops facts not hitherto known by counsel. Resisting counsel, may, if the offer of proof is found adequate, request formal testimony out of the jury's presence if he or she feels counsel has overstated or that counsel can possibly change the result by taking the witness's voir dire.

► Cross References:

Detailed discussion of procedure on motion in limine, see *California Forms of Pleading and Practice*, Ch. 373, *Motions in Limine*, § 373.16 (Matthew Bender).

Discussion of motion in limine in relation to pretrial conference, see *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 23, *Case Management*, 23.51 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Pretrial Matters
General Overview
Evidence
Procedural Considerations
Objections & Offers of Proof
Offers of Proof
Evidence
Procedural Considerations
Objections & Offers of Proof
Timeliness



51 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.05

29.05 When Ruling Was Violated

Unfortunately, opposing counsel on either side have been known to attempt to circumvent rulings on these motions. The usual guise is "innocent misunderstanding." It is for this reason the ruling should be clear and recorded. To hold counsel in contempt for violating an in limine order, the order must be in writing or recorded in the minutes [*Ketscher v. Superior Court* (1970) 9 CA3d 601, 604, 88 CR 357, 359 ; see *Charbonneau v. Superior Court* (1974) 42 CA3d 505, 510-511, 116 CR 153, 157] .

When circumvention occurs, in addition to citing the counsel for misconduct, counsel must determine whether to make a motion for mistrial, request an admonition or quietly take it up with the court at the next recess, or all three [see *Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 793-795, 174 CR 348] . In any event, counsel should be forewarned that in civil cases, failure to make a recorded motion for mistrial (out of the presence of the jury) will amount to waiver of the defect on appeal even though the trial court might still consider the matter on a motion for new trial [see *Dincau v. Tamayose* (1982) 131 CA3d 780, 794, 182 CR 855] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureCounselGeneral OverviewCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief
From JudgmentMotions for New Trials



52 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.06

29.06 Subject Matter of Motions in Limine

The subject matter of motions in limine is extremely varied, including:

- Collateral source rulings.
- Subsequent repairs.
- Other accident or lack of other accidents.
- Criminal record of a party short of impeachment quality.
- Applicability of disputed statutes.
- Subsequent marriage or possibility of remarriage in wrongful death of spouse.
- Contested admission of party.
- Photographs, torn clothing, other physical evidence.
- Engineering tests or studies.
- Trial counsel, absent a motion on limine, will frequently use the disputed evidence in the opening statement, and it cannot be urged too strongly that motions must be made at the earliest possible moment.

An example of how such a motion may be employed is demonstrated in *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173, 465 P2d 61, dealing with the collateral source rule [see also *Garfield v. Russell* (1967) 251 CA2d 275, 59 CR 379 (defense was reversed for a violation of an order of silence pending ruling by the court)]. This case deals with the collateral source rule.



Cross Reference:

Examples of application of motion in limine, see *California Forms of Pleading and Practice*, Ch. 373, *Motions in Limine*, § 373.14 (Matthew Bender).



53 of 53 DOCUMENTS

California Courtroom Evidence

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PART II. Procedures for Introduction and Limitation
Chapter 29 Motions in Limine

1-29 California Courtroom Evidence 29.07

29.07 Form of Motion in Limine

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____	)	
Plaintiff, vs. _____	)	
FIRST DOE through	)	NO. _____
FIFTIETH DOE, inclusive,	)	MOTION IN LIMINE
Defendants	)	
	)	
	)	

COMES NOW _____ [plaintiff or defendants] in the entitled and numbered cause and before trial and the selection of the jury, moves the Court in limine to instruct the _____ [defendants or plaintiff], and all of its counsel as set forth below on the following grounds:

1. Since it is immaterial to this suit whether or not: _____ [specify, e.g.,

(a) Plaintiff received any compensation from a collateral source as to the payment of his medical and hospital expenses, the defendants are precluded from using any pleading, testimony, remarks, questions, or argument which might inform the jury of such facts;

(b) _____ (Any other irrelevant facts).

2. Since the comment on such facts or the attempt to introduce of testimony or evidence would be highly improper and prejudicial to plaintiff even if the court were to sustain an objection thereto and properly instruct the jury not to consider such facts, plaintiff requests that the Court order defendants to abstain from any reference, comment, or evidence, either by way of documents or testimony, as to the source of any payments for these expenses without first obtaining permission of the Court outside the presence and hearing of the jury. The Court is further requested to order defendants'

counsel to so inform the witness not to make any such reference to collateral source payments and to strictly follow these same instructions].

DATED: _____

Respectfully submitted,

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____

[Plaintiff or Defendants]

MEMORANDUM OF POINTS AND AUTHORITIES [For Movant]

Point I: A party may attempt to preclude or limit the introduction of evidence by presenting a motion in limine to the trial court in chambers.

(Suggested Authorities:)

Evid Code §§ 350, 352:

Hrnjak v. Graymar Inc. (1971) 4 C3d 725, 94 CR 623, 484 P2d 599.

Acosta v. So. Cal. Rapid Transit Dist. (1970) 2 C3d 19, 84 CR 184, 465 P2d 72.

Helfend v. So. Cal. Rapid Transit Dist. (1970) 2 C3d 1, 84 CR 173, 465 P2d 61.

Garfield v. Russell (1967) 251 CA2d 275, 59 CR 379.

Pierce v. J. C. Penney Co. (1959) 167 CA2d 3, 334 P2d 117.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Trials Jury Trials Jury Instructions Objections to Instructions Civil Procedure Trials Jury Trials Jury Instructions Requests for Instructions Civil Procedure Trials Jury Trials Right to Jury Trial