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Expert Series

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Simons California Evidence Manual

Justice Mark B. Simons

Chapter

1. Relevant Evidence

A. General Principles Of Relevancy

§ 1:1. Evidence defined—General definition**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 🔑338, 667West's Key Number Digest, [Evidence](#) 🔑99West's Key Number Digest, [Trial](#) 🔑43**Legal Encyclopedias**[C.J.S., Criminal Law §§ 915, 972 to 982, 985, 990, 997, 1127 to 1128, 1569 to 1571, 1624 to 1625, 1636, 1638 to 1639](#)[C.J.S., Evidence §§ 2, 197 to 198, 204, 206](#)[C.J.S., Trial § 162](#)

[Evidence Code § 140](#) defines evidence as “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.” The Comment notes “ ‘Evidence’ is defined broadly to include the testimony of witnesses, 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.”

The definition of “evidence” includes anything offered in evidence whether or not it is technically inadmissible and whether or not it is received. For example, Division 10 (commencing with [Evidence Code § 1200](#)) uses “evidence” to refer to hearsay that may be excluded as inadmissible but that may be admitted if no proper objection is made. Thus, when inadmissible hearsay or opinion testimony is admitted without objection, this definition makes it clear that it constitutes evidence that may be considered by the trier of fact. ([Evidence Code § 140](#), Comment.) On appeal, such proof may be considered when evaluating a claim that insufficient evidence sup-

ports the verdict. ([People v. Panah](#), 35 Cal. 4th 395, 476, 25 Cal. Rptr. 3d 672, 107 P.3d 790 (2005).) Unsworn testimony, which is normally inadmissible, becomes evidence that can support a verdict if no objection is made. (Compare [In re Heather H.](#), 200 Cal. App. 3d 91, 95, 246 Cal. Rptr. 38 (6th Dist. 1988).)

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§ 1:2. Evidence defined—Trier of fact's observations of party or witness

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑667, 404.45, 351

West's Key Number Digest, [Trial](#) 🔑43

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[C.J.S., Criminal Law §§ 915, 1010 to 1017, 1143 to 1144, 1151 to 1152, 1569 to 1571, 1624 to 1625, 1636, 1638 to 1639](#)

[C.J.S., Trial § 162](#)

Observations about a party or witness made by the trier of fact may be evidence regardless of whether or not the person testifies. If relevant, observations of a criminal defendant's appearance are evidence. Thus a jury can base its decision that a defendant is an adult by viewing a defendant. ([People v. Montalvo](#), 4 Cal. 3d 328, 335, 93 Cal. Rptr. 581, 482 P.2d 205 (1971); [People v. Castaneda](#), 31 Cal. App. 4th 197, 202–204, 36 Cal. Rptr. 2d 844 (4th Dist. 1994)). To decide if the victim of a crime is over 65, pursuant to [Penal Code § 667.9](#), a jury may rely on its observation of the victim at trial. ([People v. Smith](#), 13 Cal. App. 4th 1182, 1190, 16 Cal. Rptr. 2d 820 (4th Dist. 1993).) The jury may compare the defendant's appearance to the witness's description of the perpetrator. A defendant may be permitted to challenge an eyewitness identification by showing the jury some unusual physical trait unobserved by the witness. Such a “showing” is nontestimonial and does not permit cross-examination. ([People v. Perez](#), 216 Cal. App. 3d 1346, 1350–1351, 265 Cal. Rptr. 400 (2d Dist. 1989).) To further support an identification, the prosecutor can require the defendant to show some unusual trait that the witness did recall. (Cf. [People v. Perez](#), 216 Cal. App. 3d 1346, 1351, 265 Cal. Rptr. 400 (2d Dist. 1989).) In at least one case, the victim was permitted to appear before the jury as an “exhibit” and answer questions, unsworn, so that the jury could determine if she was “incapable ‘because of mental disease, defect or disorder ... of giving consent [to sexual intercourse], and that is known or reasonably known or should be known to the person committing the act.’ ” ([People v. Morgan](#), 191 Cal. App. 3d 29, 38, 236 Cal. Rptr. 186 (5th Dist. 1987).)

Courts generally disapprove of treating a defendant's courtroom conduct as evidence. In *People v. Garcia*, the defendant was observed to jeer or make facial motions of jest when a witness testified. The trial judge's admonition to the jurors to disregard this behavior because it did not constitute “legal evidence” was approved. (*People v. Garcia*, 160 Cal. App. 3d 82, 91, 206 Cal. Rptr. 468 (1st Dist. 1984).)

There are two exceptions to the rule that observations of the defendant's conduct are not evidence. First, in competency proceedings under [Penal Code §§ 1367 to 1368](#), when the jury must decide if the defendant is unable either to understand the nature of the criminal proceedings or to assist counsel, “how the defendant behaves with her [or his] attorney and with the court is evidence objectively relevant to the disputed issue at trial.” (*People v. Prince*, 203 Cal. App. 3d 848, 855–856, 250 Cal. Rptr. 154 (6th Dist. 1988).) The second exception occurs when the defendant's conduct can be reasonably construed as a threat against a particular witness, which is relevant as indicating a consciousness of guilt. (*People v. Foster*, 201 Cal. App. 3d 20, 25, 246 Cal. Rptr. 855 (2d Dist. 1988).)

It will sometimes be difficult for the court to distinguish conduct that fits under the *Garcia* rule from that which is covered by the *Foster* exception. To avoid verdicts improperly based on the conclusion that the defendant is a person of poor character, in close cases, courts should direct jurors to disregard the conduct. (*People v. Garcia*, 160 Cal. App. 3d 82, 91, 206 Cal. Rptr. 468 (1st Dist. 1984); *People v. Foster*, 201 Cal. App. 3d 20, 246 Cal. Rptr. 855 (2d Dist. 1988).)

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§ 1:3. Evidence defined—Jurors' answers during voir dire

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West's Key Number Digest, [Criminal Law](#) 🔑712

West's Key Number Digest, [Trial](#) 🔑113

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[C.J.S., Criminal Law §§ 1713 to 1720, 1729, 2128 to 2130](#)

[C.J.S., Trial §§ 136 to 139, 262, 293 to 296, 298 to 315, 317 to 323](#)

Answers given by prospective jurors during voir dire are not evidence and cannot be referred to in argument. ([People v. Pitts](#), 223 Cal. App. 3d 606, 704, 273 Cal. Rptr. 757 (5th Dist. 1990).) Aside from stipulations, the unsworn statements of counsel do not constitute evidence. ([Estate of Nicholas](#), 177 Cal. App. 3d 1071, 1090, 223 Cal. Rptr. 410 (3d Dist. 1986).)

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§ 1:4. Relevant evidence defined—Relation to issue in dispute

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West's Key Number Digest, [Criminal Law](#) 🔑338

West's Key Number Digest, [Evidence](#) 🔑99

Legal Encyclopedias

[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

[C.J.S., Evidence §§ 2, 197 to 198, 204, 206](#)

[Evidence Code § 210](#) defines relevant evidence as “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.” The Comment provides that 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.” Thus, to be relevant, evidence must have some probative value; it must have a tendency in reason to prove or disprove a fact, and the fact proved or disproved must be *in dispute and of consequence* to the determination of the action.

California defines relevance more narrowly than the Federal Rules of Evidence. [Federal Rules of Evidence, rule 401](#) defines relevant evidence as having “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Both jurisdictions require that the fact be “of consequence”; only California requires that it also be a fact “in dispute.” (See Advisory Committee's Notes on [Federal Rules of Evidence, rule 401, 28 USCA.](#)) While an offer to stipulate to a fact *may* remove it from dispute and end its relevance in California (see [§ 1:6](#)) such an offer will rarely have that effect in a federal court. (See [Old Chief v. U.S.](#), 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).)

Probative value is a question of logic, whereas determining what facts are in dispute requires consideration of the pleadings, the rules in pleading, and the substantive law relating to the particular kind of case. (Witkin, *California Evidence* (3d ed.) § 286.) For an additional discussion of probative value, see § 1:28. Perhaps the best judicial statement defining relevance was made in *People v. Warner*, 270 Cal. App. 2d 900, 907, 76 Cal. Rptr. 160 (4th Dist. 1969) (citations in the text are omitted):

There is no precise and universal test by which relevancy may be determined. The general test of relevancy in a criminal case is whether the evidence “tends logically, naturally, and by reasonable inference to establish any fact material for the People or to overcome any material matter sought to be proved by the defense” Evidence tends “in reason” to prove a fact when “the evidence offered renders the desired inference more probable than it would be without the evidence.”

“Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.” (*People v. Slocum*, 52 Cal. App. 3d 867, 891, 125 Cal. Rptr. 442 (4th Dist. 1975).) Thus, the prosecutor may introduce evidence that the defendant was found in possession of an article possessed by the perpetrator at the time of the crime, even though the item is a common one possessed by many. (*People v. Freeman*, 8 Cal. 4th 450, 490–492, 34 Cal. Rptr. 2d 558, 882 P.2d 249 (1994) (white plastic garbage bag).) However, in *People v. Archer* the court found that evidence the defendant, who was charged in a homicide committed with a knife, possessed many knives was irrelevant since the apparent murder weapon “was not shown to be unique or difficult to acquire ‘Evidence of a weapon not used in the crime charged against a defendant leads logically only to an inference that the defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant.’ [Citation]” (*People v. Archer*, 82 Cal. App. 4th 1380, 1392–1393, 99 Cal. Rptr. 2d 230 (2d Dist. 2000).) (Emphasis in original.) *Archer* also held that several videotapes, books and catalogues seized from the defendant's home (for example, “Get Even and Make Them Pay”) were irrelevant. (At 1394.) But see *People v. Farnam*, 28 Cal. 4th 107, 156, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (2002), cert. denied, 537 U.S. 1124, 123 S. Ct. 861, 154 L. Ed. 2d 806 (2003) (“Evidence that defendant possessed a knife two months after the ... crimes, coupled with the evidence that the perpetrator ... used a sharp instrument, consistent with defendant's knife, to slit a screen door and sever two telephone cords ... tended to establish that defendant was the perpetrator.”) As the Supreme Court held in *People v. Cox*, 30 Cal. 4th 916, 956, 135 Cal. Rptr. 2d 272, 70 P.3d 277 (2003), cert. denied, 540 U.S. 1051, 124 S. Ct. 808, 157 L. Ed. 2d 702 (2003), “When weapons are otherwise relevant to the crime's commission but are not the actual murder weapon, they may still be admissible. [Citations.]” In *Cox*, the court approved admission of evidence that the defendant possessed certain firearms, though their link to the charged homicides seemed somewhat speculative. The guns were “possible murder weapons” (when the cause of death of the victims was unknown) or “weapons that could have been used to coerce the victims into defendant's car” (though no one so testified). (*Cox*, 30 Cal. 4th at 957. See *People v. Gunder*, 151 Cal. App. 4th 412, 416, 59 Cal. Rptr. 3d 817 (3d Dist. 2007) [Proof defendant possessed a different firearm on two different occasions shortly before the charged shooting is relevant to refute defendant's claim police planted the firearm found in his possession.]])

In *People v. Horning*, 34 Cal. 4th 871, 900, 22 Cal. Rptr. 3d 305, 102 P.3d 228 (2004), cert. denied, 126 S. Ct. 45 (U.S. 2005), the Supreme Court approved the trial court's admission of a criminalist's testimony that he compared the bullets obtained in the case with the gun barrel linked to the defendant, and the testing showed the bullets “could have been fired from the gun of which the barrel was a part, but that, due to their condition, he

could not say for sure" Obviously had the testimony been more conclusive, it would have had greater probative value. "But sometimes scientific examination of evidence is inconclusive. [Citations.] That circumstance does not make it irrelevant. It was relevant for the jury to learn that the evidence was tested and similarities existed, though no conclusive identification could be made." Evidence that hair found on the victim's sweatshirt was consistent with the defendant's hair is relevant. ([People v. Richardson](#), 43 Cal.4th 959, 1002 (2008).)

Evidence that is speculative or conjecture is not relevant evidence because neither has any tendency to prove or disprove any fact in dispute. ([People v. Babbitt](#), 45 Cal. 3d 660, 681–682, 248 Cal. Rptr. 69, 755 P.2d 253 (1988).)

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§ 1:5. Relevant evidence defined—Effect of stipulation to an element

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West's Key Number Digest, [Criminal Law](#) 🔑661

West's Key Number Digest, [Evidence](#) 🔑208, 265

West's Key Number Digest, [Pleading](#) 🔑376

West's Key Number Digest, [Trial](#) 🔑35

Legal Encyclopedias

[C.J.S., Criminal Law §§ 915, 1019, 1636 to 1637, 1639](#)

[C.J.S., Evidence §§ 337 to 338, 340 to 341, 364, 367, 400, 434, 468 to 477, 1333](#)

[C.J.S., Pleading §§ 772, 775](#)

[C.J.S., Trial §§ 141 to 142, 144](#)

By definition, evidence is relevant only if it relates to an issue in dispute. In civil cases, a party may remove a matter from dispute by admitting it in the pleadings and, thereby, render evidence about it irrelevant. Thus, in *Fuentes v. Tucker*, the defendant was sued for the wrongful death of the plaintiffs' children and admitted liability in his answer. The Supreme Court ruled that the trial judge erred in permitting plaintiff to introduce evidence on this issue: "If facts alleged in the complaint are not controverted by the answer, they are not in issue, and no evidence need be offered to prove their existence." ([Fuentes v. Tucker](#), 31 Cal. 2d 1, 4, 187 P.2d 752 (1947).)

Occasionally in criminal cases, the charge itself includes information about the defendant's prior criminal record and the defense seeks to exclude this from the jury's knowledge. In *People v. Hall*, the California Supreme Court ruled that a defendant charged with being an ex-felon in possession of a firearm ([Penal Code § 12021](#)) could offer to stipulate to the prior felony conviction and ensure that the jury was not informed of that

conviction, even if the prosecution objected. That specific holding was overturned in 1982 by Proposition 8, which added to [California Constitution, article I, § 28\(f\)](#). In relevant part, it provides: “When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.” ([People v. Hall](#), 28 Cal. 3d 143, 167 Cal. Rptr. 844, 616 P.2d 826 (1980).) *People v. Valentine* concluded that even after Proposition 8, if a defendant stipulates that he or she is an ex-felon, “evidence of the nature of his [or her] prior convictions still may and should be withheld from the jury, since such evidence is irrelevant to the ex-felon issue.” ([People v. Valentine](#), 42 Cal. 3d 170, 173, 228 Cal. Rptr. 25, 720 P.2d 913 (1986).)

When, under *Valentine*, a defendant enters into a stipulation that he or she has a prior felony conviction, it is not necessary to advise the defendant and obtain a waiver of the rights set forth in *Boykin* and *Tahl* [Boykin v. Alabama](#), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Tahl*, 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969). ([People v. Newman](#), 21 Cal. 4th 413, 87 Cal. Rptr. 2d 474, 981 P.2d 98 (1999).) Relying on its decision in [People v. Adams](#), 6 Cal. 4th 570, 581, 24 Cal. Rptr. 2d 831, 862 P.2d 831 (1993), *Newman* held that “a defendant validly may ‘stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense or ... an enhancement,’ without first having received such advisements.” ([People v. Newman](#), 21 Cal. 4th 413, 87 Cal. Rptr. 2d 474, 981 P.2d 98 (1999).) See also [People v. Hovey](#), 44 Cal. 3d 543, 244 Cal. Rptr. 121, 749 P.2d 776 (1988), a murder case with a kidnapping special circumstance, which held that the defendant's admission that he was the kidnapper and had committed the act that led to the victim's death did not require advisement of the potential penal consequences.

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§ 1:6. Relevant evidence defined—Effect of stipulation to a fact

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West's Key Number Digest, [Criminal Law](#) 🔑661

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Legal Encyclopedias

[C.J.S., Criminal Law §§ 915, 1019, 1636 to 1637, 1639](#)

[C.J.S., Trial §§ 141 to 142, 144](#)

In civil and criminal cases, parties can remove an issue from dispute by offering to stipulate to a fact. In *People v. Bonin*, the defendant was accused of murdering several individuals; the prosecutor called the parents of many of the victims as witnesses. The defense offered to stipulate to the victims' identities, to the foundational requirements of their photographs, and that they were alive before the alleged criminal acts and dead afterward. The court concluded that the parents should not have been allowed to testify on these issues: "Through the offer of the defense, the facts covered by the proposed stipulation ... were removed from dispute. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible Thus, the court should have *compelled the prosecution* to accept the defense's offer and barred it [the prosecution] from eliciting testimony on the facts covered by the proposed stipulation." (*People v. Bonin*, 47 Cal. 3d 808, 848–849, 254 Cal. Rptr. 298, 765 P.2d 460 (1989) (emphasis added); see also *People v. Avitia*, 127 Cal. App. 4th 185, 193–194, 24 Cal. Rptr. 3d 887 (2d Dist. 2005); *People v. Perry*, 166 Cal. App. 3d 924, 931–933, 212 Cal. Rptr. 793 (2d Dist. 1985).)

A party's ability to require a stipulation and limit an opponent's evidence is not unrestricted. If a proposed stipulation would prevent the admission of evidence that is probative on other issues, the evidence remains admissible on those issues. (*Martin v. Miqueu*, 37 Cal. App. 2d 133, 136, 98 P.2d 816 (1st Dist. 1940).) A common example in both civil and criminal trials is a party's offer to stipulate to the expertise of an opponent's expert. Since this witness's qualifications are also relevant to the jury's evaluation of the testimony's weight, an offer to

stipulate should not preclude the evidence. If the stipulation forces the prosecution to elect between theories of guilt, or hampers a coherent presentation of evidence on the remaining issues, evidence of the stipulated facts is admissible. (*People v. Edelbacher*, 47 Cal. 3d 983, 1007, 254 Cal. Rptr. 586, 766 P.2d 1 (1989).) For example in *People v. Arias*, the court refused to require the prosecution to stipulate that the defendant had admitted his involvement in the charged murder, when the effect of the stipulation would have been to exclude evidence the statement was made as a threat during a later sexual assault of another individual. “If this statement had been artificially divorced from its context, it would have lacked the weight it deserved on this issue. Without knowledge of the surrounding circumstances, the jury could not have evaluated whether defendant's statement was mere idle jest, or braggadocio entitled to little credence.” (*People v. Arias*, 13 Cal. 4th 92, 131, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (1996).) In *People v. Scheid*, the court upheld the prosecutor's right to reject a defense stipulation and introduce a photograph of the crime scene: “[Conventional evidence, as contrasted with a stipulation, ‘tells a colorful story with descriptive richness This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations the law places on them.’] [Citations].” (*People v. Scheid*, 16 Cal. 4th 1, 16–17, 65 Cal. Rptr. 2d 348, 939 P.2d 748 (1997); accord: *People v. Zambrano*, 41 Cal.4th 1082, 1149 (2007).) See the discussion in § 6:10.

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§ 1:7. Relevant evidence defined—Effect of stipulation to a sentencing factor

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West's Key Number Digest, [Criminal Law](#) 🔑661

West's Key Number Digest, [Sentencing and Punishment](#) 🔑1372

Legal Encyclopedias

[C.J.S., Criminal Law §§ 915, 1019, 1636 to 1637, 1639](#)

In *People v. Bouzas*, the California Supreme Court considered the effect of [California Constitution, article I, § 28\(f\)](#) on those charges that become felonies because of the existence of prior convictions, for example, petty theft with a prior, indecent exposure with a prior, drunk driving with three prior convictions. Though proof of the prior offenses is necessary to establish the felony charge, the court ruled that the prior convictions are not elements of the felony offense but only sentencing factors. (*People v. Bouzas*, 53 Cal. 3d 467, 475, 279 Cal. Rptr. 847, 807 P.2d 1076 (1991).) Therefore, the defendant's stipulation to, or admission of, the prior convictions means that the jury is not to be informed of their existence. While *Bouzas* involved a charge of petty theft with prior convictions of theft, in *People v. Weathington*, the reasoning of *Bouzas* was applied to driving under the influence with prior convictions. (*People v. Weathington*, 231 Cal. App. 3d 69, 85–91, 282 Cal. Rptr. 170 (6th Dist. 1991).)

A defendant who admits a prior conviction for purposes of a sentencing enhancement must enter into the same advisement and waiver of rights as if he or she entered a guilty plea to the charged offense. (*In re Yurko*, 10 Cal. 3d 857, 112 Cal. Rptr. 513, 519 P.2d 561 (1974).) Compare *People v. Adams* where the defendant was charged with a sentencing enhancement for having committed a felony while released on bail or own recognizance ([Penal Code § 12021.1](#)). Finding that the defendant's stipulation that he was released on bail at the time of the alleged offense was an admission to only one component of the enhancement, the court concluded no advisement was necessary. (*People v. Adams*, 6 Cal. 4th 570, 581, 24 Cal. Rptr. 2d 831, 862 P.2d 831 (1993).)

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§ 1:8. Relevant evidence defined—Miscellaneous relevance rules

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West's Key Number Digest, [Criminal Law](#) 🔑338

West's Key Number Digest, [Evidence](#) 🔑99

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[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

[C.J.S., Evidence §§ 2, 197 to 198, 204, 206](#)

The absence of particular evidence may be introduced as evidence if relevant to an issue in dispute. For example, if a criminal defendant is charged with possession of some object, he or she may introduce evidence that fingerprints were lifted from the object and compared with negative results. In fact, evidence that the police failed to attempt to lift fingerprints from the object should also be admitted, along with any explanation offered. In *People v. Cooper*, the court permitted the defendant to litigate thoroughly the competence of the police investigation. He was permitted to call an expert witness who criticized aspects of the investigation. Nevertheless, the Supreme Court upheld the trial court's decision to exclude the sheriff's policy manual on preservation of evidence and a treatise on crime scene investigation because admitting them would have been cumulative, confusing, and unduly time consuming. (*People v. Cooper*, 53 Cal. 3d 771, 817, 281 Cal. Rptr. 90, 809 P.2d 865 (1991).) In *People v. Von Villas*, the court held that the defense was entitled to introduce evidence that the prosecutor had directed the police department to discontinue the recording of witness interviews and that this direction violated departmental policy. (*People v. Von Villas*, 10 Cal. App. 4th 201, 248–249, 13 Cal. Rptr. 2d 62 (2d Dist. 1992).)

Defense evidence that a third party is responsible for the offense need no longer establish a “substantial proof of probability” of guilt to be admissible. So long as it is relevant under [Evidence Code § 350](#) and not excluded by the policy considerations of § 352, it is admissible. Evidence of mere motive or opportunity to commit

the offense by a third person is insufficient without more. There must be direct or circumstantial evidence connecting the person to the commission of the crime. (*People v. Kaurish*, 52 Cal. 3d 648, 685, 276 Cal. Rptr. 788, 802 P.2d 278 (1990).) (See the discussion in § 1:34.)

Testimony in the guilt phase of a capital case that the defendant lacks remorse is irrelevant, unless the defendant opens the door during his or her case-in-chief. (*People v. Jones*, 17 Cal.4th 279, 307, 70 Cal.Rptr.2d 793, 949 P.2d 890 (1998).) Testimony in the penalty phase of a capital case, from victims of other crimes, that the defendant uttered racial epithets while assaulting them is relevant because the remarks show the aggravated nature of defendant's unlawful conduct. (*People v. Smith*, 30 Cal. 4th 581, 626, 134 Cal. Rptr. 2d 1, 68 P.3d 302 (2003), cert. denied, 124 S. Ct. 1169, 157 L. Ed. 2d 1208 (U.S. 2004).)

A plaintiff in a personal injury case may introduce a “day in the life” videotape to show plaintiff's daily activities at home since being confined to a wheelchair as a result of an accident. (*Jones v. City of Los Angeles*, 20 Cal. App. 4th 436, 439–446, 24 Cal. Rptr. 2d 528 (2d Dist. 1993).) A prosecutor is permitted to show a jury a similar videotape to prove that a shooting victim suffered great bodily injury. (*People v. Marks*, 31 Cal. 4th 197, 225–226, 2 Cal. Rptr. 3d 252, 72 P.3d 1222 (2003), cert. denied, 541 U.S. 1033, 124 S. Ct. 2101, 158 L. Ed. 2d 716 (2004).) Though the prosecution may show a videotape tribute to the victim in the penalty phase of a capital case, the Supreme Court has noted that “courts must exercise great caution in permitting the prosecution to present ... a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents” (*People v. Prince*, 40 Cal. 4th 1179, 1289, 57 Cal. Rptr. 3d 543, 156 P.3d 1015 (2007), cert. denied, 128 S. Ct. 887, 169 L. Ed. 2d 742 (U.S. 2008).)

Evidence of the absence of prior similar claims may be introduced by the defense in negligence or strict liability cases subject to [Evidence Code § 352](#). It is particularly relevant in cases alleging negligence and the failure to warn of an alleged defect. The witness called should be familiar with product safety surveys or safety records. (*Benson v. Honda Motor Co.*, 26 Cal. App. 4th 1337, 1343–1349, 32 Cal. Rptr. 2d 322 (2d Dist. 1994).)
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§ 1:9. Relevancy as threshold test of admissibility

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[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

[C.J.S., Evidence §§ 2, 197 to 198, 204, 206](#)

The first test of admissibility of evidence is its relevancy. [California Evidence Code § 350](#) provides that only relevant evidence is admissible. Moreover, [Evidence Code § 351](#) provides that all relevant evidence is admissible unless prohibited by some other statute. In administrative proceedings, relevancy is a basic requirement. ([Voices of the Wetlands v. California State Water Resources Control Bd.](#), 157 Cal.App.4th 1268, 1338 (2007).) Statutes excluding relevant evidence are located in the Evidence Code and other codes. A partial list of these is contained in the Law Revision Commission Comment to [§ 351](#).

In 1982, the list of exclusionary statutes was narrowed considerably in criminal cases by the passage of Proposition 8, the Victims' Bill of Rights, which added to [California Constitution, Article I, § 28\(d\)](#). It provides that, in criminal cases, relevant evidence can be excluded only because of "privilege or hearsay, or [Evidence Code § 352, 782 or 1103](#) [or] ... any existing statutory or constitutional right of the press." Any additional exclusions can be created only by a two-thirds vote of the Legislature, so few such exclusions have been passed. But see [Evidence Code § 351.1](#) (polygraph results), discussed in [§ 1:18](#), and [Penal Code § 1112](#) (compelled psychological examination of witness), discussed in [§ 3:44](#).

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A. General Principles Of Relevancy

§ 1:10. Substantial similarity test—Experimental evidence

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 388, 438(8), 650

West's Key Number Digest, [Evidence](#) 🔑 150, 359(6)

West's Key Number Digest, [Trial](#) 🔑 27

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[C.J.S., Criminal Law §§ 1032 to 1034, 1037 to 1038, 1318, 1395 to 1396, 1406 to 1407, 1411, 1413 to 1418, 1575 to 1576](#)

[C.J.S., Evidence §§ 216 to 217, 987, 991, 999](#)

[C.J.S., Trial §§ 114 to 116](#)

Frequently during trial, a party will seek to introduce evidence of an experiment conducted to determine how the crime or damage occurred. The law governing admissibility is clear:

Admissibility of experimental evidence depends on proof of the following foundational items:

- The experiment must be relevant
- The experiment must have been conducted under substantially similar conditions as those of the actual occurrence; and
- The evidence of the experiment must not consume undue time, confuse the issues or mislead the jury. ([Culpepper v. Volkswagen of America, Inc.](#), 33 Cal. App. 3d 510, 521, 109 Cal. Rptr. 110 (4th Dist. 1973) cited with approval in [People v. Bonin](#), 47 Cal. 3d 808, 847, 254 Cal. Rptr. 298, 765 P.2d 460 (1989).)

In fact, the first two foundational items are related; the preliminary fact that establishes relevancy is that the experiment was performed under the same or similar circumstances as existed when the incident occurred. The third foundational item simply incorporates the principles of [Evidence Code § 352](#).

In *Culpepper*, the court allowed admission of a film of two different cars in which mechanical devices were installed to cause them to make sharp turns at varying rates of speed and so determine at what point a 1966 Volkswagen would roll over. (*Culpepper v. Volkswagen of America, Inc.*, 33 Cal. App. 3d 510, 521, 109 Cal. Rptr. 110 (4th Dist. 1973).) In *Bonin*, the Supreme Court found that the trial judge's decision to admit evidence of an experiment was erroneous. The experiment was designed to determine if the ligature marks on the neck of the body of one of the murder victims could have been made in the manner testified to by another victim. Principally, the decision was based on the prosecution's failure to show that the experiment was conducted under conditions similar to those of the victim's strangulation. (*People v. Bonin*, 47 Cal. 3d 808, 847, 254 Cal. Rptr. 298, 765 P.2d 460 (1989).) In *People v. Turner*, the court admitted an experiment that helped determine sounds on a tape were gunshots. (*People v. Turner*, 8 Cal. 4th 137, 198–199, 32 Cal. Rptr. 2d 762, 878 P.2d 521 (1994).)

Demonstrations by a witness are similar to experiments and their admissibility should be governed by similar rules. In a demonstration, a witness is asked to perform in a manner that informs the jury. Thus, in a driving-under-the-influence case, an officer may be asked to show how field sobriety tests were demonstrated to the defendant before requiring the defendant to perform them. One court permitted a medical witness to manipulate the plaintiff's injured area to demonstrate the pain caused. (*Willoughby v. Zylstra*, 5 Cal. App. 2d 297, 301, 42 P.2d 685 (2d Dist. 1935).) The potential for abuse of this type of demonstration often leads courts to exclude it as likely to mislead the jury. In *People v. Milner*, the defendant contended that while bending over he had dropped the murder weapon, a knife. The prosecutor was permitted to require the defendant to demonstrate how that occurred. The prosecutor initially suggested that the defendant do this while holding his pants waist high, but the court required the defendant to wear them normally to more closely approximate the actual incident. (*People v. Milner*, 45 Cal. 3d 227, 246 Cal. Rptr. 713, 753 P.2d 669 (1988).)

In these experiments or demonstrations, the performance in front of the jury cannot track the actual incident in each particular detail. In the *Volkswagen* experiment, a bungee cord, rather than a person, controlled the car's movement. In the field sobriety tests, the courtroom differs significantly from the late night roadway scene of most such arrests. In each, however, the courts determined that the similarities were sufficient to benefit the jury. “The standard that must be met in determining whether the proponent of the experiment has met the burden of proof ... essential to the admissibility of the experimental evidence is whether the conditions were substantially identical, not absolutely identical.” (*Culpepper v. Volkswagen of America, Inc.*, 33 Cal. App. 3d 510, 521, 109 Cal. Rptr. 110 (4th Dist. 1973).)

The type of experimental evidence discussed here is designed as a recreation of an actual event. The rules governing its admissibility differ significantly from the *Kelly* standards applied to other expert evidence of tests or procedures discussed in §§ 4:27 to 4:29.

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§ 1:11. Substantial similarity test—Proof of other accidents in negligence cases

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑141

West's Key Number Digest, [Negligence](#) 🔑1635

Legal Encyclopedias

[C.J.S., Evidence §§ 1054 to 1057, 1074 to 1076](#)

[C.J.S., Negligence §§ 782, 787 to 789, 791, 793, 798](#)

In accident cases, plaintiffs are entitled to introduce evidence of other accidents to show a defective or dangerous condition, knowledge, or notice, or to establish the cause of the accident, if the circumstances of the other accidents are similar and not too remote. ([Elsworth v. Beech Aircraft Corp.](#), 37 Cal. 3d 540, 555, 208 Cal. Rptr. 874, 691 P.2d 630 (1984); [Genrich v. State of California](#), 202 Cal. App. 3d 221, 227, 248 Cal. Rptr. 303 (4th Dist. 1988).) “ ‘The evidence must relate to accidents which are *similar* and which occur under *substantially the same* circumstances. [Citations] ... [T]he requirement of similarity may vary in strictness according to the purpose for which the evidence is introduced. Thus, if offered to show the dangerous condition of a particular thing—such as a step—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—a broader area—may be shown.’ ” ([Genrich v. State of California](#), 202 Cal. App. 3d 221, 228, 248 Cal. Rptr. 303 (4th Dist. 1988), citing [Witkin, California Evidence](#) (3d ed.) § 388, pp. 361–362 (emphasis in original).) In *Genrich*, the appellate court found that the trial court had improperly admitted evidence of other automobile accidents that were not similar enough “ ‘to actually impart notice of some particular condition requiring correction.’ ” ([Genrich v. State of California](#), 202 Cal. App. 3d 221, 228, 248 Cal. Rptr. 303 (4th Dist. 1988).) In *Elsworth*, evidence of other accidents involving aircraft built by Beech was properly admitted in the trial court. ([Elsworth v. Beech Aircraft Corp.](#), 37 Cal. 3d 540, 554–555, 208 Cal. Rptr. 874, 691 P.2d 630 (1984); see also [Brake v. Beech Aircraft Corp.](#), 184 Cal. App. 3d 930, 937–938, 229 Cal. Rptr. 336 (1st Dist. 1986).)

In [Stephen v. Ford Motor Co.](#), 134 Cal. App. 4th 1363, 1371–1372, 37 Cal. Rptr. 3d 9 (2d Dist. 2005), plaintiff's expert in a tire defect case relied, in part, on similar accident cases involving tire defects. The expert's failure to “provide police reports from the other accidents or any other information to show that the circumstances [including age and condition] of the [other] tire failures were similar to the circumstances of this case” properly led to exclusion of the expert's testimony.

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§ 1:12. Demonstrative evidence—Establishing chain of possession

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 404.5 to 404.85

West's Key Number Digest, [Evidence](#) 🔑 188 to 198

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1140 to 1152, 1154 to 1155](#)

[C.J.S., Evidence §§ 789 to 802](#)

Physical objects that are part of the transaction or that assist in explaining it may be introduced as evidence in the case if properly identified. (*People v. Trujillo*, 32 Cal. 2d 105, 115, 194 P.2d 681 (1948) (objects used to commit homicide are admissible).) Before admitting any piece of physical evidence, the proponent must establish a proper chain of possession. In *People v. Lucas*, the court restated the following rules for establishing chain of custody:

The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when there is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight. [Citations.] (*People v. Lucas*, 12 Cal. 4th 415, 444, 12 Cal. 4th 825a, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (1995).)

In *Lucas*, the court approved the trial court's decision to admit bloody shorts allegedly found in the defend-

ant's home, though the evidence of the deputy who actually seized the item was “somewhat uncertain on the record.” ([People v. Lucas](#), 12 Cal. 4th 415, 444, 12 Cal. 4th 825a, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (1995).)

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§ 1:13. Demonstrative evidence—Admitting object for illustrative purposes only

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 188 to 198

West's Key Number Digest, [Criminal Law](#) 🔑 404.5 to 404.85

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1140 to 1152, 1154 to 1155](#)

[C.J.S., Evidence §§ 789 to 802](#)

Even objects that were clearly not used in the transaction can be admitted for illustrative purposes. Thus, if a robbery victim testifies that a particular firearm looks like the one used in the crime, the weapon can be admitted into evidence even though the prosecution does not contend that the exhibit is actually the weapon used. In such a case, the jury should be admonished that the exhibit is admitted for illustrative purposes only and is not the object that was actually used in the crime. ([People v. Wiley](#), 18 Cal. 3d 162, 176–177, 133 Cal. Rptr. 135, 554 P.2d 881 (1976).) The proponent of the evidence must lay a proper foundation that the object actually used was substantially similar to the demonstration object. ([People v. Roldan](#), 35 Cal. 4th 646, 708–709, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (2005), cert. denied, 126 S. Ct. 570 (U.S. 2005).)

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§ 1:14. Demonstrative evidence—Examples

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 188 to 198

West's Key Number Digest, [Criminal Law](#) 🔑 404.5 to 404.85

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1140 to 1152, 1154 to 1155](#)

[C.J.S., Evidence §§ 789 to 802](#)

Photographs, maps, and diagrams are examples of physical objects that can be introduced into evidence if relevant and authenticated as an accurate representation of what they purport to depict. ([People v. Bowley](#), 59 Cal. 2d 855, 856–858, 31 Cal. Rptr. 471, 382 P.2d 591 (1963).)

Mannequins have been admitted when their use helps clarify evidence for the jury. ([People v. Medina](#), 11 Cal. 4th 694, 12 Cal. 4th 651b, 47 Cal. Rptr. 2d 165, 906 P.2d 2 (1995); [People v. Brown](#), 46 Cal. 3d 432, 442–443, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988); [People v. Robillard](#), 55 Cal. 2d 88, 98, 10 Cal. Rptr. 167, 358 P.2d 295 (1960).)

Films and videotapes may be admitted, and a film of a crime can be authenticated by an accomplice without corroboration. ([People v. Bowley](#), 59 Cal. 2d 855, 858, 31 Cal. Rptr. 471, 382 P.2d 591 (1963).) In *People v. Turner*, the Supreme Court upheld the introduction into evidence of a videotape of the crime scene and the victim's body as initially observed by the police. The court reasoned that the competing theories of how the homicide occurred put forward by the prosecution and the defense “depended for support on details of physical and circumstantial evidence, including a clear understanding of clues provided by the condition of the victim's body and the crime scene itself. The prosecution was not obliged to prove these details solely from the testimony of live witnesses” ([People v. Turner](#), 50 Cal. 3d 668, 706, 268 Cal. Rptr. 706, 789 P.2d 887 (1990).) In *People*

v. *Sims*, after finding that the crime scene video was admissible, the Supreme Court noted that trial courts must consider excluding such evidence under § 352 because of the prejudice that might result from its admission. ([People v. Sims, 5 Cal. 4th 405, 452, 20 Cal. Rptr. 2d 537, 853 P.2d 992 \(1993\).](#))

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§ 1:15. Demonstrative evidence—Jury's view of crime scene

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑651

Legal Encyclopedias

[C.J.S., Criminal Law § 1568](#)

Whether a jury should be permitted to view a scene is within the trial judge's discretion. In civil cases, a view is governed by [Code of Civil Procedure § 651](#), and in criminal cases by [Penal Code § 1119](#). The two code sections are similar with one exception: in civil cases, “[a]t the view, the court may permit testimony of witnesses.” ([Code of Civil Procedure § 651\(b\)](#); see [City of Pleasant Hill v. First Baptist Church](#), 1 Cal. App. 3d 384, 414, 82 Cal. Rptr. 1 (1st Dist. 1969).) Case law, however, permits the taking of testimony during a view in a criminal case. ([People v. Bolin](#), 18 Cal. 4th 297, 323–326, 75 Cal. Rptr. 2d 412, 956 P.2d 374 (1998); [People v. Mayfield](#), 14 Cal. 4th 668, 739, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (1997).) In both civil and criminal cases, the court should rest its discretion on a consideration of the probative value of the view, the prejudice that may result from it, and the court's convenience. Rarely is this exercise of discretion disturbed on appeal. In *People v. Price*, the court upheld the trial judge's decision to deny a view of the murder scene proposed to test the validity of an eyewitness identification. The trial judge had based this decision on a consideration of whether the conditions for the jury view would be substantially the same as those under which the witness made the observations, whether there were other means of testing the veracity of the witness's testimony, and the practical difficulties in conducting the view. ([People v. Price](#), 1 Cal. 4th 324, 422, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991).) In *People v. Mayfield*, the court found that a jury view of a crime scene, at least when accompanied by the taking of testimony, is a critical stage of the proceeding and a defendant has a right to be present. However, the court found that a defendant may waive his [or her] presence at the view, even if done without conforming to the requirements of [Penal Code § 977](#). ([People v. Mayfield](#), 14 Cal. 4th 668, 738–739, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (1997).)

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§ 1:16. Entirety of act or statement admissible

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 155, 383(12)

West's Key Number Digest, [Criminal Law](#) 🔑 396

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[C.J.S., Criminal Law § 1029 to 1031](#)

[C.J.S., Evidence §§ 248, 501 to 502, 816 to 817, 1035 to 1036](#)

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, its answer may be given; when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing that is necessary to make the first evidence understood may also be given in evidence. ([Evidence Code § 356](#).)

Although framed as an expansion of the concept of relevancy, [Evidence Code § 356](#) most often operates in the manner of a hearsay exception. Thus, a prosecutor in a homicide case introduces only the first part of the defendant's statement to the police, "I shot the victim, because he was going to stab me"; or the plaintiff in a wrongful death case does the same for the defendant's statement, "I entered the intersection against the red light, because my brakes failed." In either situation the defendant should be permitted to introduce the final clause of the statement despite any hearsay objection. ([People v. Wright](#), 52 Cal. 3d 367, 433, 276 Cal. Rptr. 731, 802 P.2d 221 (1990); [People v. Hamilton](#), 48 Cal. 3d 1142, 1174, 259 Cal. Rptr. 701, 774 P.2d 730 (1989).) When the defendant introduces a statement of a nontestifying witness, and the prosecutor relies on [section 356](#) to introduce an additional part of that statement, the prosecution evidence is generally not inadmissible under the 6th Amendment's Confrontation Clause. ([People v. Parrish](#), 152 Cal. App. 4th 263, 272, 60 Cal. Rptr. 3d 868 (2d Dist. 2007); see the discussion in [§ 2:113](#) of this volume.)

By its terms, [Evidence Code § 356](#) allows further inquiry into the omitted part of an act or statement only if it is relevant to the same subject as the evidence already introduced. ([People v. Breaux](#), 1 Cal. 4th 281, 302, 3 Cal. Rptr. 2d 81, 821 P.2d 585 (1991).) However, in applying this section, “the courts do not draw narrow lines around the exact subject of inquiry.” ([People v. Zapien](#), 4 Cal. 4th 929, 959, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (1993); accord: [People v. Harris](#), 37 Cal. 4th 310, 334–335, 33 Cal. Rptr. 3d 509, 118 P.3d 545 (2005), cert. denied, 126 S. Ct. 1655, 164 L. Ed. 2d 411 (U.S. 2006).) For example, in *People v. Ramirez*, the defendant called an officer to testify that on the night the defendant was arrested for rape he told the officer he was intoxicated. The prosecution was then permitted under [Evidence Code § 356](#) to introduce the rest of the defendant's statement in which he admitted to a burglary that same night. This broad definition of “the same subject matter” was explained as follows: “the jury could reasonably find defendant's description of the burglary relevant in judging the credibility of his additional statements that he was under the influence of alcohol or drugs when he committed the rape earlier that same night.” ([People v. Ramirez](#), 50 Cal. 3d 1158, 1190, 270 Cal. Rptr. 286, 791 P.2d 965 (1990).)

Warning

Parties introducing part of a statement are often aware that [Evidence Code § 356](#) permits the adverse party to introduce the balance of the statement on the same subject. However, it is less well understood that introducing evidence of an act or statement will permit the adverse party to introduce an entirely separate act or statement necessary to clarify the evidence already introduced. ([Witt v. Jackson](#), 57 Cal. 2d 57, 67, 17 Cal. Rptr. 369, 366 P.2d 641 (1961).)

Issues of relevancy and [Evidence Code § 352](#) factors are among the mix of concerns that the trial court properly considers when a party seeks to introduce evidence under [§ 356](#). ([Benson v. Honda Motor Co.](#), 26 Cal. App. 4th 1337, 1350, 32 Cal. Rptr. 2d 322 (2d Dist. 1994).) In *Benson*, after the defendant in a products liability case introduced one photograph from a report regarding crash tests, the trial court properly ruled against the plaintiff's attempt to introduce the entire report. ([Benson v. Honda Motor Co.](#), 26 Cal. App. 4th 1337, 1350, 32 Cal. Rptr. 2d 322 (2d Dist. 1994).)

Warning

Counsel often mistakenly believe that if they allow the other party to admit objectionable evidence by refraining from making the objection, they will then be entitled to admit related evidence that is otherwise inadmissible. “The so-called ‘open the door’ or ‘open the gates’ argument is ‘a popular fallacy.’ ” ([People v. Gambos](#), 5 Cal. App. 3d 187, 192, 84 Cal. Rptr. 908 (1st Dist. 1970); see also [People v. Williams](#), 213 Cal. App. 3d 1186, 1189, 262 Cal. Rptr. 303 (2d Dist. 1989).) Note, however, that a party that successfully moves for the exclusion of relevant evidence under [Evidence Code § 352](#) may erroneously open the door to admission of this evidence. See the discussion in [§ 1:28](#).

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§ 1:17. Relevant evidence excluded—In general

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West's Key Number Digest, [Evidence](#) 🔑99

West's Key Number Digest, [Criminal Law](#) 🔑338

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[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

[C.J.S., Evidence §§ 2, 197 to 198, 204, 206](#)

Relevant evidence is often excluded. Hearsay (discussed in Chapter 2), privileges (discussed in Chapter 5), and certain extrinsic policies (discussed in Chapter 6) are only some of the statutory bases for this exclusion. Since the passage of the truth-in-evidence provision of Proposition 8, the Legislature has enacted two provisions excluding relevant evidence and placed them in the article on relevant evidence (see discussion under §§ [1:18](#) and [1:19](#).)

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§ 1:18. Relevant evidence excluded—Polygraph evidence

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West's Key Number Digest, [Evidence](#) 🔑 150

West's Key Number Digest, [Criminal Law](#) 🔑 388.5

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[C.J.S., Criminal Law §§ 1037 to 1038](#)

[C.J.S., Evidence §§ 216 to 217](#)

In [Evidence Code § 351.1](#), the Legislature provided that 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. The statute also provides that it is not intended to exclude from evidence statements made during a polygraph examination that are otherwise admissible. This section applies to the penalty phase of a capital trial. ([People v. Richardson](#), 43 Cal.4th 959, 1032–1033 (2008); [People v. Koontz](#), 27 Cal. 4th 1041, 1090, 119 Cal. Rptr. 2d 859, 46 P.3d 335 (2002), cert. denied, 537 U.S. 1117, 123 S. Ct. 881, 154 L. Ed. 2d 794 (2003).) In [People v. Lee](#), 95 Cal. App. 4th 772, 790–792, 115 Cal. Rptr. 2d 828 (2d Dist. 2002), the court reversed a criminal conviction, in part because the trial court had admitted prosecution evidence of a tape recording of a witness's polygraph examination and the subsequent interrogation of that witness. The trial court had admitted the evidence for the limited purpose of showing the effect of the polygraph on the witness, who, following its administration, had stopped denying he knew who committed the murder and named the defendant as the perpetrator.

Prior to *Witherspoon v. Superior Court*, the courts of appeal uniformly excluded evidence of polygraph results. In *Witherspoon*, the court for the first time indicated that, on a proper showing, a party could introduce such

evidence. (*Witherspoon v. Superior Court*, 133 Cal. App. 3d 24, 183 Cal. Rptr. 615 (2d Dist. 1982).) In response to this case, the Legislature enacted Evidence Code § 351.1 to ban polygraph evidence. This section serves as one of the few statutorily created exceptions to the truth-in-evidence provision of Proposition 8. (*People v. Kegler*, 197 Cal. App. 3d 72, 242 Cal. Rptr. 897 (2d Dist. 1987).)

Evidence Code § 351.1 has been upheld against claims that it is an ex post facto law (*People v. Seldomridge*, 154 Cal. App. 3d 362, 201 Cal. Rptr. 377 (5th Dist. 1984)) and that it violates the defendant's right to due process under *Chambers v. Mississippi* when used to exclude a polygraph test indicating that a prosecution witness was untruthful. (*People v. Kegler*, 197 Cal. App. 3d 72, 84–90, 242 Cal. Rptr. 897 (2d Dist. 1987); see *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).) *Kegler* suggests that a *Chambers* analysis requires a case-by-case determination of the significance of the exculpatory nature of the evidence. The statute was also found not to violate due process by excluding evidence that the defendant offered to take a polygraph examination. (*People v. Espinoza*, 3 Cal. 4th 806, 816–818, 12 Cal. Rptr. 2d 682, 838 P.2d 204 (1992).)

Evidence Code § 351.1 prohibits the use of polygraph results in juvenile proceedings conducted pursuant to Welfare and Institutions Code § 602. (*In re Aontae D.*, 25 Cal. App. 4th 167, 173, 30 Cal. Rptr. 2d 176 (4th Dist. 1994).) It does not prohibit the use of results of a polygraph test in civil or noncriminal juvenile matters.

In *People v. Wilkinson*, 33 Cal. 4th 821, 845–852, 16 Cal. Rptr. 3d 420, 94 P.3d 551 (2004), cert. denied, 125 S. Ct. 892, 160 L. Ed. 2d 796 (U.S. 2005), the California Supreme Court rejected defendant's contention that, despite § 351.1, she was entitled to a *Kelly* hearing on the admissibility of polygraph evidence under her federal rights to due process and to present a defense. (*Kelly* hearings are discussed in §§ 4:27 to 4:29.) Initially, *Wilkerson* concluded that, in § 351.1, the Legislature had exercised its power to reject *Kelly* as the test of this scientific technique. (*Wilkinson*, 33 Cal. 4th at 846–847.) The Court then relied on *U.S. v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) to conclude that the “categorical exclusion of polygraph evidence mandated by section 351.1 does not violate the federal constitution.” (*Wilkinson*, 33 Cal. 4th at 848–852.)

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§ 1:19. Relevant evidence excluded—Evidence of address

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑268(17)

West's Key Number Digest, [Criminal Law](#) 🔑662

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[C.J.S., Criminal Law §§ 1514 to 1531, 1535 to 1539](#)

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 467, 481](#)

A witness can normally be compelled to provide his or her address to an adverse party during cross-examination. This affords the party “access to the witness and his residential environment to facilitate investigation into his credibility.” ([People v. Watson](#), 146 Cal. App. 3d 12, 19, 193 Cal. Rptr. 849 (3d Dist. 1983).) The Sixth Amendment does not give a criminal defendant the right to demand to know the address of each prosecution witness, however; exceptions to the disclosure rule are permitted. ([People v. Mardian](#), 47 Cal. App. 3d 16, 40, 121 Cal. Rptr. 269 (4th Dist. 1975).) One such exception is contained in [Evidence Code § 352.1](#), which permits the district attorney, on written motion, to obtain an order excluding from evidence the current address and phone number of any victim of certain enumerated sexual offenses.

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Chapter
1. Relevant Evidence

B. Preserving A Record; Limited admissibility

§ 1:20. Objections must be specific and timely

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑80

West's Key Number Digest, [Appeal and Error](#) 🔑204

West's Key Number Digest, [Criminal Law](#) 🔑695, 1036

Legal Encyclopedias

[C.J.S., Appeal and Error §§ 202, 207](#)

[C.J.S., Criminal Law § 1670 to 1671](#)

[C.J.S., Trial §§ 208 to 211, 223 to 231](#)

In order to preserve an objection on appeal, a party must state it in a timely fashion, and it must be accompanied by a reasonably definite statement of the grounds. ([Evidence Code § 353\(a\)](#).) In [People v. Demetrulias](#), 39 Cal. 4th 1, 21–22, 45 Cal. Rptr. 3d 407, 137 P.3d 229 (2006), the defendant objected that prosecution evidence showing the victim's peaceable character was “irrelevant.” This objection did not preserve for appeal an objection that the testimony was inadmissible character evidence. “To satisfy [Evidence Code section 353](#), subdivision (a), the objection or motion to strike must be both timely *and* specific as to its ground... . [T]he opponent cannot make a ‘placeholder’ objection stating general or incorrect grounds (e.g. ‘relevance’) and revise the objection later... .” These requirements are designed to avoid unfair surprise to opposing parties and to prevent error by the trial court. The trial judge is given a concrete legal proposition to consider and the opposing counsel is sufficiently advised of the alleged defect to reframe the question, lay an additional foundation, or take other steps to minimize the likelihood of reversal. ([People v. Zamudio](#), 43 Cal.4th 327, 354 (2008).)

The Evidence Code makes no effort to specify the form in which the objection must be made, and the Comment to [Evidence Code § 353](#) provides that the use of a continuing objection to a line of questions is proper.

There are certain recognized exceptions to the requirement of a specific and timely objection. First, the Comment states that [Evidence Code § 353](#) is subject to the constitutional requirement that a judgment be reversed if an error has resulted in a denial of due process of law. (See also [People v. Mills](#), 81 Cal. App. 3d 171, 176, 146 Cal. Rptr. 411 (4th Dist. 1978).) Second, a failure to object may be excused when it places an unreasonable burden on the party to anticipate unforeseen changes in the law. ([People v. Turner](#), 50 Cal. 3d 668, 703, 268 Cal. Rptr. 706, 789 P.2d 887 (1990).) However, simply because the defendant is charged in a capital case does not excuse a failure to object. ([People v. Coleman](#), 46 Cal. 3d 749, 777–778, 251 Cal. Rptr. 83, 759 P.2d 1260 (1988).) Additionally, if a party makes an objection but fails to obtain a ruling on that objection, the objection is not preserved for appeal. ([People v. Hayes](#), 52 Cal. 3d 577, 619, 276 Cal. Rptr. 874, 802 P.2d 376 (1990).)

Even if a proper objection is made and erroneously overruled, a reversal of the judgment will not occur unless the appellant was prejudiced thereby, that is, unless a miscarriage of justice occurred. ([Evidence Code § 353\(b\)](#).) Both civil and criminal cases have relied on the definition of a miscarriage of justice stated in *People v. Watson* as follows: “a ‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause 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 error.” ([People v. Watson](#), 46 Cal. 2d 818, 836, 299 P.2d 243 (1956); see also [Marocco v. Ford Motor Co.](#), 7 Cal. App. 3d 84, 95, 86 Cal. Rptr. 526 (1st Dist. 1970).) In capital cases, the same rule applies to errors committed in the guilt phase, but evidentiary errors in the penalty phase require a reversal if there is a “reasonable possibility” that such an error affected the decision. ([People v. Brown](#), 46 Cal. 3d 432, 446–449, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988).)

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1. Relevant Evidence
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§ 1:21. In limine motions—Advantages of motion

West's Key Number Digest

West's Key Number Digest, [Pretrial Procedure](#) 🔑3
West's Key Number Digest, [Criminal Law](#) 🔑632(4)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 584 to 586, 606 to 613, 615 to 618](#)

Both counsel and the court can benefit from resolving evidentiary issues outside the presence of the jury. In limine motions, often heard before the presentation of evidence or even before the selection of the jury, have numerous advantages. Counsel obtain a ruling without having to object in front of the jury. If evidence is excluded, the jury need not be instructed to perform the difficult mental gymnastic of ignoring a question that often has implied a particular answer. The court is often able to devote more time to its decision without inconvenience to the jurors. Counsel and the court are better able to plan the trial's progress when it is clear in advance if significant witnesses will or will not be permitted to testify.

In *Kelly v. New West Federal Savings*, the court recognized the benefits of such motions, but went on to note certain types of common, inappropriate in limine objections. For example, it is not unusual for counsel to file an in limine motion that seeks to exclude all “speculative” evidence or evidence presented “without a sufficient foundation.” Unless the moving party is specific about which evidence it believes is speculative or which evidence requires a foundation unlikely to be established, such motions do no more than ask the court to confirm an obvious requirement of existing law. In addition, the *Kelly* court criticized the use of such motions to set out “matters of common professional courtesy that should be accorded counsel in all trials.” It listed as examples a motion that all counsel inform other counsel which witnesses will be called the following day and a motion that no exhibits be shown the jury until viewed by all counsel and the court. ([Kelly v. New West Federal Savings](#), 49 Cal. App. 4th 659, 670–671, 56 Cal. Rptr. 2d 803 (2d Dist. 1996).) *Kelly* also noted the distinction between the purposes of a deposition and a request for admissions, which is designed to set “at rest a triable issue so that it

will not have to be tried. [Thus,] 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 his or her deposition testimony. Trial testimony may be impeached by inconsistent deposition testimony, but absent an abuse of the discovery process, such testimony should not be precluded.” (*Kelly v. New West Federal Savings*, 49 Cal. App. 4th 659, 672–673, 56 Cal. Rptr. 2d 803 (2d Dist. 1996); accord: *Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal. App. 4th 257, 271, 62 Cal. Rptr. 3d 665 (2d Dist. 2007).)

Finally, the parties and the court should be aware that whatever the advantages of an early resolution of an evidence objection, there are many occasions when the court should wisely decide to wait until it sees how the evidence develops in the case before ruling. For example, a proper evaluation of the probative value of evidence may sometimes require a consideration of how other evidence has come in. It may not be enough to be told that other evidence exists and will be introduced. The manner in which it comes in may make it strong or weak and make the challenged evidence more or less probative on the same issue.

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§ 1:22. In limine motions—The reiteration rule

West's Key Number Digest

West's Key Number Digest, [Pretrial Procedure](#) 🔑 3

West's Key Number Digest, [Trial](#) 🔑 76

West's Key Number Digest, [Appeal and Error](#) 🔑 204, 232

West's Key Number Digest, [Criminal Law](#) 🔑 632(4), 1043, 1036, 693

Legal Encyclopedias

[C.J.S., Appeal and Error §§ 292, 297 to 299, 309, 312](#)

[C.J.S., Criminal Law §§ 584 to 586, 606 to 613, 615 to 618, 1558 to 1560, 6070 to 1671](#)

[C.J.S., Trial §§ 216 to 219](#)

In a series of cases, the California Supreme Court suggested that when an in limine motion to exclude evidence is made and then overruled, [Evidence Code § 353](#) requires the objecting party to object again at the time such evidence is actually presented in order to preserve the issue on appeal. (See, e.g., [People v. Turner](#), 50 Cal. 3d 668, 708, 268 Cal. Rptr. 706, 789 P.2d 887 (1990); [People v. Jennings](#), 46 Cal. 3d 963, 975, 251 Cal. Rptr. 278, 760 P.2d 475 (1988).)

In *People v. Morris*, this reiteration rule was clarified and apparently limited. “We hold that a motion in limine to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of [Evidence Code § 353](#), i.e.: (1) a specific legal ground for exclusion is advanced; (2) the motion is directed to a particular identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.” ([People v. Morris](#), 53 Cal. 3d 152, 189–190, 279 Cal. Rptr. 720, 807 P.2d 949 (1991); see also [People v. Mayfield](#), 14 Cal. 4th 668, 732, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (1997) (defendant preserved his objection to certain

admissions even though he did not renew the objection at the trial after losing the motion to exclude in an in limine motion conducted pursuant to [Evidence Code § 402](#).) The *Morris* standards are sufficiently vague that counsel is well advised either to clarify at the time of the motion in limine that it protects the record, or repeat the objection at the time the challenged evidence is introduced.

If, following a court's ruling on a motion in limine, the evidence presented during trial is sufficiently different from the evidence presented in the motion (or in an offer of proof), the party who made the motion must renew the objection. ([People v. Champion](#), 9 Cal. 4th 879, 925, 39 Cal. Rptr. 2d 547, 891 P.2d 93 (1995); [Summers v. A.L. Gilbert Co.](#), 69 Cal. App. 4th 1155, 1184–1185, 82 Cal. Rptr. 2d 162 (5th Dist. 1999).)

Ordinarily one need not object to evidence until it is introduced. In *Rufo v. Simpson*, the defense argued that the plaintiff's failure to raise an evidence objection pretrial barred it from raising the objection later in the trial. The court rejected the contention: “A pretrial motion in limine is merely an *additional* protective device for the opponent of the evidence.” ([Rufo v. Simpson](#), 86 Cal. App. 4th 573, 608–609, 103 Cal. Rptr. 2d 492 (2d Dist. 2001).) (Emphasis in original.)

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§ 1:23. Offers of proof

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑44

West's Key Number Digest, [Appeal and Error](#) 🔑202

West's Key Number Digest, [Criminal Law](#) 🔑670, 1036

Legal Encyclopedias

[C.J.S., Appeal and Error §§ 292, 297 to 299](#)

[C.J.S., Criminal Law §§ 1650 to 1652](#)

[C.J.S., Trial §§ 163 to 175](#)

When the trial court has sustained an objection to evidence, the proponent preserves the right to appeal only if an offer of proof is made and the offer is specific, establishing the substance, purpose, and relevance of the evidence. ([Evidence Code § 354](#).) “The ‘offer-of-proof’ requirement gives the trial court an opportunity to change its ruling in the event the question is so vague or preliminary that the relevance is not clear. [Citations] Even if the question is relevant on its face, the appellate court must know the ‘substance’ or content of the answer in order to assess prejudice.” ([People v. Whitt](#), 51 Cal. 3d 620, 648, 274 Cal. Rptr. 252, 798 P.2d 849 (1990).)

The requirement that the offer of proof be specific ensures that the opposing party can raise appropriate evidentiary objections and the judge can formulate a proper ruling. ([Semsch v. Henry Mayo Newhall Memorial Hospital](#), 171 Cal. App. 3d 162, 168, 216 Cal. Rptr. 913 (2d Dist. 1985).) Moreover, the offer of proof must set forth the substance of the evidence being offered. “An offer of proof that sets forth the substance of *facts* to be proved does not comply with [Evidence Code § 354\(a\)](#), since *facts* do not constitute *evidence*.” ([United Sav. & Loan Assn. v. Reeder Dev. Corp.](#), 57 Cal. App. 3d 282, 294, 129 Cal. Rptr. 113 (2d Dist. 1976).) The proponent

should set forth the specific evidence to be presented, the witness who will present it, the purpose for which it is being offered, and its relevancy to the issues in the case. (Compare [McCleery v. City of Bakersfield](#), 170 Cal. App. 3d 1059, 1074, 216 Cal. Rptr. 852 (5th Dist. 1985).)

Counsel often fail to understand the requirement that an offer of proof set forth evidence, not facts. The following example can clarify the difference. A party fails to make a proper offer of proof by saying: “If Mr. Jones is allowed to answer this question he will testify that the accident was not the result of the defendant's negligence.” The following is a proper offer: “Mr. Jones is prepared to testify that on the date in question he observed the accident in which plaintiff was injured. He is prepared to testify that he was traveling in the same direction as plaintiff and moments before the collision, he saw the stoplight facing plaintiff's car turn red. Mr. Jones will further testify that he stopped and that plaintiff's car continued into the intersection where it collided with defendant's vehicle.”

An offer of proof is unnecessary if the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked or by any other means. ([Evidence Code § 354\(a\)](#).)

No offer of proof need be made if the rulings of the court render it futile. ([Evidence Code § 354\(b\)](#).) Thus, a party does not need to make an offer of proof if the court has previously ruled that it will receive no evidence on that general subject. In *Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co.*, a contract action, the trial court had previously ruled that it would receive no extrinsic evidence of any kind bearing on the contract's construction. The defendant then made, at best, a general offer of proof on certain evidence construing the agreement. Nevertheless, the Supreme Court ruled that the evidentiary issue was preserved. “When an entire class of evidence has been declared inadmissible or the trial court has clearly indicated it will receive no evidence of a particular class or on a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general.” (*Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co.*, 46 Cal. 2d 517, 522, 297 P.2d 428 (1956); see also *People v. Hansel*, 1 Cal. 4th 1211, 1216, 4 Cal. Rptr. 2d 888, 824 P.2d 694 (1992).) In *Hansel*, the trial court had ruled that [Penal Code § 1538.5\(i\)](#), prohibited the prosecution from calling an additional witness at the hearing on a motion to suppress evidence. The Supreme Court found that this ruling excused the need for an offer of proof as to the proposed testimony of the witness. (*People v. Hansel*, 1 Cal. 4th 1211, 1216, 4 Cal. Rptr. 2d 888, 824 P.2d 694 (1992).)

In *Castaneda v. Bornstein*, the court excused plaintiff's failure to make an offer of proof as to the testimony of its causation witness when the trial court “declared an entire class of evidence inadmissible: expert opinion on causation by a witness not designated as a causation expert.” (*Castaneda v. Bornstein*, 36 Cal. App. 4th 1818, 1826–1827, 43 Cal. Rptr. 2d 10 (2d Dist. 1995).) Contrast the result in *Gutierrez v. Cassiar Mining Corp.* During a hearing on the objection to certain evidence, the proponent asked to make an offer of proof, but did not do so after the trial judge questioned its necessity. On appeal the court distinguished this situation from a court's refusal to hear evidence. “Questioning the need for the offer does not appear to have been a refusal to hear one.” The proponent's failure to make an offer of proof barred an appeal on the issue, despite the court's disinterest in hearing it. (*Gutierrez v. Cassiar Min. Corp.*, 64 Cal. App. 4th 148, 161, 75 Cal. Rptr. 2d 132 (1st Dist. 1998).)

In addition, an offer of proof is excused if the proponent is cross-examining the witness. ([Evidence Code § 354\(c\)](#).) “Questions on cross-examination, however, are largely exploratory, and it is unreasonable to require an offer of proof since counsel often cannot know what pertinent facts may be elicited.” (*Tossman v. Newman*, 37

[Cal. 2d 522, 525, 233 P.2d 1 \(1951\).](#))

As with [Evidence Code § 353](#), an error in excluding evidence does not require reversal unless it resulted in a miscarriage of justice.

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§ 1:24. Limited admissibility

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑54, 207

West's Key Number Digest, [Criminal Law](#) 🔑673

Legal Encyclopedias

[C.J.S., Criminal Law § 1653](#)

[C.J.S., Trial §§ 178 to 181, 489, 567](#)

On occasion, evidence is admissible only as to one party or only for one purpose. ([Evidence Code § 355](#).) If a proper request is made, the trial court's failure to give a limiting instruction similar to [BAJI No. 2.05](#) or [CALJIC No. 2.09](#) is in error. ([People v. Miranda](#), 44 Cal. 3d 57, 83, 241 Cal. Rptr. 594, 744 P.2d 1127 (1987).) There is no such obligation in the absence of a request. ([People v. Richards](#), 17 Cal. 3d 614, 131 Cal. Rptr. 537, 552 P.2d 97 (1976).)

On request, the court should instruct as to the limited purpose of the evidence both at the time it is admitted and also during the instructions at the close of the case. Courts concerned about the jury's ability to adhere to the limiting instruction can utilize § 352 to exclude the evidence. ([Hrnjak v. Graymar, Inc.](#), 4 Cal. 3d 725, 729, 732–733, 94 Cal. Rptr. 623, 484 P.2d 599 (1971); [People v. Green](#), 27 Cal. 3d 1, 26, 164 Cal. Rptr. 1, 609 P.2d 468 (1980).)

A special rule exists for the confessions of a codefendant. In a jury trial, the prosecutor may not introduce evidence of a defendant's confession that implicates a codefendant, who is being tried in the same case. Simply instructing the jury to consider the statement against the declarant only is considered insufficient. ([People v. Aranda](#), 63 Cal. 2d 518, 529, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).) The passage of Proposition 8 abrogated *Aranda* to the extent it required exclusion of relevant evidence that need not be excluded under federal constitu-

tional law. ([People v. Greenberger](#), 58 Cal. App. 4th 298, 301, 68 Cal. Rptr. 2d 61 (2d Dist. 1997); see also § 2:28.) In a court trial, *Aranda* does not apply because the judge should be able to disregard the statement in considering the evidence against the codefendant. ([People v. Walkkein](#), 14 Cal. App. 4th 1401, 18 Cal. Rptr. 2d 383 (2d Dist. 1993).)

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Chapter
1. Relevant Evidence

C. Discretion To Exclude

§ 1:25. Exclusion under Evidence Code 352

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑146

West's Key Number Digest, [Criminal Law](#) 🔑338(7), 338(8)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 972 to 975, 997](#)

[C.J.S., Evidence §§ 200, 764](#)

The trial court has discretion to exclude relevant 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, confusing the issues, or misleading the jury. ([Evidence Code § 352](#).) The objection under this section is frequently made in conjunction with some other evidentiary objection. Thus, a party who loses a relevancy objection might then contend that admitting the evidence will cause an undue consumption of time or undue prejudice.

Warning

Relevant evidence cannot be excluded under [Evidence Code § 352](#) on the basis that a party is prejudiced because it is “surprised” by the proof. Though it appears the drafters of the Evidence Code considered including “surprise” as one of the exclusionary factors under [§ 352](#), this was rejected in favor of allowing discovery to prevent surprise and a continuance if surprise occurred despite diligent efforts to avoid it. ([Kelly v. New West Federal Savings](#), 49 Cal. App. 4th 659, 674, 56 Cal. Rptr. 2d 803 (2d Dist. 1996).)

It is imperative that a party raising an objection under [Evidence Code § 352](#) do so in a clear manner in order to preserve it. ([People v. Ghent](#), 43 Cal. 3d 739, 766, 239 Cal. Rptr. 82, 739 P.2d 1250 (1987).) It is also well-

settled that the court's exercise of discretion under this section will not be reversed on appeal without a clear showing of abuse. (*People v. Minifie*, 13 Cal. 4th 1055, 1070, 56 Cal. Rptr. 2d 133, 920 P.2d 1337 (1996).)

When an objection under § 352 is made, the better practice is for the trial court to weigh the probative value against the reasons for exclusion on the record. This will provide appellate courts with a record necessary for meaningful review of any claim for abuse of discretion and ensures “that a ruling on the motion ‘be the product of a mature and careful reflection on the part of the judge,’ i.e., to ‘promote judicial deliberation before judicial action.’ ” (*People v. Green*, 27 Cal. 3d 1, 25, 164 Cal. Rptr. 1, 609 P.2d 468 (1980); accord: *People v. Carter*, 36 Cal. 4th 1114, 1151, 32 Cal. Rptr. 3d 759, 117 P.3d 476 (2005), cert. denied, 126 S. Ct. 1881, 164 L. Ed. 2d 570 (U.S. 2006).) However, “a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code § 352.” (*People v. Taylor*, 26 Cal. 4th 1155, 113 Cal. Rptr. 2d 827, 34 P.3d 937 (2001); *People v. Riel*, 22 Cal. 4th 1153, 1187–1188, 96 Cal. Rptr. 2d 1, 998 P.2d 969 (2000).)

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1. Relevant Evidence

C. Discretion To Exclude

§ 1:26. Reasons to exclude—Cumulative

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West's Key Number Digest, [Trial](#) 🔑56

West's Key Number Digest, [Criminal Law](#) 🔑675

Legal Encyclopedias

[C.J.S., Criminal Law § 1643](#)

[C.J.S., Trial § 183](#)

Though probative, evidence that is cumulative should be excluded under [Evidence Code § 352](#) because it will cause an undue consumption of time. As the following cases demonstrate, the rule on cumulative evidence does not lead to the exclusion of all but the first piece of proof on a subject; the line between admissible “additional” evidence on an issue and “cumulative” excludable evidence on an issue is not one easily drawn. For example, *People v. Drews* upheld the judge's decision to exclude the testimony of a witness on a “knock and notice” search issue because the witness had the same vantage point as two earlier witnesses. ([People v. Drews](#), 208 Cal. App. 3d 1317, 1327, 256 Cal. Rptr. 846 (4th Dist. 1989).) In *People v. Filson*, the court noted that “the plain meaning of cumulative as ‘repetitive’ or ‘additional’ [citations] obviously implies in this context that other evidence on the point at issue has already been introduced To be cumulative imports that something of like effect is already shown.” ([People v. Filson](#), 22 Cal. App. 4th 1841, 1850, 28 Cal. Rptr. 2d 335 (1st Dist. 1994).) In *People v. Mattson*, the court held “[e]vidence that is identical in subject matter to other evidence should not be excluded as ‘cumulative’ when it has greater evidentiary weight or probative value.” In *Mattson*, the court upheld the trial judge's decision to admit photographs of the victim's body, although witnesses had already testified about its condition. ([People v. Mattson](#), 50 Cal. 3d 826, 871, 268 Cal. Rptr. 802, 789 P.2d 983 (1990).)

The court may limit the number of expert witnesses a party is permitted to call on an issue. ([Horn v. General Motors Corp.](#), 17 Cal. 3d 359, 371, 131 Cal. Rptr. 78, 551 P.2d 398 (1976) (defendants' fifth expert on same

subject matter properly excluded).) However, courts should be sensitive to unique factors that may make apparently similar evidence properly admissible. For example, in *McGee v. Cessna Aircraft Co.*, a suit for injuries suffered in a plane crash, the plaintiff presented experts who testified about the plane's flying capabilities and its crashworthiness. Plaintiff then sought to call an FAA investigator to testify about crashworthiness based on his observations at the scene, but the trial court held that such testimony would only be cumulative. Finding that the investigator's testimony was unique because: (1) he was the only observer to investigate at the crash scene; and (2) he was an independent observer, unlike the other experts, the reviewing court reversed that ruling, even though the additional testimony was on the same subject as that of the earlier witnesses. ([McGee v. Cessna Aircraft Co.](#), 139 Cal. App. 3d 179, 192, 188 Cal. Rptr. 542 (4th Dist. 1983).)

Even evidence impeaching a key witness can be limited if it is cumulative. In *People v. Burgener*, the prosecution's main witness had already been impeached by proof that she was a heroin user, in methadone treatment, and under the influence of Valium at the time of the crime. In addition, evidence established that she and another prosecution witness had lived together. The Supreme Court found that the trial court properly excluded further evidence of her lack of credibility as cumulative. ([People v. Burgener](#), 41 Cal. 3d 505, 524–526, 224 Cal. Rptr. 112, 714 P.2d 1251 (1986); see also [People v. Quartermain](#), 16 Cal. 4th 600, 623–624, 66 Cal. Rptr. 2d 609, 941 P.2d 788 (1997).) This rule should be distinguished from the court's authority to exclude impeachment evidence on a collateral matter under [Evidence Code § 352](#), which is discussed in [§ 1:27](#).

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1. Relevant Evidence

C. Discretion To Exclude

§ 1:27. Reasons to exclude—Time-consuming; confusion of issues

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 146

West's Key Number Digest, [Criminal Law](#) 🔑 338

Legal Encyclopedias

[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

[C.J.S., Evidence §§ 200, 764](#)

Even if evidence is not cumulative, it can be excluded if the time it will consume substantially outweighs its probative value or if there is a likelihood that it will confuse the jury. Under [Evidence Code § 780](#), a party can impeach a witness by proving that a fact testified to is false, even if that fact is collateral to the issues being tried. However, the trial court retains substantial discretion under [Evidence Code § 352](#) to preclude this impeachment if there will be undue time consumption. ([People v. Lavergne](#), 4 Cal. 3d 735, 742–744, 94 Cal. Rptr. 405, 484 P.2d 77 (1971).) The decision to exclude such evidence is even more appropriate where the party purposefully elicits the witness's testimony on the collateral issue on cross-examination in order to impeach the witness on that particular testimony. ([People v. Lavergne](#), 4 Cal. 3d 735, 743, 94 Cal. Rptr. 405, 484 P.2d 77 (1971).)

Exhibits that have marginal probative value and run the risk of overwhelming the jury can be excluded on the basis that they may unduly consume time or confuse the jury. ([Wagner v. Benson](#), 101 Cal. App. 3d 27, 36, 161 Cal. Rptr. 516 (4th Dist. 1980).)

In a medical malpractice suit, plaintiff was not permitted to prove that the doctor had been terminated from Stanford's residency program for poor performance. “Admission of the evidence threatened extensive hearings on the collateral issues of how well (or poorly) [the doctor] performed” ([Hinson v. Claremont Community](#)

[Hospital](#), 218 Cal. App. 3d 1110, 1125, 267 Cal. Rptr. 503 (4th Dist. 1990).)

Whenever a court considers allowing evidence of an uncharged act of misconduct by a party to prove some issue in dispute in the case, it must carefully weigh the probative value of that evidence against the danger it will consume undue time or confuse the jury. For a discussion of impeaching a witness with a misdemeanor conviction and judicial balancing, see Chapter 3. For a discussion of admission of prosecution evidence of defendant's uncharged misconduct to prove a plan or to prove predisposition in sexual offense or domestic violence cases, see Chapter 6.

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Chapter
1. Relevant Evidence

C. Discretion To Exclude

§ 1:28. Reasons to exclude—Undue prejudice

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 146

West's Key Number Digest, [Criminal Law](#) 🔑 338(7), 338(8)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 972 to 975, 997](#)

[C.J.S., Evidence §§ 200, 764](#)

Otherwise admissible evidence can also be excluded if the court concludes that its probative value is substantially outweighed by the undue prejudice it would create. Properly balancing these two factors depends on an understanding of the definition of each.

The chief elements of probative value are relevance, materiality, and necessity. The court must ascertain that the evidence:

- (1) tends logically, naturally, and by reasonable inference to prove the issue on which it is offered;
- (2) is offered on an issue that will ultimately prove to be material to the party's case; and
- (3) is not merely cumulative with respect to other evidence that the party may use to prove the same issue. ([People v. Schader](#), 71 Cal. 2d 761, 774–775, 80 Cal. Rptr. 1, 457 P.2d 841 (1969).)

Warning

It is a common misconception that credibility is one of the factors included in probative value; that if the

court believes the testimony of a witness is inherently unbelievable it may be excluded under § 352 because it lacks probative value. Except in rare instances of demonstrable falsity, where the testimony is physically impossible, evidence may not be excluded simply because the court does not believe it. (*People v. Cudjo*, 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (1993); *Vorse v. Sarasy*, 53 Cal. App. 4th 998, 1009–1013, 62 Cal. Rptr. 2d 164 (1st Dist. 1997).)

Some examples may assist in revealing the interplay of the elements of probative value. First, consider a situation in which the prosecutor seeks to establish a homicide victim's identity. This is an issue that should be considered material to the case (item (2)). If the prosecutor seeks to prove identity by having the victim's grieving parents introduce a photograph, this seems to be highly reliable evidence (item (1)). To a large extent, then, the probative value would depend on the existence of alternative methods of establishing identity (item (3)).

On the other hand, consider a situation in which the prosecutor seeks to establish that the defendant's motive to commit a theft-related offense was a drug abuse problem. Evidence of recent needle marks is a relatively reliable way to establish this (item (1)), and there may be no alternative proof available (item (3)). However, while always relevant, motive is not a necessary element of the prosecution's case, and so, under item (2), the probative value is reduced.

Weighed against probative value is the prejudicial effect of the evidence. It is a common misconception that evidence should be considered prejudicial if it harms the other side. Under this definition, it would be a rare piece of proof that failed to qualify. Why would one party seek to introduce evidence if it did not damage the opposing party's case? As the court noted in *People v. Brogna*, “[i]n applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’ ” (*People v. Brogna*, 202 Cal. App. 3d 700, 710, 248 Cal. Rptr. 761 (2d Dist. 1988).)

Perhaps the best statement of what “undue prejudice” means is contained in *People v. Karis*: “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. All evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.” (*People v. Karis*, 46 Cal. 3d 612, 638, 250 Cal. Rptr. 659, 758 P.2d 1189 (1988); accord: *People v. Carter*, 36 Cal. 4th 1114, 1168, 32 Cal. Rptr. 3d 759, 117 P.3d 476 (2005), cert. denied, 126 S. Ct. 1881, 164 L. Ed. 2d 570 (U.S. 2006) [upholding admission of photographs of homicide victim].) The term “undue prejudice” connotes a sense of unfairness. Thus, in *Smith v. County of Los Angeles*, a suit for inverse condemnation, the court accepted plaintiff's formulation that “for evidence to be prejudicial within the meaning of section 352, it must be unfair and tend to cause the trier of fact to decide the case on an improper basis.” (*Smith v. County of Los Angeles*, 214 Cal. App. 3d 266, 285, 262 Cal. Rptr. 754 (2d Dist. 1989); accord: *Bowen v. Ryan*, 163 Cal.App.4th 916, 927 (2008).)

In balancing probative value against prejudicial effect, the court should not exclude highly probative evidence unless the undue prejudice is unusually great. (*People v. Sassounian*, 182 Cal. App. 3d 361, 402, 226 Cal. Rptr. 880 (2d Dist. 1986); *Kessler v. Gray*, 77 Cal. App. 3d 284, 292, 143 Cal. Rptr. 496 (2d Dist. 1978).)

In conducting the balancing required by [section 352](#), courts must consider juror expectations. For example, assume the prosecution conducts scientific testing of evidence found at the scene, and the tests are inconclusive. Precluding evidence of the testing could be unduly prejudicial to the prosecution. Jurors might conclude that no testing had occurred and hold that against the prosecution. ([People v. Horning](#), 34 Cal. 4th 871, 901, 22 Cal. Rptr. 3d 305, 102 P.3d 228 (2004), cert. denied, 126 S. Ct. 45 (U.S. 2005) [inconclusive ballistics testing admitted].)

Warning

A party who prevails on a motion to exclude evidence under [Evidence Code § 352](#) must be careful to avoid opening the door to admission of the evidence. (See, e.g., [People v. Steele](#), 27 Cal. 4th 1230, 1246–1249, 120 Cal. Rptr. 2d 432, 47 P.3d 225 (2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 874, 154 L. Ed. 2d 791 (2003); [People v. Millwee](#), 18 Cal. 4th 96, 126–128, 74 Cal. Rptr. 2d 418, 954 P.2d 990 (1998), discussed in § 2:52. Compare the discussion of [People v. Senior](#), 3 Cal. App. 4th 765, 778, 5 Cal. Rptr. 2d 14 (6th Dist. 1992) in § 3:26.) For example, in a driving-under-the-influence case, assume the defendant refused to take a chemical test. He told the officer, “I’m not taking any of those tests. The last time I took one and got screwed.” At the defendant’s request, the court orders the officer not to testify regarding the second sentence because its probative value is slight and the risk of undue prejudice high from the jury learning of a prior arrest.

During the defendant’s testimony, however, he relates that he refused to take a chemical test because he was angry at the officer’s unfairness in arresting him. At the prosecutor’s request, the court should now reverse its earlier ruling and allow evidence of the second sentence to be introduced because the defendant has chosen to open up the question of his motivation for refusing the test and should not be permitted to mislead the jury. Note that if on direct the defendant does not discuss his motivation for refusing, the prosecutor may not bring up the subject. Moreover, if the prosecutor does bring up the defendant’s motivation, and the defendant responds that the refusal was based on his anger at the officer, the prosecutor should be “stuck” with the answer and not allowed to impeach with the previously excluded statement by the defendant.

Parties that prevail on in limine motions under [Evidence Code § 352](#) may ask the court for guidance on whether a particular question will open the door to admission of the previously excluded evidence. In [People v. Rowland](#), defense counsel sought such guidance prior to examining a witness, but the trial judge refused to give it. The Supreme Court refused to find that this was error, but did indicate that trial courts should try to provide this assistance to counsel, at least when they have enough information about the question and the likely response. ([People v. Rowland](#), 4 Cal. 4th 238, 259–260, 14 Cal. Rptr. 2d 377, 841 P.2d 897 (1992), accord: [People v. Bolden](#), 29 Cal. 4th 515, 542–544, 127 Cal. Rptr. 2d 802, 58 P.3d 931 (2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854 (2003).)

In a codefendant case, evidence sought to be introduced by one defendant can be excluded because it causes undue prejudice to the other defendant. ([People v. Von Villas](#), 10 Cal. App. 4th 201, 271, 13 Cal. Rptr. 2d 62 (2d Dist. 1992).)

Except in unusual circumstances, evidence of collateral source benefits is excluded under [§ 352](#), and, in ad-

dition, a plaintiff is not permitted to introduce evidence that he is ineligible to receive such benefits. ([Lund v. San Joaquin Valley R.R.](#), 31 Cal. 4th 1, 10–13, 1 Cal. Rptr. 3d 412, 71 P.3d 770 (2003).) In *Lund*, a railroad employee sued his employer under the Federal Employers' Liability Act. Railroad employees are not entitled to workers' compensation benefits and the trial court permitted plaintiff to so inform the jury. The court held that under the unusual circumstances in the case, this ruling was proper. In [Smalley v. Baty](#), 128 Cal. App. 4th 977, 984–985, 27 Cal. Rptr. 3d 575 (3d Dist. 2005), however, the court held that the plaintiff may testify that he paid his medical expenses and that the collateral source rule is inapposite.

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1. Relevant Evidence

C. Discretion To Exclude

§ 1:29. Undue prejudice—Photographs of victim

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West's Key Number Digest, [Evidence](#) 🔑359

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[C.J.S., Criminal Law §§ 1395 to 1396, 1406 to 1418](#)

[C.J.S., Evidence §§ 987 to 999, 1002](#)

It is not uncommon for objections to be made under [Evidence Code § 352](#) to the admissibility of photographs. The California Supreme Court has consistently upheld the use of photographs of a crime victim, even if “gruesome,” 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.” ([People v. Coleman](#), 46 Cal. 3d 749, 776, 251 Cal. Rptr. 83, 759 P.2d 1260 (1988).) “Our Supreme Court has recognized that ‘murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant’ Photographs disclosing and corroborating the manner in which the crime was committed are clearly relevant to the issue of malice.” ([People v. Williamson](#), 172 Cal. App. 3d 737, 747, 218 Cal. Rptr. 550 (2d Dist. 1985).) Photographs of the victims' bodies and their location at the crime scene may be admissible even if the defense does not contest the testimony of the medical examiner or of those who located and examined the bodies, if the photographs clarify that testimony. ([People v. Crittenden](#), 9 Cal. 4th 83, 132, 36 Cal. Rptr. 2d 474, 885 P.2d 887 (1994).) “Photographs are not cumulative simply because they illustrate facts otherwise presented through testimony.” ([People v. Farnam](#), 28 Cal. 4th 107, 185, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (2002), cert. denied, 537 U.S. 1124, 123 S. Ct. 861, 154 L. Ed. 2d 806 (2003); [People v. Carter](#), 36 Cal. 4th 1114, 1168–1170, 32 Cal. Rptr. 3d 759, 117 P.3d 476 (2005), cert. denied, 126 S. Ct. 1881, 164 L. Ed. 2d 570 (U.S. 2006).)

Examples of cases admitting photographs of crime victims.

In *People v. Mattson*, a capital case, the prosecution was permitted to introduce photographs that reflected the position of the victim's body when found. The photographs tended to confirm the veracity of the defendant's confession, which he had repudiated. Even though witnesses had testified to their observations of the body, the testimony reflected only the witness's opinion that details given by the defendant matched the actual condition of the body. The photographs were the best evidence of this. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight." (*People v. Mattson*, 50 Cal. 3d 826, 871, 268 Cal. Rptr. 802, 789 P.2d 983 (1990).) In *People v. Thompson*, the photographs were admitted because they aided in understanding the pathologist's testimony. (*People v. Thompson*, 45 Cal. 3d 86, 115–116, 246 Cal. Rptr. 245, 753 P.2d 37 (1988).) In *People v. Brawley*, color photographs were admitted despite the prior admission of black-and-white photographs because those in color showed the wounds more clearly. (*People v. Brawley*, 1 Cal. 3d 277, 295, 82 Cal. Rptr. 161, 461 P.2d 361 (1969).) In *People v. Taylor*, 26 Cal. 4th 1155, 1167–1168, 113 Cal. Rptr. 2d 827, 34 P.3d 937 (2001), crime scene photographs and a videotape of the handcuffed victims were properly admitted because they supported one victim's testimony about the circumstances of the crime.

In *People v. Spears*, the court noted the normal reasons for the admission of photographs of the homicide victim: the photographs may clarify medical testimony, establish an element of the crime, including the existence of malice or premeditation, or negate an asserted defense. In *Spears*, the court approved the admission of autopsy photographs to corroborate the autopsy testimony and to establish intent even though the defendant offered to stipulate that the victim suffered wounds as depicted in the photographs. (*People v. Spears*, 228 Cal. App. 3d 1, 28–29, 278 Cal. Rptr. 506 (6th Dist. 1991).) In *People v. Jones*, the prosecutor was permitted to introduce photographs of the victim's wounds with extensive bleeding, despite the presence of other photographs showing wounds and no blood. "The extent of the bleeding from the wounds was probative as to severity." (*People v. Jones*, 119 Cal. App. 3d 749, 753–754, 174 Cal. Rptr. 218 (3d Dist. 1981).) In a slight variant, the Supreme Court in *People v. Brown* upheld the decision to allow the prosecution to use a mannequin dressed in the victim-police officer's uniform to establish that the defendant knew when he fired his weapon that the victim was a peace officer. (*People v. Brown*, 46 Cal. 3d 432, 442–443, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988).)

Examples of cases excluding photographs of crime victims.

In *People v. Marsh*, the court found that "the jury was not enlightened one additional whit by viewing those seven gory autopsy photographs." (*People v. Marsh*, 175 Cal. App. 3d 987, 998, 221 Cal. Rptr. 311 (4th Dist. 1985).) In *People v. Boyd*, the court found that the photographs were not relevant on the issues of intent, malice, or degree. (*People v. Boyd*, 95 Cal. App. 3d 577, 157 Cal. Rptr. 293 (2d Dist. 1979); but see *People v. Scheid*, 16 Cal. 4th 1, 17, 65 Cal. Rptr. 2d 348, 939 P.2d 748 (1997): "We reject defendant's broad contention that because malice is not an issue in a felony-murder prosecution, the crime scene photograph was irrelevant.") In *People v. Gibson*, the court found that the photographs were gruesome, revolting, and shocking to ordinary sensibilities. Their probative value was substantially outweighed by the danger of undue prejudice since other less offensive photographs of the deceased victim were also available and admitted. (*People v. Gibson*, 56 Cal. App. 3d 119, 135, 128 Cal. Rptr. 302 (2d Dist. 1976).) In *People v. Smith*, the photographs were excluded because they "supplied no more than a blatant appeal to the jury's emotions," and they were cumulative. (*People v. Smith*, 33 Cal. App. 3d 51, 69, 108 Cal. Rptr. 698 (3d Dist. 1973).)

People v. Boyd, discussed above, and *People v. Jackson* provide interesting examples of the rule's applica-

tion. Boyd was Jackson's accomplice in the murder of a Mrs. Curtis. A photograph of the victim was admitted in both cases. In *Jackson*, this ruling was upheld because the photograph “bore on the issue of defendant's requisite state of mind towards Mrs. Curtis, i.e., did he possess malice?” (*People v. Jackson*, 28 Cal. 3d 264, 302–303, 168 Cal. Rptr. 603, 618 P.2d 149 (1980).) In *Boyd*, the admission of the victim's photograph was found to be in error because Boyd was tried on a felony-murder theory only. The photograph's probative value was much lower, but the danger of undue prejudice remained the same, thus requiring the opposite ruling. (*People v. Boyd*, 95 Cal. App. 3d 577, 157 Cal. Rptr. 293 (2d Dist. 1979).)

Comment

For a defendant in a homicide case or a defendant in a personal injury case, where the prosecution/plaintiff seeks to introduce photographs of the victim or scene, there are at least two advantages in obtaining a decision early in the case on which of the photographs will be admitted. First, an early decision will permit use of the pictures in voir dire to determine their effect on the jury. Second, an early decision will avoid what occurred in *Brawley and Jones*, discussed above, where less probative photographs were introduced first.

For a court faced with a challenge whether or not to use pictures of the homicide or tort victim or scene under [Evidence Code § 352](#), perhaps the best approach is to single out those photographs that raise concern because of their violent or gruesome character. Then the court can require that the proponent provide a separate reason for the admission of each and exclude those lacking sufficient justification. Generally, the court should take the position that introduction of more than one photograph is unnecessary to establish each point unless the proponent is able to persuade the court to the contrary.

A related rule excludes evidence of the victim's photo taken while the victim was alive, unless it bears on a contested issue. (*People v. Thomas*, 2 Cal. 4th 489, 522–523, 7 Cal. Rptr. 2d 199, 828 P.2d 101 (1992); *People v. Ramos*, 30 Cal. 3d 553, 577, 180 Cal. Rptr. 266, 639 P.2d 908 (1982), judgment rev'd, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983); *O'Meara v. Haiden*, 204 Cal. 354, 366, 268 P. 334 (1928) (wrongful death case).)

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§ 1:30. Undue prejudice—Prior bad acts

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West's Key Number Digest, [Evidence](#) 🔑 129(5)

West's Key Number Digest, [Criminal Law](#) 🔑 369 to 374

Legal Encyclopedias

[C.J.S., Criminal Law §§ 596 to 597, 1115 to 1125](#)

[C.J.S., Evidence §§ 762 to 766, 770 to 771, 773, 783 to 788](#)

Under [Evidence Code § 1101\(b\)](#), evidence of uncharged bad acts (whether criminal or not) by a person is admissible to prove any issue in dispute, including motive, opportunity, intent, identity, or scheme, but not criminal disposition. Even disposition evidence is admissible in criminal prosecutions involving sexual assaults and domestic violence. (See the discussion in [§ 6:14](#).) Evidence admissible under these rules can be excluded under [Evidence Code § 352](#) if its probative value is substantially outweighed by an undue prejudicial effect. In fact, a common use of [Evidence Code § 352](#) is to reinforce the goals of those code provisions, primarily located in [Evidence Code §§ 1100 to 1156](#), which exclude relevant evidence due to some extrinsic policy. Listed below is a sampling of cases ruling on [Evidence Code § 352](#) objections to evidence of prior crimes.

In *People v. Malone*, the defendant was charged with the murder of B and evidence of the murder of A was admitted. “Because of its inflammatory impact, evidence relevant on one of those theories (set forth in [section 1101](#)) should be excluded when it is ‘not relevant to an issue expressly in dispute ... merely cumulative ... or ... more prejudicial than probative under all the circumstances.’ ” (*People v. Malone*, 47 Cal. 3d 1, 17, 18, 252 Cal. Rptr. 525, 762 P.2d 1249 (1988).) Since the murder of A was admissible on issues of intent and identity of the killer of B, and there were substantial and distinctive similarities between the two offenses, the [§ 352](#) objection was properly rejected. (*People v. Malone*, 47 Cal. 3d 1, 20–22, 252 Cal. Rptr. 525, 762 P.2d 1249 (1988).)

In *People v. Schader*, the defendant was charged with murder in the course of a robbery. Evidence of a separate robbery was held admissible as proof of common scheme or modus operandi and intent. (*People v. Schader*, 71 Cal. 2d 761, 776–777, 80 Cal. Rptr. 1, 457 P.2d 841 (1969).) For a discussion of the evidence admissible to prove plan or scheme, see § 6:13.

In *People v. Edelbacher*, the defendant was charged with his wife's murder. Evidence that she had testified against him in a spousal rape trial was admitted, though he had been acquitted of the charge, because it helped established a motive for the killing. (*People v. Edelbacher*, 47 Cal. 3d 983, 1028, 254 Cal. Rptr. 586, 766 P.2d 1 (1989).) An objection under § 352 was overruled because “the evidence was highly relevant on the issue of motive, which was an important issue in the case, and the risk of prejudice was not excessive.” (*People v. Edelbacher*, 47 Cal. 3d 983, 254 Cal. Rptr. 586, 766 P.2d 1 (1989).) As to motive evidence in homicide cases generally, see *People v. Garceau*: “[i]n the absence of physical evidence linking defendant to the ... killings, the presence of a motive was particularly significant in this case.” (*People v. Garceau*, 6 Cal. 4th 140, 177, 24 Cal. Rptr. 2d 664, 862 P.2d 664 (1993).)

In *Isaacs v. Huntington Memorial Hospital*, the plaintiff, in a suit against a landowner for criminal acts of a third person on the landowner's property, was permitted to establish foreseeability by proving prior incidents of violence on the premises. Remoteness is one factor to consider under § 352, but the trial court's ruling that no incident older than three years would be admissible was found by the Supreme Court to be arbitrary. (*Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 132–133, 211 Cal. Rptr. 356, 695 P.2d 653 (1985).) In *Bowen v. Ryan*, 163 Cal.App.4th 916 (2008) a minor patient sued a dentist, who treated children with behavioral problems, for choking him and shoving him against a wall during a dental appointment. *Bowen* reversed a plaintiff's verdict because the trial court incorrectly admitted evidence of nine other incidents where the dentist used violence while treating his patients, to show a common design or plan. (at 924; see the discussion in Note 6:5) *Bowen* then concluded that even if the evidence had been admissible under section 1101, it should have been excluded under section 352, in part because it tended to “evoke an emotional bias against defendant that clouded the relevant issues in the case.” (at p. 927.)

In *People v. Mason*, the trial judge permitted the prosecution to introduce evidence of the defendant's flight, knowing that the defendant would then seek to explain the flight by admitting uncharged crimes. The test under § 352 concerning admissibility of the flight evidence was applied as if the prosecution was introducing the evidence of the uncharged offenses. On the facts of this case, the decision to admit the flight evidence was upheld. (*People v. Mason*, 52 Cal. 3d 909, 942, 277 Cal. Rptr. 166, 802 P.2d 950 (1991).)

In *People v. Ewoldt*, a case involving evidence of the defendant's common scheme or plan, the California Supreme Court provided an excellent analysis of the factors involved in determining the admissibility of uncharged crimes under Evidence Code § 352 (*People v. Ewoldt*, 7 Cal. 4th 380, 404–405, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)):

Our conclusion that § 1101 does not require exclusion of the evidence of defendant's uncharged misconduct ... does not end our inquiry. Evidence of uncharged offenses “is so prejudicial that its admission requires extremely careful analysis Since ‘substantial prejudicial effect [is] inherent in [such] evidence,’ uncharged offenses are admissible only if they have *substantial* probative value.” (*People v. Thompson*, 27 Cal. 3d 303, 318, 165 Cal. Rptr. 289, 611 P.2d 883 (1980), italics in original, fn. omitted.) ... The principal

factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of a common design or plan The probative value of evidence of uncharged misconduct also is affected by the extent to which its source is independent of the evidence of the charged offense. For example, if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness's account may have been influenced by knowledge of the charged offense would be eliminated and the probative value of the evidence would be enhanced. The probative value of such evidence would increase further if independent evidence of additional instances of similar misconduct, committed pursuant to the same design or plan, were produced.

On the other side of the scale, the prejudicial effect of this evidence is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the likelihood that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of “confusing the issues” ([Evidence Code § 352](#)), because the jury had to determine whether the charged offenses had occurred. The testimony describing defendant's uncharged acts, however, was no more inflammatory than the testimony concerning the charged offenses. This circumstance decreased the potential for prejudice The circumstance that the defendant's uncharged misconduct ... occurred approximately 12 years prior to trial does not, in the context of this case, significantly lessen the probative value of this evidence, because only a few years elapsed between the time defendant last molested Natalie and the time he began his ongoing pattern of molesting Jennifer. In *People v. Ing* [citation] we held admissible evidence of uncharged misconduct even though one of the prior offenses was committed 15 years before the charged offenses.

See *People v. Kipp*, which applied the factors discussed in *Ewoldt* and admitted evidence of an uncharged rape-murder against a defendant charged with a similar offense. ([People v. Kipp](#), 18 Cal. 4th 349, 371–372, 75 Cal. Rptr. 2d 716, 956 P.2d 1169 (1998).) It is apparent that the Supreme Court intends to apply this *Ewoldt* analysis to § 352 questions whenever uncharged misconduct is introduced, whether under § 1101(b), or not. (See the discussion of [Evidence Code §§ 1108 and 1109](#) in § 6:14.)

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1. Relevant Evidence

C. Discretion To Exclude

§ 1:31. Undue prejudice—Gang membership

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Legal Encyclopedias

[C.J.S., Criminal Law §§ 1115 to 1117, 1119 to 1121, 1123 to 1124](#)

[C.J.S., Witnesses §§ 632 to 633](#)

Evidence of the defendant's gang membership, when not directly relevant to prove an element of the offense or an enhancement (see the California Street Terrorism Enforcement and Prevention Act, [Penal Code §§ 186.20 et seq.](#)), is, like evidence of prior crimes, subject to both [Evidence Code §§ 1101\(b\)](#) and 352. When evaluating evidence of gang membership under [Evidence Code § 352](#), “because it may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it.” ([People v. Williams](#), 16 Cal. 4th 153, 193, 66 Cal. Rptr. 2d 123, 940 P.2d 710 (1997) (court admitted the evidence as probative of both motive and identity); [People v. Jones](#), 30 Cal. 4th 1084, 1115, 135 Cal. Rptr. 2d 370, 70 P.3d 359 (2003), cert. denied, 541 U.S. 975, 124 S. Ct. 1877, 158 L. Ed. 2d 472 (2004) (Court properly admitted evidence of defendant's membership in the 211 187 Hard Way Gangster Crips in a robbery-murder capital case because “the gang's name itself is evidence of premeditation.”).) In [People v. Contreras](#) and [People v. Plasencia](#) where the two defendants were co-participants in a single robbery, the evidence established that the crime had been committed by members of a certain street gang to obtain money for beer and drugs. Evidence that the two defendants each belonged to that gang was, therefore, admissible to show motive. ([People v. Contreras](#), 144 Cal. App. 3d 749, 756, 192 Cal. Rptr. 810 (2d Dist. 1983); [People v. Plasencia](#), 168 Cal. App. 3d 546, 552, 223 Cal. Rptr. 786 (2d Dist. 1985); see also [People v. Sandoval](#), 4 Cal. 4th 155, 175, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992); [People v. Martin](#), 23 Cal. App. 4th 76, 81, 28 Cal. Rptr. 2d 660 (6th Dist. 1994).) In addition, evidence of a defendant's gang membership has been admitted to explain the reluctance of a prosecution witness to testify ([People v. Har-](#)

ris, 175 Cal. App. 3d 944, 957–958, 221 Cal. Rptr. 321 (2d Dist. 1985); and to explain why a victim delayed in reporting crimes to the police. (*People v. Albillar*, 162 Cal.App.4th 935, 944 (2008).) Further, the failure of witnesses to remember a previous identification of a gang member as a perpetrator of the crime “raises a reasonable inference they were afraid to do so at trial based on defendant's gang status... .” (*People v. Martinez*, 158 Cal.App.4th 1324, 1333 (2008).)

Evidence of common gang membership is admissible when introduced to show possible bias of the defense witnesses in favor of the defendant. (*People v. Holt*, 37 Cal. 3d 436, 456, 208 Cal. Rptr. 547, 690 P.2d 1207 (1984); *In re Wing Y.*, 67 Cal. App. 3d 69, 76, 136 Cal. Rptr. 390 (2d Dist. 1977).) The evidence should be excluded, however, if there is already substantial evidence that they were all friends and lived in the same neighborhood. (*People v. Cardenas*, 31 Cal. 3d 897, 904–906, 184 Cal. Rptr. 165, 647 P.2d 569 (1982).) Although *Cardenas* is an opinion of three justices and of limited precedential value (see *People v. Harris*, 175 Cal. App. 3d 944, 957, 221 Cal. Rptr. 321 (2d Dist. 1985)), its reasoning seems sound (see *People v. Davis*, 42 Cal. App. 4th 806, 813, 49 Cal. Rptr. 2d 890 (2d Dist. 1996); *People v. Maestas*, 20 Cal. App. 4th 1482, 1495, 25 Cal. Rptr. 2d 644 (2d Dist. 1993)). In addition, though common membership is relevant to show bias, evidence of the gang's criminal activities is unnecessary for this purpose and should be excluded. (*People v. Bojorquez*, 104 Cal. App. 4th 335, 343–345, 128 Cal. Rptr. 2d 411 (2d Dist. 2002); Cf. *In re Wing Y.*, 67 Cal. App. 3d 69, 78, 136 Cal. Rptr. 390 (2d Dist. 1977).)

Evidence that the defendant belonged to one gang and the victim to another, that the two gangs had a violent relationship, that the gangs retaliate for the deaths of fellow gang members, and that the defendant's close friend had been killed by a member of the victim's gang was all admissible to establish the defendant's intent to kill the victim. (*People v. Woods*, 226 Cal. App. 3d 1037, 1049, 277 Cal. Rptr. 269 (2d Dist. 1991); see also *People v. Funes*, 23 Cal. App. 4th 1506, 1518, 28 Cal. Rptr. 2d 758 (1st Dist. 1994).) Evidence that the defendant had participated in a prior gang-related drive-by shooting was admissible to establish his intent and motivation to participate in the charged drive-by shooting. (*People v. Zepeda*, 87 Cal. App. 4th 1183, 1210–1212, 105 Cal. Rptr. 2d 187 (6th Dist. 2001).)

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1. Relevant Evidence
C. Discretion To Exclude

§ 1:32. Undue prejudice—Drug use and addiction

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 [369](#), [371](#), [372](#)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1115 to 1117, 1119 to 1121, 1123 to 1125](#)

As with gang membership, admission of evidence of prior drug use or addiction depends on the prosecution's ability to satisfy the requirements of [Evidence Code §§ 1101\(b\)](#) and 352. In *People v. Cardenas*, the California Supreme Court set down a rule that greatly restricts admissibility of evidence concerning the defendant's drug use and addiction:

[E]vidence of an accused's narcotics addiction is inadmissible where it “tends only remotely or to an insignificant degree to prove a material fact in the case ...” [citation]. Prior cases have upheld the admission of evidence of an accused's narcotics addiction where the accused was charged with a violation of the Health and Safety Code or where obtaining narcotics was the direct object of the crime committed [citations]. However, in cases where the object of the charged offense was to obtain money or an item other than narcotics, evidence of the accused's narcotics use has been uniformly found inadmissible [citation]. ([People v. Cardenas](#), 31 Cal. 3d 897, 906–907, 184 Cal. Rptr. 165, 647 P.2d 569 (1982).)

In *Cardenas*, the trial court erroneously admitted evidence that at the time the defendant was arrested, five days after the crime, he was under the influence of drugs. ([People v. Cardenas](#), 31 Cal. 3d 897, 906–907, 184 Cal. Rptr. 165, 647 P.2d 569 (1982).) In accordance with *Cardenas*, the Supreme Court in *People v. Holt* found that the trial court should not have admitted evidence that the defendant used the proceeds of the robbery to obtain and use heroin. ([People v. Holt](#), 37 Cal. 3d 436, 449–450, 208 Cal. Rptr. 547, 690 P.2d 1207 (1984).)

Cardenas is a decision of only three justices and, despite its holding, evidence of drug addiction has not been rejected uniformly in cases in which the object of the robbery has been money. For example, in *People v. Chatman*, 38 Cal. 4th 344, 371, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (2006), the court noted that evidence of narcotics addiction is inadmissible where it “tends only remotely or to an insignificant degree to prove a material fact,” but approved the admission of evidence that following the homicide the defendant used crack cocaine because the existence of defendant's intent to steal before the homicide was “hotly contested.” In addition, the prosecution, has been allowed to show a defendant's need for money in order to establish a motive for the crime. If a defendant has a drug habit that requires expenditures beyond his or her apparent ability, such evidence can establish this motive. (*People v. Perez*, 42 Cal. App. 3d 760, 767–768, 117 Cal. Rptr. 195 (4th Dist. 1974).) However, in *People v. Reid*, the court limited evidence of drug addiction to those cases where the magnitude of the habit is established. (See *People v. Reid*, 133 Cal. App. 3d 354, 362–363, 184 Cal. Rptr. 186 (5th Dist. 1982), cited with approval in *People v. Valentine*, 207 Cal. App. 3d 697, 703, 254 Cal. Rptr. 822 (4th Dist. 1988).) A good general discussion of this area is contained in *People v. Felix*, 23 Cal. App. 4th 1385, 1392–1396, 28 Cal. Rptr. 2d 860 (4th Dist. 1994).

Comment

In a related area, the California Supreme Court has held that evidence of the defendant's indebtedness is generally inadmissible to establish a motive for a robbery or other theft: “Under certain circumstances, however, evidence of poverty or indebtedness may be relevant or admissible for limited purposes, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money.” (*People v. Wilson*, 3 Cal. 4th 926, 939, 13 Cal. Rptr. 2d 259, 838 P.2d 1212 (1992); *People v. Koontz*, 27 Cal. 4th 1041, 1083–1084, 119 Cal. Rptr. 2d 859, 46 P.3d 335 (2002), cert. denied, 537 U.S. 1117, 123 S. Ct. 881, 154 L. Ed. 2d 794 (2003).) In addition, evidence of a defendant's poverty may be admitted to “eliminate other possible explanations for a defendant's sudden wealth after a theft offense.” (*People v. Cornwell*, 37 Cal. 4th 50, 96–97, 33 Cal. Rptr. 3d 1, 117 P.3d 622 (2005), cert. denied, 126 S. Ct. 1432, 164 L. Ed. 2d 135 (U.S. 2006).)

In *People v. Moten*, the defendant was charged with causing the death of her eight-week-old baby by dehydration and starvation. The court found error in the trial judge's decision to admit evidence that the defendant used drugs during pregnancy. It rejected the contention that the drug use showed an indifference to the unborn child that by inference could have continued after the birth. Even if relevant for this purpose, the court found that the evidence created a “substantial danger of undue prejudice” and should have been excluded under Evidence Code § 352. (*People v. Moten*, 229 Cal. App. 3d 1318, 1326–1327, 280 Cal. Rptr. 602 (5th Dist. 1991).)

The courts have been cautious in admitting evidence of addiction because of the recognition that the effect of such evidence “upon a jury of laymen [is] catastrophic It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.” (*People v. Davis*, 233 Cal. App. 2d 156, 161, 43 Cal. Rptr. 357 (2d Dist. 1965).)

Evidence that any witness used narcotics either just before the events observed or just before testifying is admissible to permit the jury to evaluate the witness's ability to perceive, recollect, or relate his or her observations, if there is expert testimony substantiating the effects of such use. (*People v. Rocha*, 3 Cal. 3d 893, 901, 92 Cal. Rptr. 172, 479 P.2d 372 (1971).)

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§ 1:33. Excluding defense evidence—Due process considerations

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West's Key Number Digest, [Constitutional Law](#) 🔑266

West's Key Number Digest, [Criminal Law](#) 🔑338

Legal Encyclopedias

[C.J.S., Constitutional Law §§ 992, 1026 to 1035, 1037, 1041 to 1044](#)

[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

The United States Supreme Court has held that the even handed application of state evidentiary rules must, on occasion, yield to the defendant's constitutional right to present a defense. (See, e.g., [Chambers v. Mississippi](#), 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); [Washington v. Texas](#), 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).)

In [People v. Babbitt](#), 45 Cal. 3d 660, 684, 248 Cal. Rptr. 69, 755 P.2d 253 (1988), the California Supreme Court conceded that these cases applied to an exclusion of defense evidence under § 352 and adopted the following rule from [People v. Reeder](#), 82 Cal. App. 3d 543, 553, 147 Cal. Rptr. 275 (2d Dist. 1978):

[Evidence Code § 352](#) must bow to the due process rights of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense. In [Chambers v. Mississippi](#) it was held that the exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial in violation of constitutional due process requirements. We do not mean to imply, however, that a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using [Evidence Code § 352](#).

In [Babbitt](#), the trial court excluded defense evidence that had, at best, a speculative relevance. The defendant

had murdered a stranger in her home. In the room where the body was found the television was on, tuned to a particular channel, with the sound off. The defendant sought to prove that certain movies shown that night on that television station might have triggered a psychotic state drawing him to enter the home through an open screen door and to commit the homicide. Clearly, a conclusion contrary to the one reached excluding the evidence would have insulated defense evidence from any challenge under [Evidence Code § 352](#). (*People v. Babbitt*, 45 Cal. 3d 660, 684, 248 Cal. Rptr. 69, 755 P.2d 253 (1988); see also *People v. Milner*, 45 Cal. 3d 227, 240, 246 Cal. Rptr. 713, 753 P.2d 669 (1988).)

In *People v. Becerra*, the court upheld the denial of a defendant's request to execute a handwriting exemplar for comparison in front of the jury. The trial court had agreed to permit the defense to call an expert to testify with respect to any preexisting exemplar prepared by the defendant at a time when his handwriting was not under suspicion. (*People v. Becerra*, 188 Cal. App. 3d 772, 233 Cal. Rptr. 679 (2d Dist. 1987).)

In *People v. Burrell–Hart*, the court recognized that the balance between probative value and prejudicial effect is “ ‘particularly delicate and critical where what is at stake is a defendant's liberty.’ ... We further recognize that a defendant's right to present his defense theory is a fundamental right and all of his pertinent evidence should be considered by the trier of fact.” *Davis v. Alaska*, 415 U.S. 308, 317, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). (*People v. Burrell–Hart*, 192 Cal. App. 3d 593, 599, 237 Cal. Rptr. 654 (2d Dist. 1987).) *Burrell–Hart* found that the trial court in a rape case had erred in not allowing the defendant to introduce evidence that on another occasion the victim had falsely accused another man of rape, even though the proffered evidence was conflicting as to the precise nature of the prior complaint and there was some dissimilarity in the incidents. (But see *People v. Bittaker*, 48 Cal. 3d 1046, 1097–1098, 259 Cal. Rptr. 630, 774 P.2d 659 (1989), where evidence of prior rape accusations by the victim was found to be properly excluded under [§ 352](#) because the incidents were long past, never reached the point of formal charges, and would consume considerable time.)

The criminal defendant's due process right to a fair trial may impact exercise of the court's discretion under [§ 352](#). Though generally the right to a fair trial is not infringed by application of the ordinary rules of evidence, [§ 352](#) “must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense.” (*People v. Babbitt*, 45 Cal. 3d 660, 684, 248 Cal. Rptr. 69, 755 P.2d 253 (1988); *People v. Cunningham*, 25 Cal. 4th 926, 108 Cal. Rptr. 2d 291, 25 P.3d 519 (2001).) *Babbitt* held that due process does not bar use of [§ 352](#) at the penalty phase of a capital trial. (*Babbitt*, 45 Cal. 3d at 684–685.) “[E]xcluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to a defense.” (*People v. Fudge*, 7 Cal. 4th 1075, 1102–1103, 31 Cal. Rptr. 2d 321, 875 P.2d 36 (1994).) Cumulative evidence presented by the defense is properly excluded; it does not have significant probative value. (*People v. Shoemaker*, 135 Cal. App. 3d 442, 448–450, 185 Cal. Rptr. 370 (3d Dist. 1982).)

[Evidence Code § 352](#) can be relied on by a codefendant who objects to evidence offered by another defendant. It is not limited to evidentiary disputes between opposing parties; it is also applicable to parties on the same side of an action when their interests are adverse. (*People v. Ainsworth*, 45 Cal. 3d 984, 1007, 248 Cal. Rptr. 568, 755 P.2d 1017 (1988).) “However, in a joint criminal trial, if admission of evidence of *significant* probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not exclusion of the evidence but rather a limiting instruction or severance.” (*People v. Greenberger*, 58 Cal. App. 4th 298, 351–352, 68 Cal. Rptr. 2d 61 (2d Dist. 1997) (emphasis added).) In *Greenberger*, the court found that the trial court properly excluded one defendant's evidence at the request of a codefendant because the evidence was not significant

to the proponent's case.

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§ 1:34. Excluding defense evidence—Third-party culpability

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[C.J.S., Criminal Law § 994](#)

[C.J.S., Negligence § 782](#)

For many years, the California courts required a high minimum threshold for admission of evidence of third-party guilt. The so-called *Mendez-Arline* test excluded such evidence unless it was “substantial evidence tending to directly connect that person with the actual commission of the offense.” (*People v. Green*, 27 Cal. 3d 1, 22, 164 Cal. Rptr. 1, 609 P.2d 468 (1980), relying on *People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924); *People v. Arline*, 13 Cal. App. 3d 200, 91 Cal. Rptr. 520 (5th Dist. 1970).) This rule was rejected in *People v. Hall*, which concluded that “third-party evidence need not show ‘substantial proof of a probability’ that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.” (*People v. Hall*, 41 Cal. 3d 826, 833, 226 Cal. Rptr. 112, 718 P.2d 99 (1986).) *Hall* went on, however, to reject the notion that such evidence was always admissible. “[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” In *Hall*, the Supreme Court found that the trial court erred by excluding defense evidence of another's guilt because the defendant had submitted offers of proof that actually linked the third person to the murder. (*People v. Hall*, 41 Cal. 3d 826, 834, 226 Cal. Rptr. 112, 718 P.2d 99 (1986). See, also, *People v. Bradford*, 15 Cal. 4th 1229, 1325, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997).) In *People v. Basuta*, 94 Cal. App. 4th 370, 386–388, 114 Cal. Rptr. 2d 285 (4th Dist. 2001), the court reversed the conviction of a day-care provider for assault on a child with force likely to produce great bodily injury resulting in death, because the trial court had refused to permit the defend-

ant to introduce evidence that the child's mother had a history of abusive behavior directed at the child and others.

Hall requires more than proof that the victim lived a troubled or dangerous lifestyle. For example, in *People v. Edelbacher*, the court relied on the *Hall* rule to uphold exclusion of third-party evidence. The defendant's offer of proof simply linked the homicide victim to drug dealing. Counsel argued that “people who are dealing in narcotics frequently end up injured or shot.” The defendant, however, did not identify a possible alternate suspect or even establish an actual motive, as opposed to possible motive, for the crime. Thus, the evidence was properly excluded. (*People v. Edelbacher*, 47 Cal. 3d 983, 1017–1018, 254 Cal. Rptr. 586, 766 P.2d 1 (1989); see also *People v. Gutierrez*, 28 Cal. 4th 1083, 1134–1137, 124 Cal. Rptr. 2d 373, 52 P.3d 572 (2002), cert. denied, 538 U.S. 1001, 123 S. Ct. 1899, 155 L. Ed. 2d 829 (2003); *People v. Sandoval*, 4 Cal. 4th 155, 176–177, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992).) In *People v. Kaurish*, the trial court properly excluded defense evidence of the “seedy” character of the victim's neighborhood, which was offered to suggest the possibility that the perpetrator was an unknown derelict. (*People v. Kaurish*, 52 Cal. 3d 648, 686, 276 Cal. Rptr. 788, 802 P.2d 278 (1990).)

In *People v. Pride*, the court properly excluded defense evidence that would have established a motive for the victim's husband to kill her: he received a \$40,000 life insurance payment, purchased a home, traveled abroad, and remarried more than a year after her death. The evidence already had established that the husband was present at the murder scene and apparently lacked corroboration of his whereabouts at the time of death. The Supreme Court noted that “nothing in the purported motive evidence distinguishes Jeff from any other person who is named as a beneficiary under a working spouse's life insurance policy or who makes a fresh start after a painful loss Absent any physical or other evidence linking Jeff to ‘actual perpetration of the murders, the alleged third-party evidence was irrelevant.’ ” (*People v. Pride*, 3 Cal. 4th 195, 238, 10 Cal. Rptr. 2d 636, 833 P.2d 643 (1992); *People v. Yeoman*, 31 Cal. 4th 93, 139–141, 2 Cal. Rptr. 3d 186, 72 P.3d 1166 (2003), cert. denied, 541 U.S. 991, 124 S. Ct. 2018, 158 L. Ed. 2d 497 (2004) (Defendant's offer of proof showed motive, only, and was therefore insufficient).)

In *City of Alhambra v. Superior Court*, a defendant in a homicide case sought pretrial discovery of police reports of homicide investigations of the same type in a given area during a two-year period. The court found that the decision in *Hall* made it easier for the defendant to establish plausible justification for the request. “The lowered evidentiary threshold set forth in *Hall* has an obvious impact on the scope of discovery available However, a sufficient showing of plausible justification still must contain *facts* demonstrating that there is a reasonable likelihood that the material . . . requested is, or might lead to, direct or circumstantial evidence which *links* a third person to the actual crime.” (*City of Alhambra v. Superior Court*, 205 Cal. App. 3d 1118, 205 Cal. App. 3d 1556d, 252 Cal. Rptr. 789 (2d Dist. 1988).)

In *City of Alhambra*, the police had arrested a suspect in the discoverable incidents. In *People v. Jackson*, 110 Cal. App. 4th 280, 288, 1 Cal. Rptr. 3d 561 (5th Dist. 2003), where no arrests in the discoverable incidents had been made, the court found that distinction “critical: the government's interest in maintaining confidentiality in a case of an ongoing investigation is far greater than in a case where a suspect has been charged and the matter has entered the public view through the court system. *City of Alhambra* never considered the issue before (*People v. Littleton*, 7 Cal. App. 4th 906, 9 Cal. Rptr. 2d 288 (4th Dist. 1992)) and this court—i.e., whether a defendant's entitlement to potentially exculpatory material outweighs the official information privilege and a vic-

tim's privacy rights—and is not probative on this matter.” *Jackson* denied disclosure of the requested information.

Evidence of negligence by nonparties is inadmissible in a civil suit when presented by a defendant to help prove that defendant's conduct was not negligent. In *Fagerquist v. Western Sun Aviation, Inc.*, the court refused to permit the defendant to prove that a nonparty had negligently manufactured the plane's engine. Defendant had contended that such evidence would show that it did not negligently maintain the plane and would prove that if the product were defective, defendant could not have discovered the defects even with reasonable inspection. (*Fagerquist v. Western Sun Aviation, Inc.*, 191 Cal. App. 3d 709, 716, 236 Cal. Rptr. 633 (4th Dist. 1987).) *Fagerquist* noted that a different result might be obtained in a case where plaintiff relies on the *res ipsa loquitur* doctrine. (*Fagerquist v. Western Sun Aviation, Inc.*, 191 Cal. App. 3d 709, 717, 236 Cal. Rptr. 633 (4th Dist. 1987).)

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§ 1:35. Impact of Proposition 8 on Evidence Code 352

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West's Key Number Digest, [Witnesses](#) 🔑337, 345

West's Key Number Digest, [Criminal Law](#) 🔑338

Legal Encyclopedias

[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

[C.J.S., Witnesses §§ 587, 589 to 590, 593, 596 to 602, 605](#)

Proposition 8 preserved the court's discretionary power to exclude evidence under [Evidence Code § 352](#). However, it added [article I, § 28\(f\) to the California Constitution](#), which provides that “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” This provision has greatly expanded the use of felony convictions to impeach witnesses, including criminal defendants. The prior limitations on such impeachment, which were rooted in [Evidence Code § 352](#) and set forth in *People v. Beagle* and its progeny, have been modified substantially. (*People v. Beagle*, 6 Cal. 3d 441, 99 Cal. Rptr. 313, 492 P.2d 1 (1972).) See the discussion of this issue in §§ 3:62 to 3:66.

Proposition 8 has had an expansive effect on [§ 352](#) in one area. The Supreme Court has held that the provision in the initiative requiring the admission of “all relevant evidence” has, for criminal cases, eliminated the evidentiary limitations contained in [Evidence Code §§ 786 to 790](#). (*People v. Harris*, 47 Cal. 3d 1047, 1081–1082, 255 Cal. Rptr. 352, 767 P.2d 619 (1989).) However, the opponent of the evidence may still rely on [Evidence Code § 352](#) as a reason for exclusion. The policy basis of the sections eliminated by the initiative can then be presented as examples of the prejudice that the party will suffer by admission of the evidence. (See, e.g., *People v. Harris*, 47 Cal. 3d 1047, 1090, 255 Cal. Rptr. 352, 767 P.2d 619 (1989); *People v. Taylor*, 180 Cal. App. 3d 622, 633, 225 Cal. Rptr. 733 (3d Dist. 1986) (although [Evidence Code § 790](#) was repealed by Proposi-

tion 8, the rationale behind it may be argued in a [§ 352](#) motion). Cf. [People v. Glidden](#), 258 Cal. Rptr. 463 (App. 4th Dist. 1989) (California's rule on admissibility of post-arrest silence repealed by Proposition 8 retains its vitality in [§ 352](#).)

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D. Preliminary Determinations on Admissibility

§ 1:36. Preliminary fact and proffered evidence defined

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West's Key Number Digest, [Trial](#) 🔑60, 51

West's Key Number Digest, [Criminal Law](#) 🔑672, 681

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1657 to 1658](#)

[C.J.S., Evidence § 823](#)

[C.J.S., Trial §§ 177, 191 to 192](#)

[Evidence Code §§ 400 and 401](#) define “preliminary fact” and “proffered evidence” and describe how they interact. A “ ‘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.” ([Evidence Code § 400.](#)) “ ‘Proffered evidence’ means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.” ([Evidence Code § 401.](#)) *People v. Balderas* provides a concrete example of this interaction. In *Balderas*, the defendant sought to impeach a prosecution witness by raising doubts as to the witness's ability to understand and recollect certain incriminating statements allegedly made to him by the defendant. To accomplish this the defense asked whether the witness had taken narcotics on days other than the day the admissions were made. The Court of Appeal upheld the rejection of this proffered evidence in the absence of proof of a preliminary fact: expert testimony on the probable effect of such drug use on perception and memory. ([People v. Balderas](#), 41 Cal. 3d 144, 191, 222 Cal. Rptr. 184, 711 P.2d 480 (1985).)

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D. Preliminary Determinations on Admissibility

§ 1:37. Preliminary fact determinations—Evidence Code 402 hearings

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West's Key Number Digest, [Trial](#) 🔑 60, 51

West's Key Number Digest, [Criminal Law](#) 🔑 672, 681

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1657 to 1658](#)

[C.J.S., Evidence § 823](#)

[C.J.S., Trial §§ 177, 191 to 192](#)

[Evidence Code § 402](#) sets forth a procedure for determining foundational and other preliminary facts when the existence of a preliminary fact is disputed. “Issues regarding a witness's credibility are properly left to the jury, and are not a proper subject of an [Evidence Code section 402](#) hearing.” ([People v. Smith](#), 40 Cal. 4th 483, 515–516, 54 Cal. Rptr. 3d 245, 150 P.3d 1224 (2007), cert. denied, 2007 WL 2024989 (U.S. 2007).) 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 admissibility of a confession or admission by the defendant out of the presence and hearing of the jury if any party so requests. ([Evidence Code § 402\(b\)](#).) For a discussion of an [Evidence Code § 402](#) hearing on a motion to suppress a confession, see [People v. Spears](#), 228 Cal. App. 3d 1, 20–23, 278 Cal. Rptr. 506 (6th Dist. 1991).

Warning

Because “a ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto” ([Evidence Code § 402\(c\)](#)), a party who receives an adverse ruling should take care to clarify that the judge has considered each of the necessary factors.

An [Evidence Code § 402](#) hearing would commonly be used to determine if an expert has the proper qualifications to testify. ([People v. Fierro](#), 1 Cal. 4th 173, 222–223, 3 Cal. Rptr. 2d 426, 821 P.2d 1302 (1991).) As [Evidence Code § 402\(b\)](#), provides, this hearing might be conducted in front of the jury or, at the request of any party, outside the jury's presence. If the hearing is conducted outside the jury's presence and the expert is permitted to testify, the hearing will then have to occur again in the jury's presence so that it can consider the expert's qualifications when evaluating the strength of any opinions rendered. Though this suggests an advantage in doing the initial hearing in front of the jury, normally this is inadvisable. Unless the court is quite certain it will permit the expert to provide an opinion even before the challenge to the qualifications is heard, the risk of prejudicing either the proponent or opponent of the evidence is usually too great to permit a challenge, which ultimately is successful, to occur before the jury.

[Evidence Code §§ 400 to 406](#) set forth the rules governing the admissibility of evidence that depends on the proof of a preliminary fact. The Comments to these sections provide an excellent analysis of these statutes, a summary of which follows.

[Evidence Code § 402](#) simply requires the judge to follow the procedures for determining the existence of a disputed preliminary fact set forth in [Evidence Code §§ 400 to 406](#). For this reason, almost all hearings on preliminary fact questions are referred to as “402 hearings.” Two situations must be distinguished: (1) where the judge must be persuaded of the existence of the preliminary fact before admitting the proffered evidence; and (2) where the judge must admit the evidence merely upon the introduction of evidence sufficient to sustain a finding of the preliminary fact.

[Evidence Code § 405](#) governs those cases under (1) above, where the judge, alone, determines the preliminary fact question, resolving any conflicts in the evidence on this preliminary fact. After deciding this question, the judge either admits or excludes the evidence.

[Evidence Code § 403](#) governs the cases under (2) above, where the judge admits the proffered evidence if there is sufficient evidence to sustain a jury's finding of the preliminary fact. Under [§ 403](#), the jury makes the final determination on the existence of the preliminary fact. “[W]hen a defendant has proffered evidence, the relevance (and therefore the admissibility) of which depends upon the existence of a preliminary fact, he or she bears the burden of producing sufficient evidence of the preliminary fact. [Citation.] Sufficient evidence in this context means evidence strong enough to ‘support a favorable determination by the jury.’ [Citation.] The determination of the existence, or non-existence, of sufficient evidence of a preliminary fact is committed to the sound discretion of the trial court.” ([People v. Rundle](#), 43 Cal.4th 76, 130–131 (2008).)

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Simons California Evidence Manual
Justice Mark B. Simons
Chapter
1. Relevant Evidence
D. Preliminary Determinations on Admissibility

§ 1:38. Preliminary fact determinations—Province of court and jury

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑 139.1

West's Key Number Digest, [Criminal Law](#) 🔑 733

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1338, 1350, 1374, 1730 to 1732, 1735 to 1747, 2063, 2125](#)

[C.J.S., Trial §§ 346 to 368, 400, 431, 456, 458, 461, 471 to 473, 475 to 478](#)

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 §§ 400 to 406. ([Evidence Code § 310\(a\)](#).)

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 § 450). ([Evidence Code § 310\(b\)](#).)

Except as otherwise provided by law, where the trial is by jury (a) all questions of fact are to be decided by the jury, and (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 declarant. ([Evidence Code § 312](#).)

[Evidence Code §§ 310\(a\)](#) and [312](#) divide the functions of the judge and jury along lines similar to those of §§ 402 to 405. In addition, [§ 310\(a\)](#) allocates all questions of law to the court. Among those questions are the following:

- Construction of a contract. See, e.g., [Ray v. Farmers Ins. Exchange](#), 200 Cal. App. 3d 1411, 1415–1416,

246 Cal. Rptr. 593 (3d Dist. 1988): “The meaning to be ascribed to an insurance policy, as with any contract, is a question of law. It is a matter, in the first instance, for the trial court’s determination, not the jury’s. And unless interpretation of the policy turns on the credibility of extrinsic evidence, an appellate court may independently determine the policy’s meaning regardless of what the trial court may have concluded.”

- Construction of a statute. See, e.g., [Donald v. Sacramento Valley Bank](#), 209 Cal. App. 3d 1183, 1190, 260 Cal. Rptr. 49 (3d Dist. 1989), which confirmed that a defendant is entitled to summary judgment if it persuades the trial court that none of the plaintiff’s asserted causes of action are within the contemplation of the statute. *Donald* also held, however, that the trial court erred in its interpretation of the application of the handicap access statutes to automatic teller machines.

- Construction of foreign law. [Evidence Code § 310\(b\)](#) allocates construction of foreign laws to the court, to be determined under the judicial notice procedures. Section 311 directs that when “such law cannot be determined, the court may, as the ends of justice require, either: (a) Apply the law of this state ...; or (b) Dismiss the action without prejudice”

Perhaps the most important function assigned to the jury as the trier of fact is contained in [Evidence Code § 312\(b\)](#): “to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarant.” Thus, on appeal from a criminal conviction, a court does not re-weigh the facts or re-decide if the evidence established guilt beyond a reasonable doubt, but only decides “whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” ([People v. Rich](#), 45 Cal. 3d 1036, 1081–1082, 248 Cal. Rptr. 510, 755 P.2d 960 (1988); [People v. Provencio](#), 210 Cal. App. 3d 290, 306, 258 Cal. Rptr. 330 (4th Dist. 1989).) The reviewing court may not reject evidence believed by the jury, “unless there exists either a physical impossibility they are true, or their falsity is apparent without resorting to inferences or deductions.” ([People v. Thomas](#), 180 Cal. App. 3d 47, 54, 225 Cal. Rptr. 277 (5th Dist. 1986).)

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D. Preliminary Determinations on Admissibility

§ 1:39. Preliminary fact determinations—Conducting 402 hearing in jury's presence

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West's Key Number Digest, [Trial](#) 🔑50

West's Key Number Digest, [Criminal Law](#) 🔑671

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[C.J.S., Criminal Law §§ 1285 to 1286, 1645](#)

[C.J.S., Trial § 176](#)

[Evidence Code § 402](#) addresses one specific issue: the location of the hearing on the preliminary fact. In all but one situation, the court has discretion to conduct the [§ 402](#) hearing outside the presence of the jury: In a criminal case, when considering the admissibility of a defendant's admission or confession, the court must conduct the hearing outside the presence and hearing of the jury if any party so requests. (*In re Juma P.*, 204 Cal. App. 3d 1228, 1236, 251 Cal. Rptr. 739 (1st Dist. 1988).)

Whether discretion really exists to hold a hearing on the admissibility of a criminal defendant's admission or confession in front of the jury is open to some doubt. [Evidence Code § 402](#) clearly states that such discretion exists if neither party has requested the jury's removal. However, the Comment to [Evidence Code § 405](#) states that the voluntariness of a confession is to be considered under [Evidence Code § 405](#), not § 403, and therefore is held outside the jury's presence. In *People v. Rowe*, the court agreed with the latter interpretation and found that the trial court erred by failing to hold the hearing on the voluntariness of a confession outside the presence of the jury, even though no party requested it. (*People v. Rowe*, 22 Cal. App. 3d 1023, 1030, 99 Cal. Rptr. 816 (4th Dist. 1972); see also *People v. Bennett*, 58 Cal. App. 3d 230, 235–236, 129 Cal. Rptr. 679 (5th Dist. 1976).) In *People v. Fowler*, the court disagreed with *Rowe* and found that in the absence of a request to excuse the jury, the suppression motion could be conducted in the jury's presence. (*People v. Fowler*, 109 Cal. App. 3d 557, 564, 167 Cal. Rptr. 235 (3d Dist. 1980).) Perhaps the best analysis of these competing views is contained in *People v.*

Torrez, in which the court concluded that in the absence of a party's request, the court has discretion to conduct the hearing in the jury's presence. In all but the most unusual cases, however, the court concluded that it would be an abuse of that discretion not to excuse the jury. ([People v. Torrez](#), 188 Cal. App. 3d 723, 733, 236 Cal. Rptr. 299 (5th Dist. 1987).)

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D. Preliminary Determinations on Admissibility

§ 1:40. Section 403 issues

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West's Key Number Digest, [Trial](#) 🔑60

West's Key Number Digest, [Criminal Law](#) 🔑681

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1657 to 1658](#)

[C.J.S., Evidence § 823](#)

[C.J.S., Trial §§ 191 to 192](#)

[Evidence Code § 403](#) covers those situations in which the judge is required to admit the proffered evidence upon the introduction of evidence sufficient to sustain a finding of the preliminary fact. [Section 403](#) governs when:

- The relevance of the proffered evidence depends on the existence of the preliminary fact;
- The preliminary fact is the personal knowledge of a witness concerning the matter of his testimony;
- The preliminary fact is the authenticity of a writing; or
- 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 or herself.

In addition, various other Evidence Code sections state that admissibility depends on “evidence sufficient to sustain a finding” of a preliminary fact and [§ 403](#) governs.

As the Comment points out, because the preliminary fact questions set forth in § 403 have traditionally been regarded as jury questions, the judge's decision is not final. On this type of question, the judge's role is merely to determine if there is evidence sufficient to permit the jury to decide the question. (See *Legrand v. Yellow Cab Co.*, 8 Cal. App. 3d 125, 133, 87 Cal. Rptr. 292 (2d Dist. 1970).)

The following are among the types of issues considered in § 403 hearings:

- A homicide defendant's right to show that a particular person was an associate of the victims and had a reputation for dangerousness to bolster his claim of self-defense is relevant only if the defendant knew of that person's reputation and his association with the victims. This knowledge was a preliminary fact, and the trial court could exclude the proffered evidence in a section 403 hearing in the absence of evidence of the requisite knowledge. (*People v. Tafoya*, 42 Cal.4th 147, 164–166 (2007).)
- In *Pugh v. See's Candies, Inc.*, plaintiff sought to establish that he had been fired for objecting to a union contract on the ground of illegality. Evidence of his objection was held irrelevant, however, without some showing in a § 403 hearing that it was communicated to See's. (*Pugh v. See's Candies, Inc.*, 203 Cal. App. 3d 743, 758, 250 Cal. Rptr. 195 (1st Dist. 1988).)
- In *Matthews v. Superior Court*, the court found that the prosecution had discharged its burden of showing at a § 403 hearing that two prior crimes committed by the defendant were sufficiently similar to be admitted. (*Matthews v. Superior Court*, 201 Cal. App. 3d 385, 390, 247 Cal. Rptr. 226 (2d Dist. 1988).)
- When a criminal defendant objects to an in-court identification as tainted by prior police misconduct, the court must hold a hearing under § 403 and review the propriety and effect of the pretrial identification procedures used. (See *People v. Citrino*, 11 Cal. App. 3d 778, 782–783, 90 Cal. Rptr. 80 (1st Dist. 1970).) In *Citrino*, the court reversed the conviction, finding that the prosecution had failed to meet its burden of showing, by a preponderance of the evidence, that the identification procedure employed was not overly suggestive.
- In any hearsay exception, there are two preliminary determinations: (1) Did the declarant actually make the statement; and (2) Is the statement “trustworthy” as required by the Evidence Code exception? The first determination is, in effect, a relevancy issue that is decided under § 403. The second is determined under § 405 and is discussed in § 1:42. Some hearsay exceptions have a third issue, the due diligence of the prosecutor in obtaining a witness. This appears to be a § 403 issue that can be heard in the jury's presence unless counsel requests otherwise. (*People v. Rodriguez*, 18 Cal. App. 3d 793, 798–799, 96 Cal. Rptr. 162 (2d Dist. 1971).)
- Where a criminal defendant wishes to raise a defense to a charge of cultivating or possessing marijuana under the Compassionate Use Act of 1996, a hearing conducted pursuant to §§ 402 and 403 is appropriate. The court makes a preliminary determination if there is sufficient evidence to sustain a jury finding that the defendant is protected by the limited statutory immunity provided. (*People v. Galambos*, 104 Cal. App. 4th 1147, 1156–1159, 128 Cal. Rptr. 2d 844 (3d Dist. 2002).)
- Evidence of a threatening phone call made to a witness is irrelevant until the preliminary fact of the caller's identity is established. (*People v. Collins*, 44 Cal. App. 3d 617, 628, 118 Cal. Rptr. 864 (3d Dist. 1974).)

1975); but see the discussion in Note 3:47 of this volume.)

[Evidence Code § 403\(b\)](#), provides that, subject to § 702 (personal knowledge of the witness, discussed in [§ 3:4](#)), the court may admit the proffered evidence on condition that evidence of the preliminary fact is submitted later in the trial. [Section 403\(c\)](#), sets forth certain instructions to be given to the jury when the judge admits the proffered evidence. (See [Everett v. Everett](#), 150 Cal. App. 3d 1053, 1072–1073, 201 Cal. Rptr. 351 (2d Dist. 1984).) For example, if the court admits certain evidence and then determines the preliminary fact was not proved, it should instruct the jury to disregard the evidence. ([People v. Lucas](#), 12 Cal. 4th 415, 467–468, 12 Cal. 4th 825a, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (1995).)

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SIMCAEVID § 1:40

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§ 1:41. Procedure when preliminary fact involves privilege against self-incrimination

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [307](#), [308](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 545, 547 to 549](#)

Whenever proffered evidence is claimed to be privileged under [Evidence Code § 940](#) (privilege against self-incrimination), the person claiming the privilege has the burden of showing that the proffered evidence might tend to be incriminating. 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. ([Evidence Code § 404](#).)

[Evidence Code § 404](#) allocates to the objecting party the burden of showing that the testimony sought might incriminate him or her. The Comment to this section indicates that this need not be done by producing evidence as such. “[T]he judge 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.” If the objecting party carries his or her burden, then the judge must sustain the claim of privilege unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the person. ([People v. Seijas](#), [36 Cal. 4th 291, 304–305, 30 Cal. Rptr. 3d 493, 114 P.3d 742 \(2005\)](#).)

In order to assert this privilege, a witness who is not the defendant must be called and sworn. Even if the witness is or was a codefendant, it is inappropriate to assume that the privilege will be invoked. ([People v. Ford](#), [45 Cal. 3d 431, 439–440, 247 Cal. Rptr. 121, 754 P.2d 168 \(1988\)](#).) In *Ford* the Supreme Court commended the procedure whereby the claim of privilege was asserted in a pretestimonial hearing outside the jury's presence. ([People v. Ford](#), [45 Cal. 3d 431, 441, 247 Cal. Rptr. 121, 754 P.2d 168 \(1988\)](#).)

In *In re Marshall K.*, the court approved a procedure whereby the witness was called and sworn and received advice from his attorney whether or not to answer each question. If the attorney instructed the witness not to answer, and the judge believed that this was appropriate, the witness was ordered not to answer. If the question's tendency to incriminate was not so clear, the judge permitted counsel for each side to comment on it and then ruled. (*In re Marshall K.*, 14 Cal. App. 3d 94, 100, 92 Cal. Rptr. 39 (5th Dist. 1970).)

If a witness in a felony criminal action asserts the privilege against self-incrimination, the prosecutor can obtain immunity for the witness and require the testimony under [Penal Code § 1324](#). In a misdemeanor case, the witness cannot be compelled to testify even with immunity, but must voluntarily give up the privilege against self-incrimination under [Penal Code § 1324.1](#). Unlike the testimony of an accomplice, the testimony of a witness who has received immunity does not need to be corroborated. (*People v. Echevarria*, 11 Cal. App. 4th 444, 451, 13 Cal. Rptr. 2d 840 (2d Dist. 1992).)

In *People v. Lopez*, a non-party witness announced the intention to claim the privilege against self-incrimination. In a hearing conducted outside the jury's presence the court determined that the privilege was inapplicable and ordered the witness to testify. Despite the ruling, the witness asserted the privilege in front of the jury. The subsequent conviction was upheld. On appeal, the court held that the jury was entitled to consider the assertion of the privilege to support the testimony of the prosecution's gang expert that gang members cooperate to promote the interests of the gang and its members. (*People v. Lopez*, 71 Cal. App. 4th 1550, 84 Cal. Rptr. 2d 655 (4th Dist. 1999).)

If the defendant wishes to obtain immunity for a witness in order to present exculpatory evidence, no statute or case permits it without the prosecutor's agreement. (*People v. Estrada*, 176 Cal. App. 3d 410, 418, 221 Cal. Rptr. 922 (2d Dist. 1986), cited with approval in *People v. Ledesma*, 204 Cal. App. 3d 682, 697, 251 Cal. Rptr. 417 (2d Dist. 1988).) In *People v. Cooke*, the court refused to permit defense witness immunity even if the defendant's right to a fair trial requires it, in the absence of a Supreme Court decision authorizing it. (*People v. Cooke*, 16 Cal. App. 4th 1361, 1371, 20 Cal. Rptr. 2d 506 (1st Dist. 1993).) The Supreme Court has left open the question of whether the defendant would be entitled to obtain immunity for a witness "if the witness's testimony was both clearly exculpatory and essential to an effective defense, and if no strong governmental interest weighed against the grant of immunity." (*People v. Cudjo*, 6 Cal. 4th 585, 619, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (1993).) The Supreme Court has, however, "characterized as 'doubtful' the 'proposition that the trial court [possesses] inherent authority to grant immunity.' [Citations.]" (*People v. Stewart*, 33 Cal. 4th 425, 468, 15 Cal. Rptr. 3d 656, 93 P.3d 271 (2004).) To preserve the issue on appeal, the defense must request immunity for the witness in the trial court. (*People v. Cudjo*, 6 Cal. 4th 585, 619, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (1993).)

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§ 1:42. Section 405 issues

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[C.J.S., Criminal Law §§ 1657 to 1658](#)

[C.J.S., Evidence § 823](#)

[C.J.S., Trial §§ 191 to 192](#)

With respect to preliminary fact determinations not governed by [Evidence Code § 403](#) or [404](#), 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. ([Evidence Code § 405\(a\)](#).)

If a preliminary fact is also a fact in issue in the action, the jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact. If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact. ([Evidence Code § 405\(b\)](#).)

[Evidence Code §§ 400 to 406](#) do not limit the right of a party to introduce evidence relevant to weight or credibility before the trier of fact.

As the Comment notes, [Evidence Code § 405](#) deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion.

Initially the court must indicate to the parties who has the burden of proof and the burden of producing evidence on the disputed issue. With privileges, for example, the objecting party has the burden of showing the applicability of the privilege, and the proponent of the evidence has the burden of showing an exception. (*State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (2d Dist. 1997).) On occasion, a preliminary fact issue to be decided by the judge under § 405 coincides with an issue involved in the merits of the case. In such a situation, subsection (b)(1) provides that the jury is not to be informed of the court's decision concerning the preliminary fact. Subsection (b)(2) provides that the jury is not to be instructed that it can disregard the proffered evidence if its determination of the preliminary fact differs from the court's.

Section 405 changed the law relating to confessions. Where the evidence of the voluntariness of the confession is conflicting, the court must exclude the confession unless the court is persuaded that the confession was made freely and voluntarily. The prosecution has the burden of proving it is voluntary by a preponderance of the evidence. (*People v. Markham*, 49 Cal. 3d 63, 69–71, 260 Cal. Rptr. 273, 775 P.2d 1042 (1989).) Once the judge has determined that a confession is voluntary and admissible, the jury does not redetermine the voluntariness issue under Evidence Code § 405. (*People v. Jimenez*, 21 Cal. 3d 595, 607, 147 Cal. Rptr. 172, 580 P.2d 672 (1978) (erroneous admission of confession not reversible per se).) However, as the Comment to § 405 indicates, the defendant is permitted to introduce evidence of the circumstances under which the statement was made, if such evidence relates to the credibility of the statement, even though it may duplicate the evidence presented to the court on the issue of admissibility. The jury's sole concern is the truth or falsity of the facts stated, not the admissibility of the statement. (See Evidence Code § 406.)

Another example of the interplay between Evidence Code §§ 405 and 406 is in the qualifying of an expert witness. These qualifications are determined by the judge under § 405 without resubmission of the issue to the jury. However, though the judge admits the testimony, the jury is entitled to consider the evidence of qualifications in determining its weight. (*People v. King*, 266 Cal. App. 2d 437, 444, 72 Cal. Rptr. 478 (2d Dist. 1968).)

Two issues must be resolved in hearsay questions. The first, the identity of the declarant, is considered under § 403 and is discussed in § 1:40. The second, the reliability of the statement, is considered under § 405. Thus, if a statement is proffered as a spontaneous declaration or a writing is proffered as a business record, the court must decide if the requirements of Evidence Code § 1240 or 1271 have been met under § 405.

Competency of a witness to testify is also an issue considered under § 405. In *Adamson v. Department of Social Services*, a child day care center petitioned for a writ of mandate to set aside the revocation of its license. The primary witness was a five-year-old girl who testified she had been molested. Under §§ 700 and 701, plaintiff challenged her competency to testify. Adamson noted that under § 405, “[t]he party challenging a witness's qualification has the burden of proving disqualification. [Citations.] Once the trial court determines the competency of a witness, this decision will not be disturbed on appeal in the absence of a clear abuse of discretion.” (*Adamson v. Department of Social Services*, 207 Cal. App. 3d 14, 19–20, 254 Cal. Rptr. 667 (1st Dist. 1988).)

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E. Weight Of The Evidence

§ 1:43. Direct and circumstantial evidence

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West's Key Number Digest, [Criminal Law](#) 🔑552, 338(2)

West's Key Number Digest, [Evidence](#) 🔑587, 100

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[C.J.S., Criminal Law §§ 914, 972 to 973, 975, 977, 981, 997, 1496 to 1497, 1502](#)

[C.J.S., Evidence §§ 2, 205, 245, 1330](#)

“ ‘Direct evidence’ means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.” ([Evidence Code § 410](#).) Circumstantial evidence, which is not defined in the Evidence Code, is evidence that proves one fact from which an inference of a second may be made. ([People v. Crawford](#), 253 Cal. App. 2d 524, 530, 61 Cal. Rptr. 472 (5th Dist. 1967): “The opinion of experts have ... uniformly been held to constitute circumstantial evidence.” ([Torres](#), 98 Cal. App. 4th at 216).) “Inference” is defined in [Evidence Code § 600\(b\)](#), 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.” As the Comment to [§ 600](#) notes, “under the Evidence Code an inference is not itself evidence; it is the result of reasoning from evidence.”

Circumstantial is distinguished from direct evidence by the following characteristics: first, the existence of one or more evidentiary facts; and second, a process of inference, by which these facts are so connected with the facts sought, as to tend to persuade one of their truth. ([People v. Nealy](#), 228 Cal. App. 3d 447, 451, 279 Cal. Rptr. 36 (2d Dist. 1991).) An inference is the product of logic and reason and must rest on the evidence, on probability, not speculative possibility or conjecture. It must comport with physical laws and human experience. ([Louis & Diederich, Inc. v. Cambridge European Imports, Inc.](#), 189 Cal. App. 3d 1574, 1584–1585, 234 Cal. Rptr. 889 (6th Dist. 1987).) In an auto burglary case, the car's owner did not testify that the vehicle was locked.

However, evidence that a car window had been unbroken six to eight hours before the crime and was broken when the police arrived during the burglary provided substantial evidence supporting a finding that the car was locked when the entry occurred. ([People v. Rivera](#), 109 Cal. App. 4th 1241, 1245, 135 Cal. Rptr. 2d 682 (4th Dist. 2003).)

An inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary. A judgment or order may be supported by substantial evidence based on inferences drawn from inferences. However, the first inference must be drawn from sufficient evidence and the second not too remote. Otherwise, resting an inference on an inference may result in a “progressive weakening of logical sequence.” ([Louis & Diederich, Inc. v. Cambridge European Imports, Inc.](#), 189 Cal. App. 3d 1574, 1584, 234 Cal. Rptr. 889 (6th Dist. 1987).)

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E. Weight Of The Evidence

§ 1:44. Direct evidence of one witness sufficient

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West's Key Number Digest, [Evidence](#) 🔑584(3)

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[C.J.S., Criminal Law §§ 914, 1482 to 1483, 1489, 1485, 1489 to 1492](#)

[C.J.S., Evidence §§ 729, 1300 to 1305, 1313 to 1315, 1320, 1324, 1326 to 1327, 1340, 1342, 1345](#)

The direct evidence of one witness is sufficient to prove any fact, except where a statute requires additional evidence. ([Evidence Code § 411](#).) The Comment to [Evidence Code § 411](#) provides a list of several statutes that require additional evidence. The one-witness rule has been utilized in diverse circumstances.

In civil cases, though the lone witness is a party to the action, the testimony can suffice. ([In re Marriage of Catalano](#), 204 Cal. App. 3d 543, 548, 251 Cal. Rptr. 370 (1st Dist. 1988); [Chodos v. Insurance Co. of North America](#), 126 Cal. App. 3d 86, 178 Cal. Rptr. 831 (2d Dist. 1981).) Even if unproduced documents exist on the same subject matter, a witness's testimony may be enough. ([Bank of Costa Mesa v. Losack](#), 74 Cal. App. 3d 287, 141 Cal. Rptr. 550 (4th Dist. 1977).) One witness can provide evidence of habit and custom substantial enough to sustain a verdict. ([Jenkins v. Tuneup Masters](#), 190 Cal. App. 3d 1, 13–14, 235 Cal. Rptr. 214 (3d Dist. 1987).) Moreover, the testimony of an expert is covered by the one-witness rule. ([Kearl v. Board of Medical Quality Assurance](#), 189 Cal. App. 3d 1040, 1052–1053, 236 Cal. Rptr. 526 (2d Dist. 1986).)

In criminal cases, the rule has been applied to uphold a conviction where the only evidence of the perpetrator's identity came from the victim, though there were inconsistencies between the defendant's appearance and the victim's description and there was evidence that she had been coached by the prosecutor. ([In re Gustavo M.](#), 214 Cal. App. 3d 1485, 1497, 263 Cal. Rptr. 328 (6th Dist. 1989).) In addition, the Supreme Court has con-

cluded that jailhouse informants are covered by this rule. Unlike accomplice testimony, cellmate testimony is still sufficient to convict, even in a capital case, without corroboration. (*People v. Hovey*, 44 Cal. 3d 543, 554–555, 244 Cal. Rptr. 121, 749 P.2d 776 (1988).) Even accomplice testimony need not be corroborated in probation revocation proceedings. (*People v. McGavock*, 69 Cal. App. 4th 332, 81 Cal. Rptr. 2d 600 (1st Dist. 1999).)

It is generally true that the uncontradicted testimony of a witness about a particular fact may not be disregarded but should be accepted as proof of that fact. (*Joseph v. Drew*, 36 Cal. 2d 575, 579, 225 P.2d 504 (1950).) However, the trial judge is not required to accept such testimony as true. (*Warner Bros. Records, Inc. v. Golden West Music Sales*, 36 Cal. App. 3d 1012, 1017, 112 Cal. Rptr. 71 (2d Dist. 1974).) Thus, such testimony can be disregarded if it is physically impossible or inherently improbable (*People v. Scott*, 21 Cal. 3d 284, 296, 145 Cal. Rptr. 876, 578 P.2d 123 (1978)), or if the demeanor of the witness suggests it is false, or if the witness has an obvious bias. (*Leonard v. Watsonville Community Hospital*, 47 Cal. 2d 509, 518, 305 P.2d 36 (1956).)

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E. Weight Of The Evidence

§ 1:45. Introducing weaker evidence or failing to explain evidence

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑74, 584

West's Key Number Digest, [Criminal Law](#) 🔑317, 549

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[C.J.S., Criminal Law §§ 914, 1482 to 1483, 1489, 1485, 1489 to 1492](#)

[C.J.S., Evidence §§ 163 to 167, 217, 729, 1300 to 1305, 1313 to 1315, 1320, 1323 to 1324, 1326 to 1327, 1340, 1342, 1345](#)

“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.” ([Evidence Code § 412](#).) 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 testimony such evidence or facts in the case against the party or the party's willful suppression of evidence relating thereto, if such be the case. ([Evidence Code § 413](#).)

These rules apply both in civil and criminal trials, but are severely limited in two ways. First, the inferences of [§§ 412 and 413](#) do not apply where each party has an equal opportunity to present the evidence. Thus, in *Provencio v. Merrick*, where neither side in a personal injury case called the police officer who investigated the accident, no negative inference was appropriate. ([Provencio v. Merrick](#), 5 Cal. App. 3d 39, 84 Cal. Rptr. 882 (2d Dist. 1970); see also [Patton v. Royal Industries, Inc.](#), 263 Cal. App. 2d 760, 768–769, 70 Cal. Rptr. 44 (2d Dist. 1968).) Second, neither party is required to call as witnesses all persons who are witnesses to a crime. In *People v. Stanley*, the court held that the prosecution was not required to call one complaining witness on sex charges on which the defendant had been convicted in order to sustain the conviction. ([People v. Stanley](#), 67 Cal. 2d 812, 820, 63 Cal. Rptr. 825, 433 P.2d 913 (1967).)

The inference contained in [Evidence Code § 412](#) arises only if the party offers less satisfactory evidence. When a party is called as an adverse witness under [Evidence Code § 776](#), the party's testimony is not “offered” under [§ 412](#) and the inference is not triggered. (*DeMiglio v. Mashore*, 4 Cal. App. 4th 1260, 1271, 6 Cal. Rptr. 2d 267 (1st Dist. 1992).)

What effect do these inferences have? First, the Comment notes that there is no conflict between [Evidence Code §§ 412, 413 and 913](#), which provides that “no presumption shall arise because of the exercise of [a] privilege, and the trier of fact may not draw any inference therefrom.” As the Comment notes, [§ 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. [Evidence Code §§ 412 and 413](#), on the other hand, discuss the inferences to 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.

Second, the inferences from these sections may be taken into account by the trier of fact. (See *Duffy v. City of Arcadia*, 195 Cal. App. 3d 308, 313, 243 Cal. Rptr. 87 (2d Dist. 1987); *People v. Moya*, 184 Cal. App. 3d 1307, 1312, 229 Cal. Rptr. 402 (1st Dist. 1986); *Westinghouse Credit Corp. v. Wolfer*, 10 Cal. App. 3d 63, 88 Cal. Rptr. 654 (2d Dist. 1970).) In fact, the two inferences are so logical that even in the absence of the two statutes the trier of fact would likely take them into account.

Third, the parties may comment to the jury on the other side's failure to produce evidence. See, for example, *People v. Hughey*, 194 Cal. App. 3d 1383, 1395–1396, 240 Cal. Rptr. 269 (2d Dist. 1987), which held that a prosecutor may comment in closing argument on the defendant's failure to call a witness. *Hughey*, however, criticized the prosecutor for going outside the record and pointing to the witness in the courtroom, stating that “the reason she did not testify was because she had changed her mind.”

Fourth, in a criminal case, the prosecution may not comment on the defendant's failure to testify. (*Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).) If the defendant testifies only on a limited issue, for example, denying that he made a specific statement to the police, *Griffin* permits no comment on his failure to discuss the circumstances of the crime. (*People v. Tealer*, 48 Cal. App. 3d 598, 608, 122 Cal. Rptr. 144 (2d Dist. 1975).) (See a general discussion of *Griffin* error in [§ 5:14](#).)

Fifth, the jury can be instructed on the inference contained in [§ 412](#) (weaker evidence to be viewed with distrust) only where the party has a special relationship with the witness. (See *Provencio v. Merrick*, 5 Cal. App. 3d 39, 42, 84 Cal. Rptr. 882 (2d Dist. 1970).) Thus, in *Hays v. Viscome*, the defendants had their own physician examine plaintiff and then failed to call the doctor at the trial. Given this relationship between the expert and the defense, plaintiff was entitled to an instruction on the “weaker and less satisfactory” inference. The failure to give it required reversal. (*Hays v. Viscome*, 122 Cal. App. 2d 135, 264 P.2d 173 (2d Dist. 1953).)

Finally, an instruction to the jury under [Evidence Code § 413](#) should only be given where the evidence is willfully suppressed or where the party's failure to explain or deny evidence against him is clear. The prosecution's right to an instruction pointing out a criminal defendant's failure to explain or deny negative evidence has been upheld against the claim that it runs counter to the presumption of innocence. (*People v. Saddler*, 24 Cal. 3d 671, 678–681, 156 Cal. Rptr. 871, 597 P.2d 130 (1979).) *Saddler* further pointed out that such instructions in criminal cases can only be given as to the defendant's testimony because the defendant is the only possible party who can testify. *Saddler*, however, found that the instruction was given improperly in that case because there ap-

peared to be no facts or evidence in the prosecution's case within the defendant's knowledge that he did not explain or deny. ([People v. Saddler](#), 24 Cal. 3d 671, 682, 156 Cal. Rptr. 871, 597 P.2d 130 (1979).)

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Chapter
2. Hearsay Evidence
A. General Rules Governing Hearsay

§ 2:1. Defining hearsay

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 314 to 318

West's Key Number Digest, [Criminal Law](#) 🔑 419

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[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1195, 1198, 1200, 1203 to 1211, 1213, 1216 to 1218](#)

[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 319](#)

The code defines hearsay evidence as “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.” ([Evidence Code § 1200](#).) A useful way to understand which statements do and do not constitute hearsay is to consider the four areas where most errors arise: (1) the nature of the “speaker”; (2) the timing of the statement; (3) conduct as a statement; and (4) the truth of the matter stated. (See §§ [2:2](#) to [2:5](#).)

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2. Hearsay Evidence

A. General Rules Governing Hearsay

§ 2:2. The nature of the speaker

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[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 319](#)

The “speaker” of the statement related by the in-court witness is referred to as the “declarant” or the “hearsay declarant.” [Evidence Code § 135](#) defines “declarant” as “a person who makes a statement.” [Evidence Code § 175](#) defines “person” to include “a natural person, firm, association, organization, partnership, business trust, corporation or public entity.”

As broad as this definition is, it does not include animals or machines, though this omission is often overlooked. Consider a narcotics prosecution in which an officer is describing the investigation and testifies that a canine “alerted” to a particular object leading to its search. The officer must be prepared to describe the dog's training for this testimony to be admissible ([People v. Maltgren](#), 139 Cal. App. 3d 234, 188 Cal. Rptr. 569 (1st Dist. 1983)) but no hearsay objection properly lies.

In addition, the calculations of a machine are not subject to such an objection. A printout of a computer's internal operations is not hearsay and a sufficient foundation requires proof only that the computer was operating properly at the time of the printout. ([People v. Hawkins](#), 98 Cal. App. 4th 1428, 1450, 99 Cal. App. 4th 1333A, 121 Cal. Rptr. 2d 627 (6th Dist. 2002), cert. denied, 537 U.S. 1189, 123 S. Ct. 1256, 154 L. Ed. 2d 1021 (2003).) In *Hawkins*, the defendant objected to a printout, which noted when certain computer files had last been ac-

cessed. The defendant argued that “the date and time on that [printout] is hearsay ... a statement generated by the computer ... being admitted ... for the truth of the matter asserted. It's the computer saying the last time I was accessed was this date.” (*Hawkins*, 98 Cal. App. 4th at 1446–1447.) The court rejected this argument on the basis that the information was generated by a machine and “[t]he Evidence Code does not contemplate that a machine can make a statement.” (*Hawkins*, 98 Cal. App. 4th at 1449.) For the same reason, an officer may testify that he or she saw an Intoxilyzer's digital readout and tell the jury what he or she observed, without relying on any hearsay exception, so long as the device is properly qualified. (*McKinney v. Department of Motor Vehicles*, 5 Cal. App. 4th 519, 525, 7 Cal. Rptr. 2d 18 (1st Dist. 1992).) However, a record retrieved from a computer is hearsay, just as if the statement was filed and then recovered from a file drawer. (See the discussion in § 2:63.)

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§ 2:3. The timing of the statement

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[C.J.S., Evidence](#) §§ 228, 259 to 266, 268 to 280, 283 to 284, 319

A statement made by a witness while testifying at the hearing is not hearsay. A statement made at some other time and repeated at the hearing is hearsay, even if made by the same witness who is presently testifying. Thus if W testifies he saw the perpetrator and identifies the defendant as that person, there is no hearsay. If, however, W testifies he saw the perpetrator and three days ago told the investigating officer that the defendant was that person, the statement to the investigating officer is hearsay and inadmissible in the absence of an exception.

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§ 2:4. Conduct as a statement

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[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 319](#)

[Evidence Code § 225](#) defines “statement” as “(a) oral or written verbal expression or (b) nonverbal conduct by a person intended by him [or her] as a substitute for oral or written verbal expression.” Under subdivision (b), then, certain types of nonverbal conduct are statements governed by the hearsay rule. The distinction between conduct within and without this rule rests on the intent of the actor: is the conduct intended as a substitute for oral or written verbal expression? The following example may help clarify the difference between assertive and nonassertive conduct. Assume a police officer is providing aid to a stabbing victim and is surrounded by a crowd of people. The victim says that Rico stabbed him. The officer yells, “Where’s Rico?” Someone in the crowd looks at the defendant who is quickly walking away from the scene. While this would not appear to be hearsay because the conduct is not intended as a substitute for verbal expression, the conclusion might be different if the person in the crowd had first looked at the officer and then nodded in the direction of the defendant.

Several cases have found conduct both nonassertive (and therefore nonhearsay) and relevant. For example, in one case, the police contacted the defendant to inform him that his business partner had been found dead. The prosecution was permitted to introduce testimony from an officer that the defendant had no emotional response to this information, over a hearsay objection. ([People v. Snow](#), 44 Cal. 3d 216, 227, 242 Cal. Rptr. 477, 746 P.2d 452 (1987).) In [People v. Jurado](#), 38 Cal. 4th 72, 129, 41 Cal. Rptr. 3d 319, 131 P.3d 400 (2006), cert. denied, 2006 WL 1909711 (U.S. 2006), the court held that the defendant's emotional displays during a videotaped inter-

rogation regarding a homicide were nonassertive conduct. In another case, the court found that the victim's play with anatomically correct dolls was not assertive conduct covered by the hearsay rule. (*In re Cheryl H.*, 153 Cal. App. 3d 1098, 1127, 200 Cal. Rptr. 789 (2d Dist. 1984).) In a fourth case, the court found that the young victim's unusual, sexualized behavior was not intended as communication, therefore it was not hearsay. (*In re Dorinda A.*, 10 Cal. App. 4th 1657, 1663, 13 Cal. Rptr. 2d 653 (2d Dist. 1992). See, also, *People v. Roberto V.*, 93 Cal. App. 4th 1350, 1365, 113 Cal. Rptr. 2d 804 (2d Dist. 2001).) In *People v. Fields*, the court found that the telephone number on the defendant's pager was not hearsay. (*People v. Fields*, 61 Cal. App. 4th 1063, 1066–1070, 72 Cal. Rptr. 2d 255 (2d Dist. 1998).) In *Fields*, an undercover police officer arranged to purchase drugs from M, who then placed a phone call from a public phone. Soon after he hung up, the phone rang. M spoke briefly and told the officers a friend was “on the way.” M was then seen by other officers giving money to the defendant and receiving an object from him. M then provided the undercover officers with drugs. The defendant was stopped and a pager with the number of the public phone was found on his person. The appellate court found that this was not hearsay because the phone number was nonassertive conduct that was relevant to help establish the relationship between M and the defendant. In *People v. Zamudio*, 43 Cal.4th 327, 350–351 (2008), to establish that the victim's wallet had been in her home at the time of her murder, the prosecutor asked the victim's daughter if her mother ever told her the wallet had been lost or stolen. The witness replied in the negative. Evidence of the victim's silence was found to be relevant, but because the silence was not intended to convey a message, it was not a “statement” as defined by the hearsay rule.

Under [Evidence Code § 225\(a\)](#), the phrase “written expression” is broadly defined. [Evidence Code § 250](#) defines “writing” as “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.” A videotape is a writing and is covered by the hearsay rule. (*People v. Archer*, 215 Cal. App. 3d 197, 207, 263 Cal. Rptr. 486 (4th Dist. 1989).) Note that silence can be construed as a “statement.” [Evidence Code § 125](#) includes in the definition of “conduct” passive and nonverbal behavior, while [Evidence Code § 225](#) includes nonverbal conduct in the definition of “statement.” Thus a juror who improperly fails to respond when asked if anyone on the panel knows the defendant may be prosecuted for perjury. (*Cabe v. Superior Court*, 63 Cal. App. 4th 732, 739, 74 Cal. Rptr. 2d 331 (2d Dist. 1998), citing with approval *People v. Meza*, 188 Cal. App. 3d 1631, 234 Cal. Rptr. 235 (6th Dist. 1987).)

The Evidence Code's definition of a “statement” seemingly resolved a dispute as to whether an out-of-court declaration should be treated as hearsay when it is introduced for the truth of an implied assertion, but not the express assertion. (See the discussion in [Evidence Code § 1200](#), Comment.) For example, while conducting the search of a defendant's residence, assume the police answer the phone and the caller states that he wants to buy an illegal drug. This statement contains an express assertion, the desire to buy, and an implied assertion, the belief that someone at the defendant's phone number sells drugs. Can the prosecution introduce the content of the phone call against the defendant at a subsequent trial for possession of drugs for sale? For the following reasons, it can. First, the declaration is not coming in for the truth of the express assertion; whether or not the caller actually wants drugs is, without more, irrelevant to the question of the defendant's guilt or innocence. The assertion implied in the phone call is, however, relevant. If the caller had expressed both assertions (“I know [the defendant] sells drugs. I want to buy some today.”), the first sentence would be hearsay. The Evidence Code's definition of “statement” and the Comment explaining hearsay clarify, however, that if only the second sentence is ex-

pressed, we do not exclude it simply because the first sentence is implied. Implied assertions are excluded from the definition of hearsay for two reasons. First, a concern for the veracity of the declarant, which is one reason for the hearsay rule, is inapplicable when the assertion is implied. Second, the declarant (or actor) has based his/her action (placing the phone call) on the implied belief, providing a guarantee of trustworthiness; “actions speak louder than words.” See the cases discussed in § 2:7 of this volume.

Questions, requests and words of direction or authorization, like “Do not come around the house anymore,” are usually not hearsay because they are not admitted for the truth of the matter stated. (*People v. Jurado*, 38 Cal. 4th 72, 117, 41 Cal. Rptr. 3d 319, 131 P.3d 400 (2006), cert. denied, 2006 WL 1909711 (U.S. 2006); *People v. Mayfield*, 14 Cal. 4th 668, 741, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (1997); *People v. Bolden*, 44 Cal. App. 4th 707, 714–715, 52 Cal. Rptr. 2d 485 (2d Dist. 1996).) Of course, if a declarant asks a question or gives a direction with the apparent intent to convey an implied message to the listener, the hearsay rule should apply. Thus, assume a declarant is asked, “May I invite Jack over?” The response should be tested by the hearsay rule whether it consists of the declarant saying, “No, Jack is a thief,” or “Would I invite a thief into my house?” or “No thieves are welcome here.” Thus, only if the declarant intends to convey the implied assertion should we treat that assertion as hearsay. (But, see, *People v. Morgan*, 125 Cal. App. 4th 935, 23 Cal. Rptr. 3d 224 (3d Dist. 2005), discussed in § 2:7.)

The Federal Rules of Evidence also define hearsay so as to exclude statements offered to prove assertions implied therein. (*U.S. v. Zenni*, 492 F. Supp. 464 (E.D. Ky. 1980); Rule 801(a), Advisory Committee's Note.)

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§ 2:5. Truth of the matter stated

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[C.J.S., Evidence](#) §§ 228, 259 to 266, 268 to 280, 283 to 284, 319

To avoid hearsay problems, the proponent will often contend that the statement is offered for a reason other than its truth. The adverse party should require the court to carefully examine this contention: (1) Is there a theory of admissibility unrelated to the truth of the matter? (2) Is that nonhearsay purpose relevant? As the Supreme Court noted, “[A]n out-of-court statement is not made admissible simply because its proponent states a theory of admissibility not related to the truth of the matter asserted ‘The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.’ ” ([People v. Bunyard](#), 45 Cal. 3d 1189, 1204, 249 Cal. Rptr. 71, 756 P.2d 795 (1988)). Listed in §§ 2:6 to 2:15 are some common areas in which a statement is properly offered for a nonhearsay purpose.

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§ 2:6. Examples of nonhearsay purposes—Indicia

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[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 319](#)

Documents in the defendant's name found in a residence where drugs were found are not admitted for the truth of the matter and are relevant since the jury can infer from them that the defendant lives there. ([People v. Goodall](#), 131 Cal. App. 3d 129, 143, 182 Cal. Rptr. 243 (2d Dist. 1982).) In another case, the court rejected the argument that indicia is hearsay because it is introduced for the implied statement that the person named is the possessor or occupant of the premises. It found that indicia, like a utility bill that has the defendant's name on it, would be admissible even if no address appeared on it. "That is because a utility bill is an item of personal property of the type which is more likely to be found in the residence of the person named than in the residence of any other person." ([People v. Williams](#), 3 Cal. App. 4th 1535, 1542, 5 Cal. Rptr. 2d 372 (4th Dist. 1992).)

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§ 2:7. Examples of nonhearsay purposes—Offer to purchase drugs; offer to place a bet

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[C.J.S., Evidence §§ 259 to 266, 268, 270 to 272, 279 to 280, 283 to 284, 319](#)

When a police officer is executing a search warrant at the home of a suspected drug dealer or bookmaker, the warrant will often permit the officer to answer the phone. When the caller offers to purchase drugs or place a bet, the officer can so testify at trial, despite any hearsay objection. As the court noted in *People v. Nealy*, “subject to [Evidence 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*, 228 Cal. App. 3d 447, 452, 279 Cal. Rptr. 36 (2d Dist. 1991); see also *People v. Ventura*, 1 Cal. App. 4th 1515, 2 Cal. Rptr. 2d 586 (2d Dist. 1991).) In *People v. Fischer*, a similar result was reached in a bookmaking case. (*People v. Fischer*, 49 Cal. 2d 442, 447, 317 P.2d 967 (1957).) (See the discussion in [§ 2:4](#).) In *People v. Morgan*, 125 Cal. App. 4th 935, 23 Cal. Rptr. 3d 224 (3d Dist. 2005), the court rejected this analysis. In a factual context similar to *Nealy* and *Ventura*, the court concluded that the statements made by a caller asking to buy illegal drugs are hearsay because of the assertion implied. (See the discussion in [§ 2:4](#).) However, the court found that the “increased reliability of nonassertive statements justify the recognition of an exception to the prohibition on the use of hearsay” and admitted the phone call. (*Morgan*, 125 Cal. App. 4th at 944.)

Certain language in *Nealy* is troubling. The caller had asked to buy some “doves,” and the court found it obvious that this statement was not in for the truth of the matter: “The people's theory was not that appellant was a member of the Audubon Society, an ornithologist, or in the bird-selling business. These requests to purchase ‘doves’ were not hearsay.” Though the decision to admit evidence of the phone call seems correct, the reasoning is suspect. If a drug purchaser calls and says, “I want to buy methamphetamine,” the statement is not in for the truth of the matter; the purchaser's true intent is irrelevant to the charges. Perhaps the caller wants nothing more than to establish that the defendant has methamphetamine on the premises in order to rob the dealer. Since it is not in for its truth, the call is not hearsay. To the extent the call provides circumstantial evidence of the defendant's intent in possessing the drugs, it is relevant and admissible.

Obviously if the caller referred to methamphetamine as “speed” or “doves,” the analysis should not change. The drug trade is often conducted in slang, or even code. The slang or code may well require an expert's interpretation to be relevant. With that interpretation, it would be illogical to find the statement not hearsay because it relates to birds (or miles per hour).

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§ 2:8. Examples of nonhearsay purposes—Proving knowledge or notice

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[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 314 to 319, 325, 327 to 328](#)

Proof that a party made allegations of structural defects in a prior complaint is not hearsay if introduced solely to show that the party had knowledge that the defects existed. ([Magnolia Square Homeowners Assn. v. Safeco Ins. Co.](#), 221 Cal. App. 3d 1049, 1057, 271 Cal. Rptr. 1 (6th Dist. 1990); see also [Bihun v. AT&T Information Systems, Inc.](#), 13 Cal. App. 4th 976, 988, 16 Cal. Rptr. 2d 787 (2d Dist. 1993) (statements were admitted not for the truth of the matter but to show the defendant's knowledge of a supervisor's reputation and complaints about him in a sexual harassment case).) In a related area, reports compiled during an employer's investigation of sexual harassment claims, including interviews of employees, is admissible to show the reasonableness of the employer's action. Such reports are admissible to show “that the investigation took place, that it was appropriate under the circumstances, and that the termination decision was reasonable based on that information.” ([Silva v. Lucky Stores, Inc.](#), 65 Cal. App. 4th 256, 76 Cal. Rptr. 2d 382 (5th Dist. 1998).)

In [People v. Cox](#), 30 Cal. 4th 916, 961–963, 135 Cal. Rptr. 2d 272, 70 P.3d 277 (2003), cert. denied, 540 U.S. 1051, 124 S. Ct. 808, 157 L. Ed. 2d 702 (2003), the court approved admission of a police officer's testimony that a particular witness, who claimed to have observed a murder, provided accurate directions to the area where the body was discovered. The court found these directions constituted nonhearsay, circumstantial evidence of the witness' knowledge of the homicide, which had been contested by the defense.

In an employment discrimination lawsuit, plaintiff should have been permitted to justify the late filing of his administrative complaint with evidence that the appropriate administrative officials had informed him the limitations period was not a concern. “[T]hese statements were not offered as proof of the facts that they contained. Rather this is a typical example of the *nonhearsay* use of an extrajudicial statement ‘to prove ... the ... hearer ... obtained ... certain information by hearing ... the statement and, *believing such information to be true*, acted in conformity with such a belief. ([Holland v. Union Pacific Railroad Co.](#), 154 Cal.App.4th 940, 947 (2007).)

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§ 2:9. Examples of nonhearsay purposes—Proving memory

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#)  [412\(5\)](#)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1220, 1224](#)

Defendant's prior statement describing his confrontation with a murdered police officer was admitted not for its truth but to rebut his later claim of amnesia. ([People v. Jackson](#), 49 Cal. 3d 1170, 1185, 264 Cal. Rptr. 852, 783 P.2d 211 (1989).)

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§ 2:10. Examples of nonhearsay purposes—Pay-owe ledgers

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#)  [419\(12\)](#)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1161, 1175](#)

Ledgers found during a search of the residence of an alleged drug dealer are admissible as circumstantial evidence that the residence was the scene of drug transactions. ([People v. Harvey](#), 233 Cal. App. 3d 1206, 1222, 285 Cal. Rptr. 158 (4th Dist. 1991).)

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§ 2:11. Examples of nonhearsay purposes—False statements

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 406, 413

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1220, 1224, 1227, 1235 to 1238, 1253](#)

A criminal defendant's exonerating statements to the police, which the prosecution believes are false, may be introduced by the prosecution to show a consciousness of guilt and are not hearsay because they are not introduced for their truth. The falsity of the statements may then be proved by other prosecution witnesses. ([People v. Mendoza](#), 192 Cal. App. 3d 667, 672, 238 Cal. Rptr. 1 (1st Dist. 1987).) For example if a defendant charged with burglary denies ever having entered the subject building, a prosecutor with evidence the defendant's fingerprints were found inside the building should be permitted to introduce the statement to show a consciousness of guilt. ([People v. Hughes](#), 27 Cal. 4th 287, 335, 27 Cal. 4th 825a, 116 Cal. Rptr. 2d 401, 39 P.3d 432 (2002).) Evidence of an attempt to create a false alibi for defendant by his stepfather was not hearsay, but was relevant to show the declarant knew that defendant, who he had recently been with, was about to engage in a criminal act. ([People v. Crew](#), 31 Cal. 4th 822, 841, 3 Cal. Rptr. 3d 733, 74 P.3d 820 (2003), cert. denied, 541 U.S. 991, 124 S. Ct. 2018, 158 L. Ed. 2d 497 (2004).)

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§ 2:12. Examples of nonhearsay purposes—Consciousness of guilt

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 419, 351

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1010 to 1017, 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1195, 1198, 1203 to 1211, 1213, 1216 to 1218](#)

A criminal defendant's refusal to submit to some authorized test is admissible to show consciousness of guilt. For example, a defendant's refusal to provide a court-ordered handwriting exemplar was admissible against him at trial. ([People v. Clark](#), 5 Cal. 4th 950, 1003, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (1993); see the discussion in [§ 5:15](#).)

The reasoning behind admitting a statement as evidence of consciousness of guilt is clear. What is less clear is whether the defense may introduce statements of the defendant as evidence of a “consciousness” or “badge of innocence,” when they consist of agreeing to a proposed police procedure. One court rejected the defendant's contention that he should have been permitted to admit proof he had been willing to submit to a polygraph examination as a badge of innocence. The primary reason for rejecting the evidence was not that badge of innocence evidence was inadmissible per se, but that the polygraph is unreliable. “ ‘A guilty suspect ... may be willing to hazard the test in the hope that it will erroneously record innocence, knowing that even if it does not the results cannot be used as evidence against him.’ ” ([People v. Espinoza](#), 3 Cal. 4th 806, 817–818, 12 Cal. Rptr. 2d 682, 838 P.2d 204 (1992).)

It would seem that applying the normal rules of relevance, limited by [Evidence Code § 352](#), would permit a narrow window of admissibility for badge of innocence testimony. A statement-by-statement analysis seems appropriate; bright line rules of admissibility should be rejected. Consider the examples below:

- A defendant is charged with possession of the contraband found in the trunk of the car he was driving. He consented to the search: “Go ahead and look. I’ve got nothing to hide.” Depending on the circumstances, this consent might well be evidence a jury *could* rely on to determine he was unaware of its presence. If so, it should be admissible.
- During some interrogations the police (accurately or not) inform the suspect that certain crime scene evidence has been discovered, and in effect, challenge him [or her] to provide physical evidence that could match it. For example, a rape suspect might be told that semen has been discovered in the victim’s vagina and then asked what he thinks will occur when they compare his semen to the sample found. If he promptly responds that he is prepared to give a sample because he knows it will clear him, a court might properly decide to admit the statement (or at least the first clause), particularly if no semen was discovered in the victim.
- A suspect is invited to the police station to discuss the crime. Once there, the suspect protests her innocence and insists the police search her home for evidence. Absent unusual circumstances, this seems like a garden variety denial of guilt by one who has had sufficient opportunity to ensure police follow-up will prove fruitless. The window of admissibility should not open wide enough to admit it.

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§ 2:13. Examples of nonhearsay purposes—Videotape of defendant's statement to show physical state

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#)  438(8), 419

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1010 to 1017, 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1195, 1198, 1203 to 1211, 1213, 1216 to 1218, 1395 to 1396, 1406 to 1407, 1411, 1413 to 1418](#)

Regardless of its admissibility under *Miranda* (see §§ 5:21 to 5:23), a videotaped statement of a defendant, obtained soon after a crime, may be introduced to show the trier of fact the defendant's appearance, if that appearance is relevant, so long as it is a “reasonable representation of that which it is alleged to portray.” (*People v. Hughes*, 27 Cal. 4th 287, 330–331, 27 Cal. 4th 825a, 116 Cal. Rptr. 2d 401, 39 P.3d 432 (2002) (videotape of the interrogation of the defendant was properly introduced by the prosecution to rebut his defense of intoxication in a capital case); *People v. Carpenter*, 15 Cal. 4th 312, 386, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997).)

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§ 2:14. Examples of nonhearsay purposes—Verbal acts

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑267

West's Key Number Digest, [Criminal Law](#) 🔑419(2.10)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1175, 1187, 1203 to 1211, 1213, 1216 to 1218](#)

[C.J.S., Evidence §§ 259, 285, 311 to 313, 326, 333 to 336, 343](#)

When the very thing in issue is whether certain words were said and not whether those words are true or false, the words are not hearsay. ([People v. Dell](#), 232 Cal. App. 3d 248, 258, 283 Cal. Rptr. 361 (2d Dist. 1991) (prostitute's offer of sex for money); [Stebbins v. White](#), 190 Cal. App. 3d 769, 787, 235 Cal. Rptr. 656 (3d Dist. 1987) (offer of a bribe).) These statements are sometimes referred to as “operative acts.” ([People v. Fields](#), 61 Cal. App. 4th 1063, 1068–1069, 72 Cal. Rptr. 2d 255 (2d Dist. 1998).)

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§ 2:15. Examples of nonhearsay purposes—Fresh complaint doctrine

West's Key Number Digest

West's Key Number Digest, [Infants](#) 🔑20

West's Key Number Digest, [Rape](#) 🔑48

Legal Encyclopedias

[C.J.S., Infants §§ 125 to 137](#)

[C.J.S., Rape §§ 1, 62, 72 to 76](#)

Traditionally, in prosecutions for sexual assault offenses, testimony that a victim complained about the assault to a third person was admissible under the “fresh complaint” doctrine. The historic justification offered for admissibility is that one expects “the victim of such a crime would complain of it, and the prosecution can show the fact of complaint to forestall the assumption that none was made and that therefore the offense did not occur.” ([People v. Burton](#), 55 Cal. 2d 328, 351, 11 Cal. Rptr. 65, 359 P.2d 433 (1961).) The complaint is admitted as nonhearsay because it does not come in for the truth of the matter, but only to show it was made.

The Supreme Court has reexamined the fresh complaint doctrine. It found the assumption that victims promptly complain about such offenses “discredited.” ([People v. Brown](#), 8 Cal. 4th 746, 759, 35 Cal. Rptr. 2d 407, 883 P.2d 949 (1994).) The Court, however, went on to conclude that a complaint by a victim of any offense “ordinarily would be relevant under generally applicable rules of evidence, and therefore admissible, so long as its probative value outweighs its prejudicial effect. ([Evidence Code § 352.](#))” ([People v. Brown](#), 8 Cal. 4th 746, 760, 35 Cal. Rptr. 2d 407, 883 P.2d 949 (1994).) Evidence of the complaint must be limited to the fact of the making of the complaint and other circumstances material to this limited purpose. ([People v. Brown](#), 8 Cal. 4th 746, 763, 35 Cal. Rptr. 2d 407, 883 P.2d 949 (1994).) “In sexual as well as nonsexual offenses” the court held, “evidence of the fact and circumstances of a victim's complaint must be relevant for a variety of nonhearsay purposes, regardless whether the complaint is prompt or delayed.” ([People v. Brown](#), 8 Cal. 4th 746, 761, 35 Cal.

Rptr. 2d 407, 883 P.2d 949 (1994).) “[T]he admissibility of such evidence does not turn invariably upon whether ... the complaint was volunteered spontaneously by the victim or instead was prompted by some inquiry or questioning from another person.” (People v. Brown, 8 Cal. 4th 746, 763, 35 Cal. Rptr. 2d 407, 883 P.2d 949 (1994).)

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§ 2:16. Multiple hearsay**West's Key Number Digest**

West's Key Number Digest, [Evidence](#) 🔑 314 to 318

West's Key Number Digest, [Criminal Law](#) 🔑 419(13)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1175](#)

[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 319](#)

Evidence is not inadmissible on the ground that the evidence is hearsay if it consists of one or more statements each of which meets the requirements of a hearsay exception. ([Evidence Code § 1201](#).) [Evidence Code § 1201](#) makes it possible to use admissible hearsay to prove another statement that is also admissible hearsay. ([Evidence Code § 1201](#), Comment.) For example, in *People v. Zapien*, the Supreme Court upheld the admission of several levels of hearsay, each of which was admissible under [Evidence Code § 1235](#) as a prior inconsistent statement. In that case, A told B that she had seen the defendant on the day of the murder and that he had admitted the killing to her. B related this to C, who later told the police. At trial, A denied both the observations and the statement to B. B denied that A told her and denied that she told C. C said she did not recall telling the police. Over objection, the prosecutor was permitted to introduce C's statement to the police that B told her that A had told her that she had seen the defendant and he had admitted the homicide. ([People v. Zapien](#), 4 Cal. 4th 929, 950–958, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (1993).)

In another case, the Supreme Court rejected the defendant's attempt to introduce a news article that described his remorse for the crime. The article involved multiple hearsay: the defendant's statements to the interviewer and the magazine's publication of them. Since a hearsay exception did not exist at each level, the article was properly excluded. ([People v. Whitt](#), 51 Cal. 3d 620, 643, 274 Cal. Rptr. 252, 798 P.2d 849 (1990).)

In preliminary hearings qualified law enforcement officers may relate hearsay. ([Penal Code § 872\(b\)](#).) Despite language in *Whitman v. Superior Court*, suggesting that in certain circumstances multiple hearsay is admissible, it is not unless each level is separately justified. ([Whitman v. Superior Court](#), 54 Cal. 3d 1063, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (1991); [Montez v. Superior Court](#), 4 Cal. App. 4th 577, 5 Cal. Rptr. 2d 723 (2d Dist. 1992).) Whether multilevel hearsay is admissible in a situation in which police officer-declarants exist at each level and each is qualified within the meaning of *Whitman* has been termed an “interesting issue” and has not yet been resolved. ([Shannon v. Superior Court](#), 5 Cal. App. 4th 676, 685, 7 Cal. Rptr. 2d 47 (2d Dist. 1992).)

An out-of-court contemporaneous translation of a statement made by a non-English speaker does not create a second level of hearsay. ([People v. Torres](#), 213 Cal. App. 3d 1248, 1258–1260, 262 Cal. Rptr. 323 (3d Dist. 1989).) “Rather, a generally unbiased and adequately skilled translator simply serves as a ‘language conduit,’ so that the translated statement is considered to be the statement of the original declarant, and not that of the translator.” ([Correa v. Superior Court](#), 27 Cal. 4th 444, 448, 117 Cal. Rptr. 2d 27, 40 P.3d 739 (2002).)

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§ 2:17. Credibility of hearsay declarant

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [380\(3\)](#), 335

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 590 to 592, 594 to 595, 678 to 680](#)

Evidence that would have been admitted to attack or support the credibility of a hearsay declarant if he or she had actually testified is admissible to attack or support the hearsay declaration. ([Evidence Code § 1202](#).) The hearsay declaration can be impeached using inconsistent statements or other conduct by the declarant even without giving the declarant the opportunity to explain or deny the inconsistency. In *People v. Jacobs*, a co-defendant was permitted to introduce part of the defendant's statement to the police. The defendant then persuaded the court that his entire statement, including certain exculpatory portions, was admissible under § 356 (discussed in [§ 1:16](#) of this volume). After the entire statement was admitted, the trial judge properly allowed the prosecution, under [Evidence Code § 1202](#), to introduce prior felony convictions of the defendant to impeach the exculpatory parts of the defendant's statement introduced at his behest. (*People v. Jacobs*, 78 Cal. App. 4th 1444, 93 Cal. Rptr. 2d 783 (1st Dist. 2000).) In *People v. Malone*, 112 Cal. App. 4th 1241, 1244–1245 (2003), defendant testified in his first trial and admitted two prior felony convictions that impeached the testimony. In a subsequent re-trial, defendant invoked his privilege against self-incrimination and did not testify. The prosecution was entitled to introduce his prior testimony under [Evidence Code § 1291](#) (prior testimony of unavailable witness, see [§ 2:72](#)), including that portion of his testimony in which he was impeached with the two prior felony convictions. But see, *People v. Fritz*, 153 Cal.App.4th 949 (2007). In *Fritz*, the defendant did not testify but the prosecution introduced defendant's statement to the arresting officer, in which defendant stated he had never stolen anything from a store in the past. The prosecution was then permitted to introduce evidence of two prior thefts committed by the defendant. The Court of Appeal reversed, concluding the evidence of the thefts was inadmissible to impeach the prior statement because the defendant did not introduce the statement. (at 955–956.)

Additionally, the court found the evidence inadmissible as proof of consciousness of guilt. (at 957–960.)

Even if the hearsay declarant is available, the declaration may be impeached with an inconsistent statement without first calling the declarant as a witness. After introducing the inconsistent statement however, the declarant should be given an opportunity to explain the inconsistency. (*People v. Farmer*, 47 Cal. 3d 888, 910, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).) The trial judge may utilize [Evidence Code § 352](#) to restrict impeachment of the hearsay declarant. ([Evidence Code § 1202](#), Comment.)

Prior inconsistent statements of a hearsay declarant are admissible only to impeach and not for the truth of the matter. ([Evidence Code § 1202](#), Comment; *People v. Cudjo*, 6 Cal. 4th 585, 616, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (1993). Compare [Evidence Code § 1235](#), which makes prior inconsistent statements of a witness admissible for both purposes.) [Evidence Code § 1294](#) (discussed in [§ 2:42](#)) creates one limited exception to this rule. Certain evidence of prior inconsistent statements of a witness introduced in a preliminary hearing or trial of the same criminal matter can be admitted for the truth if the witness is unavailable at a subsequent proceeding and former testimony of that witness from the earlier proceeding is introduced.

For purposes of supporting or attacking his or her credibility under [§ 1202](#), the deponent of a deposition offered into evidence shall be treated as a hearsay declarant. ([Evidence Code § 1202](#).)

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§ 2:18. Cross-examination of hearsay declarant

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  276

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[C.J.S., Witnesses §§ 457 to 458](#)

The declarant of a statement admitted as hearsay may be called and examined by any adverse party as if under cross-examination concerning the statement. ([Evidence Code § 1203\(a\)](#).) This reverses the traditional rule that a witness called by a party may not be cross-examined by him or her. ([Evidence Code § 1203](#), Comment.) The following exceptions to this right exist. First, this right does not exist if the declarant is a party or one identified with a party pursuant to [Evidence Code § 776\(a\)](#), or if the declarant is a witness who previously testified in the case concerning the subject matter of the statement. ([Evidence Code § 1203\(b\)](#).) Second, this right does not exist if the hearsay evidence introduced is admitted under any of the following sections:

- [Evidence Code §§ 1220 to 1228](#) (confessions and admissions)
- [Evidence Code §§ 1235 to 1238](#) (prior statements)
- [Evidence Code §§ 1300 to 1302](#) (judgments)

Finally, this right does not exist if the hearsay evidence is introduced at a preliminary examination pursuant to [Penal Code § 872\(b\)](#). ([Evidence Code § 1203.1](#).) This is one of several provisions set forth in Proposition 115, adopted by the voters in 1990, which is designed to permit the prosecution to make out a prima facie case by hearsay at the preliminary hearing in order to spare victims and witnesses the inconvenience of coming to court for such hearings.

This right does not preclude the admission of hearsay evidence when the declarant is unavailable to be

called and cross-examined by the adverse party. ([Evidence Code § 1203](#)(d).)

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§ 2:19. Hearsay rule at penalty phase of capital case

West's Key Number Digest

West's Key Number Digest, [Sentencing and Punishment](#) 🔑 1766

Legal Encyclopedias

[C.J.S., Criminal Law §§ 2113, 2117 to 2122, 2124 to 2125, 2131 to 2132, 2215 to 2218](#)

The federal due process rights of the defendant are violated if “hearsay testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is ‘highly relevant to a critical issue in the punishment phase of the trial’; and (2) there are substantial reasons to assume the reliability of the evidence.” ([People v. Smithey](#), 20 Cal. 4th 936, 995, 86 Cal. Rptr. 2d 243, 978 P.2d 1171 (1999), quoting [People v. Kaurish](#), 52 Cal. 3d 648, 704, 276 Cal. Rptr. 788, 802 P.2d 278 (1990); accord: [People v. Morrison](#), 34 Cal. 4th 698, 725, 21 Cal. Rptr. 3d 682, 101 P.3d 568 (2004), cert. denied, 126 S. Ct. 160 (U.S. 2005).) *Smithey* noted that the right of a capital defendant to present all relevant mitigating evidence to a jury does not preclude the state from applying ordinary rules of evidence to determine whether such evidence is admissible. The court found the challenged evidence properly excluded because it simply corroborated other evidence presented by the defendant. It distinguished other cases that overturned rulings excluding defense evidence “highly probative of the defendant's innocence.” As an example, it noted [Green v. Georgia](#), 442 U.S. 95, 97, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), where the trial court incorrectly excluded hearsay that “the defendant's accomplice had confessed to killing the victim after ordering the defendant to run an errand.” ([People v. Smithey](#), 20 Cal. 4th 936, 995, 86 Cal. Rptr. 2d 243, 978 P.2d 1171 (1999).)

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B. Hearsay Exceptions

§ 2:20. Hearsay exceptions generally

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 314 to 318

West's Key Number Digest, [Criminal Law](#) 🔑 419

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[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218](#)

[C.J.S., Evidence §§ 228, 259 to 266, 268 to 280, 283 to 284, 319](#)

Most hearsay exceptions are located in [Evidence Code §§ 1220 to 1370](#). They exist, however, in other codes as well. For example, [Penal Code § 872\(b\)](#) permits hearsay to be introduced at preliminary hearings to establish probable cause. This statute was found constitutional in [Whitman v. Superior Court](#), 54 Cal. 3d 1063, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (1991). [Penal Code § 969b](#) permits proof of a prior conviction by introducing evidence of a certified copy of a prison record. [Welfare and Institutions Code §§ 281 and 355](#) are hearsay exceptions that permit hearsay evidence to be used in the social study that is a part of the probation or social worker's report submitted to the court in a [Welfare and Institutions Code § 300](#) dependency hearing. (*In re Jose M.*, 206 Cal. App. 3d 1098, 1104–1105, 254 Cal. Rptr. 364 (4th Dist. 1988).) A juvenile court may rely on this social study when deciding if a minor falls within its jurisdiction under [Welfare and Institutions Code § 300\(a\)](#). (*In re Ma-linda S.*, 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244 (1990).) [Welfare and Institutions Code § 5361](#) permits use of hearsay opinions in the petition for reappointment by a conservator.

To be admissible in a criminal case against the defendant, a hearsay statement must fit within a statutory exception and must not offend the confrontation clauses of the constitutions of the United States and [California](#). ([Evidence Code § 1204](#).) (See the discussion in §§ 2:111 to 2:114.)

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§ 2:21. Witness unavailability—In general

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 317(17)

West's Key Number Digest, [Criminal Law](#) 🔑 419(4), 419(5)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1175, 1166 to 1169, 1171 to 1173](#)

[C.J.S., Evidence §§ 259 to 260](#)

Many common hearsay exceptions require proof that the declarant is unavailable as a witness. [Evidence Code § 240\(a\)](#), sets forth five categories of unavailability, which are discussed in §§ [2:22](#) to [2:26](#). [Evidence Code § 240\(b\)](#) notes, however, that the declarant is not legally unavailable if the factors discussed below were “brought about by the procurement or wrongdoing of the proponent” in order to prevent the declarant from testifying.

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§ 2:22. Witness unavailability—Exercise of privilege

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 419, 543

West's Key Number Digest, [Evidence](#) 🔑 577

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1475 to 1479, 1480](#)

[C.J.S., Evidence §§ 486, 488](#)

The declarant is considered unavailable as a witness if exempted or precluded on the ground of privilege from testifying on the matter to which that statement relates. ([Evidence Code § 240\(a\)\(1\).](#))

When a witness invokes the privilege against self-incrimination, the witness is legally unavailable and prior testimony may be introduced at the trial. ([People v. Malone](#), 47 Cal. 3d 1, 23–24, 252 Cal. Rptr. 525, 762 P.2d 1249 (1988).) The fact that the witness failed to assert the privilege at the preliminary examination does not bar its assertion at the trial. ([People v. Seijas](#), 36 Cal. 4th 291, 303, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (2005).) Even if the witness makes an incriminating statement at an in limine hearing concerning the admissibility of evidence, the witness may assert the privilege at trial. ([People v. Williams](#), 43 Cal.4th 584, 615 (2008).) To evaluate whether a waiver of the privilege has occurred, “we consider the purpose of the hearing at which it is claimed [the witness] waived his privilege against self-incrimination.” (*Williams* at p. 617.) The court should look at such factors as whether the trier of fact was present when the incriminating statements were made and whether the testimony had an impact on the factfinding process at trial. (*Williams* at pp 615–618.)

There appears to be no general requirement that the prosecution grant a witness immunity before relying on the invocation of this privilege to introduce a prior statement in a criminal case. (See the discussion in [§ 1:41.](#))

However, in those situations where the witness contends that the earlier testimony was false, and then invokes this privilege, one court has suggested that the better approach is for the “trial court to condition the prosecution's request to use the allegedly perjured testimony upon its granting [the witness] immunity.” ([People v. Garner](#), 207 Cal. App. 3d 935, 941, 255 Cal. Rptr. 257 (2d Dist. 1989).)

As the Comment to [Evidence Code § 240](#) indicates, witness unavailability due to privilege may establish one element in a hearsay exception, but if the prior statement is, itself, privileged, it is still inadmissible.

A criminal defendant may not rely on his or her own privilege against self-incrimination to become “unavailable” so as to admit a prior statement. ([People v. Aguilar](#), 218 Cal. App. 3d 1556, 1567, 267 Cal. Rptr. 879 (2d Dist. 1990); see also [Evidence Code § 240](#), Comment.)

The trial court's determination in a criminal case that a witness is entitled to assert the privilege against self-incrimination is subject to de novo review on appeal because the ruling affects the constitutional right to confrontation. ([People v. Seijas](#), 36 Cal. 4th 291, 303–304, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (2005).)

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§ 2:23. Witness unavailability—Disqualification

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 542, 543, 419

West's Key Number Digest, [Evidence](#) 🔑 576, 577

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C.J.S., [Criminal Law](#) §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1475 to 1479, 1480

C.J.S., [Evidence](#) §§ 486 to 488

The declarant is unavailable as a witness if disqualified from testifying to the matter. ([Evidence Code § 240\(a\)\(2\)](#).) Thus, a witness who has been found incompetent to testify at trial is unavailable to testify and testimony at an earlier proceeding may be admissible. ([People v. Liddicoat](#), 120 Cal. App. 3d 512, 174 Cal. Rptr. 649 (1st Dist. 1981).) A witness may be disqualified from testifying because he or she was hypnotized as part of the investigation, but pre-hypnotic statements may be admissible. (See [People v. Gallego](#), 52 Cal. 3d 115, 175, 276 Cal. Rptr. 679, 802 P.2d 169 (1990) (court admitted pre-hypnotic statements as spontaneous utterances).)

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§ 2:24. Witness unavailability—Deceased or ill

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 542, 419

West's Key Number Digest, [Evidence](#) 🔑 576

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[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1475 to 1479, 1480](#)

[C.J.S., Evidence § 487](#)

A declarant is unavailable as a witness if dead or unable to attend or to testify because of then-existing physical or mental illness or infirmity. ([Evidence Code § 240\(a\)\(3\)](#).) “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 [or her] testifying, relatively impossible and not merely inconvenient.” ([People v. Gomez](#), 26 Cal. App. 3d 225, 230, 103 Cal. Rptr. 80 (2d Dist. 1972).) Evidence that there was a 70 percent chance that testifying would prove detrimental is sufficient. ([People v. Macioce](#), 197 Cal. App. 3d 262, 282, 242 Cal. Rptr. 771 (6th Dist. 1987).) The evidence of illness must be current. One court has held that information two months old was not timely. ([Ritter v. State Bar](#), 40 Cal. 3d 595, 601, 221 Cal. Rptr. 134, 709 P.2d 1303 (1985).)

Expert testimony on the witness's mental or physical condition is necessary to establish the illness. Thus, the testimony of a witness's mother about the witness's mental health is, standing alone, legally insufficient to justify a finding of unavailability. ([People v. Stritzinger](#), 34 Cal. 3d 505, 516, 194 Cal. Rptr. 431, 668 P.2d 738 (1983).) However, in a situation in which a witness testifies in a credible fashion that he or she has lost all memory of the relevant events because of a mental infirmity, the proponent of earlier testimony need not introduce expert testimony to establish this infirmity. ([People v. Alcalá](#), 4 Cal. 4th 742, 780, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (1992).)

“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 ‘Expert’ means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of [Evidence Code] Section 1010.” (Evidence Code § 240(c); *People v. Winslow*, 123 Cal. App. 4th 464, 472–473, 19 Cal. Rptr. 3d 872 (2d Dist. 2004).)

A person who suffers a genuine and total loss of memory is considered unavailable for purposes of admitting prior testimony. (*People v. Alcala*, 4 Cal. 4th 742, 778, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (1992).)

If a witness is present in court and refuses to testify and the court uses all available means to coerce this testimony, then the witness is legally considered unavailable. Among other means, the court should appoint counsel to advise the witness, inquire if the witness is seeking immunity, impose contempt if that is practical, inquire as to the reasons for the refusal, and order the testimony. (*People v. Francis*, 200 Cal. App. 3d 579, 585–587, 245 Cal. Rptr. 923 (5th Dist. 1988).)

Warning

A court's ability to impose contempt is limited when a victim of sexual assault or domestic violence or a minor witness under the age of 16 refuses to testify. (See *Code of Civil Procedure* §§ 1219(b), (c), 1219.5.)

While at least one court has referred to a refusal to testify as reflecting a “mental infirmity” under *Evidence Code* § 240(a)(3), it seems more accurate to say that such a refusal does not fit well into any of the categories set forth in *Evidence Code* § 240. (See *People v. Rojas*, 15 Cal. 3d 540, 551, 125 Cal. Rptr. 357, 542 P.2d 229 (1975); *People v. Reed*, 13 Cal. 4th 217, 226–227, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (1996).)

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§ 2:25. Witness unavailability—Unable to compel attendance by court process**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 🔑 419, 543West's Key Number Digest, [Evidence](#) 🔑 577**Legal Encyclopedias**

C.J.S., [Criminal Law](#) §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1475 to 1479, 1480

C.J.S., [Evidence](#) §§ 486, 488

This provision ([Evidence Code § 240\(a\)\(4\)](#)) seems only to apply to a foreign national whose location is known to be outside the United States. Thus, if a permanent resident of this country is located abroad he or she is subject to a federal court subpoena. See [People v. St. Germain](#), 138 Cal. App. 3d 507, 516–518, 187 Cal. Rptr. 915 (1st Dist. 1982), which discusses both of these situations. When a foreign national is, in fact, beyond court process, the person is per se unavailable without any showing of due diligence. ([People v. Denson](#), 178 Cal. App. 3d 788, 792, 224 Cal. Rptr. 63 (2d Dist. 1986).) However, in *People v. Sandoval*, the court noted that subsequent to the *Denson* decision, there had been substantial cooperation in obtaining witnesses between the United States and other countries, including Mexico. *Sandoval* held that the Sixth Amendment required proof of good faith prosecution efforts to utilize the treaty with Mexico to obtain the attendance at trial of a Mexican citizen living in Mexico before evidence of his testimony at the preliminary hearing could be introduced. ([People v. Sandoval](#), 87 Cal. App. 4th 1425, 105 Cal. Rptr. 2d 504 (3d Dist. 2001).) *Sandoval* also held that if the foreign witness indicates a willingness to appear voluntarily in return for a payment for expenses, the prosecution has the burden of demonstrating that compliance with the request is unreasonable. (At 1441–1442.) In [People v. Smith](#), 30 Cal. 4th 581, 611, 134 Cal. Rptr. 2d 1, 68 P.3d 302 (2003), cert. denied, 124 S. Ct. 1169, 157 L. Ed. 2d 1208 (U.S. 2004), the California Supreme Court stated that the defendant's failure to raise the issue made it

unnecessary to decide if due diligence requires a prosecutor to ask a witness located in a foreign country to come voluntarily to California to testify.

In a situation in which a legal resident is served with a California subpoena and later leaves the country, though unavailability does not exist under [Evidence Code § 240\(a\)\(4\)](#), it may exist under [Evidence Code § 240\(a\)\(5\)](#), discussed in [§ 2:26](#). ([People v. Watson](#), 213 Cal. App. 3d 446, 453, 261 Cal. Rptr. 635 (2d Dist. 1989).)

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§ 2:26. Witness unavailability—Due diligence

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West's Key Number Digest, [Criminal Law](#) 🔑 419, 543

West's Key Number Digest, [Evidence](#) 🔑 577

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[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1475 to 1479, 1480](#)

[C.J.S., Evidence §§ 486, 488](#)

The declarant is unavailable as a witness if absent from the hearing after the proponent has exercised reasonable (due) diligence and has been unable to procure the witness's attendance by the court's process. ([Evidence Code § 240\(a\)\(5\)](#).)

Virtually all the published criminal cases under this subsection involve the prosecution's attempt to introduce a statement after a showing of due diligence. Among those few criminal cases that involve a defendant as the proponent of the hearsay, there is some suggestion that the defense burden is lighter, in part because of a “wide disparity” in prosecution and defense resources. ([People v. Forgason](#), 99 Cal. App. 3d 356, 362, 160 Cal. Rptr. 263 (1st Dist. 1979).) However, in more recent cases, the appellate courts have upheld findings the defense had failed to establish due diligence without ever suggesting that the defense should be evaluated differently than the prosecution in this area. ([People v. Sanders](#), 11 Cal. 4th 475, 522–525, 12 Cal. 4th 783c, 46 Cal. Rptr. 2d 751, 905 P.2d 420 (1995); see also [People v. Walton](#), 42 Cal. App. 4th 1004, 49 Cal. Rptr. 2d 917 (2d Dist. 1996).)

“Due diligence” has been defined as follows: “It is not enough to show that the witness has not been found, but there must be evidence of a substantial character to support the conclusion of due diligence. It contemplates

something more than a desultory and indifferent search, but connotes persevering application and untiring efforts in good earnest.” (*People v. Benjamin*, 3 Cal. App. 3d 687, 696, 83 Cal. Rptr. 764 (1st Dist. 1970).) “The measure of due diligence is not the difficulties imposed by a search for a witness, but rather the diligence exercised in surmounting those difficulties.” (*People v. Enriquez*, 19 Cal. 3d 221, 236, 137 Cal. Rptr. 171, 561 P.2d 261 (1977).) The obligation on the party seeking to introduce the hearsay statement is to show that reasonable efforts have been made to find the witness. “That additional efforts might have been made or other lines of inquiry pursued does not affect (our) conclusion It is enough that the People used reasonable efforts to locate the witness.” (*People v. Cummings*, 4 Cal. 4th 1233, 1298, 18 Cal. Rptr. 2d 796, 850 P.2d 1 (1993).)

Normally, serving a witness with a valid subpoena is sufficient. (Cf. *Gaines v. Municipal Court*, 101 Cal. App. 3d 556, 561, 161 Cal. Rptr. 704 (2d Dist. 1980).) Service of a subpoena by mail pursuant to *Penal Code* § 1328d has been held sufficient, even if the witness is placed on “on-call” status. (*People v. Perez*, 207 Cal. App. 3d 431, 435–437, 254 Cal. Rptr. 869 (2d Dist. 1989).) When the prosecution knows that the subpoenaed witness will be leaving the country before trial, but has good reason to believe he or she will return, the service alone has been found to constitute due diligence. (*People v. Watson*, 213 Cal. App. 3d 446, 453, 261 Cal. Rptr. 635 (2d Dist. 1989).) It has been held that the prosecution has no obligation to keep “periodic tabs” on every material witness who has been subpoenaed in a criminal case to ensure against their disappearance. (*People v. Wilson*, 36 Cal. 4th 309, 342, 30 Cal. Rptr. 3d 513, 114 P.3d 758 (2005); *People v. Hovey*, 44 Cal. 3d 543, 562, 244 Cal. Rptr. 121, 749 P.2d 776 (1988).) *Hovey* distinguished *People v. Louis*, where Justice Mosk had set forth the prosecution’s duty “to use reasonable means to prevent a present witness from becoming absent.” *Louis* was distinguished as a situation in which the prosecution had arranged the release without bail of a witness “knowing of a substantial risk that this important witness would flee.” (*People v. Hovey*, 44 Cal. 3d 543, 564, 244 Cal. Rptr. 121, 749 P.2d 776 (1988); *People v. Louis*, 42 Cal. 3d 969, 991, 232 Cal. Rptr. 110, 728 P.2d 180 (1986); see also *People v. Wise*, 25 Cal. App. 4th 339, 344, 30 Cal. Rptr. 2d 413 (1st Dist. 1994).)

If a witness is located out-of-state, the prosecution should comply with the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, *Penal Code* §§ 1334 et seq. In *People v. Cogswell*, 156 Cal.App.4th 698, 711 (2007), the court in a sexual assault case concluded the prosecution had not fully utilized the Uniform Act because it did not ask that Colorado place the reluctant victim into “immediate custody” and deliver her to a California officer; *Code of Civil Procedure* section 1219, subdivision (b) does not preclude placing a sexual assault victim in custody in this non-contempt context.

In each of the situations discussed above, the prosecution had the witness available to subpoena at one time. What effort must be made to locate a witness whose whereabouts are never discovered? In *People v. Pitts*, the court found inadequate a search for a known criminal that involved no check of the court system or jails for the witness’s aliases, no check of neighboring county courts and jails, and no contact with the witness’s former probation officers. (*People v. Pitts*, 223 Cal. App. 3d 1547, 1556–1557, 273 Cal. Rptr. 389 (2d Dist. 1990).) In *People v. Guiterrez*, however, a search for a similar witness was deemed sufficient when it included his parent’s home and last known address, hospitals, jails, and the morgue, as well as a court file revealing a currently outstanding bench warrant for a probation violation. Special emphasis was placed on the warrant which, the court said, gave the witness “a strong motive to avoid appearing in court.” (*People v. Guiterrez*, 232 Cal. App. 3d 1624, 1640, 284 Cal. Rptr. 230 (1st Dist. 1991); see also *People v. Jackson*, 28 Cal. 3d 264, 312, 168 Cal. Rptr. 603, 618 P.2d 149 (1980); *People v. Ventura*, 174 Cal. App. 3d 784, 792, 220 Cal. Rptr. 269 (2d Dist. 1985) (upholding the prosecution’s efforts); *People v. Enriquez*, 19 Cal. 3d 221, 235, 137 Cal. Rptr. 171, 561 P.2d 261

(1977) (finding due diligence to be lacking).)

How quickly should the subpoena process begin? One aspect of due diligence is the speed with which the search is begun. In *People v. Robinson*, the court noted that the “practical realities” of local subpoena procedure should determine whether the subpoena process was “timely commenced.” Factors to be considered include “[w]hat efforts are customary; are those customary procedures generally successful in securing witness's attendance; were there exigencies in a particular case which required more, or which justified less, stringent efforts than normally employed?” (*People v. Robinson*, 226 Cal. App. 3d 1581, 1585–1586, 277 Cal. Rptr. 504 (6th Dist. 1991).) In *People v. Saucedo*, the court upheld a finding of witness unavailability based on a search for the witness that began on the first day of trial and continued for one week. (*People v. Saucedo*, 33 Cal. App. 4th 1230, 1236–1239, 40 Cal. Rptr. 2d 153 (2d Dist. 1995).) But see *People v. Sanders*, where the court upheld a finding that the defense had failed to prove due diligence when the effort to subpoena the witness did not begin “until well into the trial” and counsel knew in advance that the witness might be necessary and was uncooperative. (*People v. Sanders*, 11 Cal. 4th 475, 524–525, 12 Cal. 4th 783c, 46 Cal. Rptr. 2d 751, 905 P.2d 420 (1995); see *People v. Avila*, 131 Cal. App. 4th 163, 169–170, 31 Cal. Rptr. 3d 441 (2d Dist. 2005).) If the prosecution is aware that a witness is planning to leave the state, it should subpoena that witness before departure. (*People v. Mendieta*, 185 Cal. App. 3d 1032, 1036–1037, 230 Cal. Rptr. 162 (5th Dist. 1986).)

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West's Key Number Digest, [Criminal Law](#) 🔑 419, 543

West's Key Number Digest, [Evidence](#) 🔑 577, 581

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[C.J.S., Evidence §§ 486, 488 to 489](#)

The proponent of the evidence has the burden of establishing unavailability by a preponderance of the evidence. ([People v. Turner](#), 219 Cal. App. 3d 1207, 1213, 268 Cal. Rptr. 686 (2d Dist. 1990).) The proper standard of review on appeal of the trial court's decision on unavailability is independent, de novo review, not the more deferential abuse of discretion standard. ([People v. Cromer](#), 24 Cal. 4th 889, 893, 103 Cal. Rptr. 2d 23, 15 P.3d 243 (2001).)

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§ 2:28. Party admissions

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West's Key Number Digest, [Evidence](#) 🔑 200 to 265

West's Key Number Digest, [Criminal Law](#) 🔑 405 to 410

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[C.J.S., Criminal Law §§ 1220, 1222, 1224, 1227, 1231 to 1238, 1253, 1243, 1277 to 1286, 1288 to 1292](#)

[C.J.S., Evidence §§ 293, 337 to 338, 340 to 341, 364 to 477, 1333](#)

A statement is not inadmissible hearsay if offered against the declarant in an action in which he or she is a party, in either an individual or representative capacity, regardless of whether the statement was made in his or her individual or representative capacity. ([Evidence Code § 1220](#).) An admission is simply evidence, not conclusive proof, and may be overcome by other evidence. ([Frankenheimer v. Frankenheimer](#), 231 Cal. App. 2d 101, 110, 41 Cal. Rptr. 636 (2d Dist. 1964).) A judicial admission in a pleading in the present case is conclusive on the issue, not simply evidence. ([Valerio v. Andrew Youngquist Construction](#), 103 Cal. App. 4th 1264, 1271, 127 Cal. Rptr. 2d 436 (1st Dist. 2002); [Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.](#), 122 Cal. App. 4th 834, 850, 176 Cal. Rptr. 239 (1st Dist. 1981).) “[A]n oral statement by counsel in the same action is a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly. [Citations.]” ([Fassberg Const. Co. v. Housing Authority of City of Los Angeles](#), 152 Cal. App. 4th 720, 752, 60 Cal. Rptr. 3d 375 (2d Dist. 2007) [Statement by counsel in closing argument was clear and deliberate and bound the client.])

A plea of no contest to a crime *punishable* as a felony is admissible as a party admission against the defendant in a civil action based upon or growing out of the act upon which the criminal prosecution is based. ([Penal Code § 1016\(3\)](#).) Thus, if a defendant pleads no contest to a felony grand theft auto and the court subsequently reduces the charge to a misdemeanor, pursuant to the plea bargain and [Penal Code § 17\(b\)](#), the plea may be in-

roduced against the defendant in a subsequent civil suit brought by the car's owner. (*Rusheen v. Drews*, 99 Cal. App. 4th 279, 284–288, 120 Cal. Rptr. 2d 769 (2d Dist. 2002).)

The admissions exception applies in civil cases.

Magnecomp Corp. v. Athene Co. held that a properly authenticated letter from a party can be used against it to show an agency relationship existed. (*Magnecomp Corp. v. Athene Co.*, 209 Cal. App. 3d 526, 537–538, 257 Cal. Rptr. 278 (2d Dist. 1989).) Statements provided in depositions, interrogatories, or a pleading in a prior civil action may be introduced against the declarant as an admission. (*Mayhood v. La Rosa*, 58 Cal. 2d 498, 500–501, 24 Cal. Rptr. 837, 374 P.2d 805 (1962) (deposition); *Muth v. Urricelqui*, 251 Cal. App. 2d 901, 910, 60 Cal. Rptr. 166 (1st Dist. 1967).)

The Comment to [Evidence Code § 1220](#) provides that the statement in the admission need not be one that would be admissible if made at the hearing. Thus, an admission is admissible even though the declarant did not have personal knowledge of the facts asserted or even if the admission consists of the statement of an otherwise inadmissible opinion. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.*, 74 Cal. App. 3d 762, 786–787, 142 Cal. Rptr. 1 (1st Dist. 1977).)

“In summary judgment and summary adjudication proceedings ‘[a]dmissions of material facts in the opposing party's pleadings are binding on that party as judicial admissions. They are conclusive concessions of the truth of these matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her.’ [Citation.]” (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.*, 111 Cal. App. 4th 1234, 1248, 4 Cal. Rptr. 3d 416 (4th Dist. 2003).) However, neither “a legal conclusion nor even a ‘mixed factual-legal conclusion’ in a pleading constitutes a binding judicial admission.” (*Schachter v. Citigroup, Inc.*, 159 Cal.App.4th 10, 21 (2008).)

The admissions exception applies in criminal cases.

A criminal defendant's own hearsay statements are admissible against him. (*People v. Lewis*, 43 Cal.4th 415, 529 (2008).) In *People v. Anderson*, the defendant's statement that he was “born ... to be a killer” was admitted to rebut his claim of no malicious intent in the homicides. (*People v. Anderson*, 52 Cal. 3d 453, 477, 276 Cal. Rptr. 356, 801 P.2d 1107 (1990).) In *People v. Goodner*, the defendant's statements in a probation officer's report prepared for a prior conviction were admissible to prove that the previous conviction was for residential burglary. (*People v. Goodner*, 226 Cal. App. 3d 609, 615, 276 Cal. Rptr. 542 (6th Dist. 1990).) Where a defendant represented himself in his first trial, statements he made during closing argument may properly be introduced against him in his second trial. (*People v. Kiney*, 151 Cal. App. 4th 807, 812–816, 60 Cal. Rptr. 3d 168 (3d Dist. 2007).)

Unlike the hearsay exception for declarations against interest, discussed in [§ 2:39](#), at the time it was made, the admission may have been neutral or even self-serving. It is still admissible if it is dis-serving at the time it is offered into evidence. See *People v. Diaz*, where the court found that the defendant's prior guilty plea established the residential rather than commercial nature of the burglary even though it was a fact of no consequence at the time of the plea. (*People v. Diaz*, 208 Cal. App. 3d 338, 349, 255 Cal. Rptr. 91 (6th Dist. 1989).) As the court noted in *People v. Carpenter*, “The hearsay rule does not compel exclusion of *any* statement offered against a party declarant whether or not it can be described as an admission It is true that the section head-

ing refers to ‘Admission of Party,’ but the heading is irrelevant to the construction.” (*People v. Carpenter*, 21 Cal. 4th 1016, 1049, 90 Cal. Rptr. 2d 607, 988 P.2d 531 (1999) (emphasis in original).)

For a statement to qualify under this section as a party admission, it must be offered against the declarant. Thus a self-serving denial of responsibility cannot be introduced by a party. (*People v. Clay*, 153 Cal. App. 3d 433, 457, 200 Cal. Rptr. 269 (1st Dist. 1984).)

Comment

It is not uncommon in a criminal case for the prosecutor to introduce an exculpatory statement by the defendant and then attempt to disprove it. It would be incorrect to analyze this as a hearsay statement falling under the admissions exception. Rather, this is properly seen as nonhearsay: It is not introduced for the truth of the matter stated, but rather to show a consciousness of guilt. (See *People v. Mendoza*, 192 Cal. App. 3d 667, 672, 238 Cal. Rptr. 1 (1st Dist. 1987); *People v. La Salle*, 103 Cal. App. 3d 139, 150, 162 Cal. Rptr. 816 (2d Dist. 1980); see the discussion in § 2:11.)

In criminal cases, the defendant's admission can be introduced only if it is voluntarily given and if the requirements of *Miranda v. Arizona* are met. (*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); see the discussion in § 5:21.)

In a joint trial, an admission by one criminal defendant that implicates a codefendant may not be introduced even with an appropriate limiting instruction. If the statements implicating the codefendant cannot be effectively deleted without prejudice to the declarant, the prosecution must choose between separate trials and proceeding without the admission. (*People v. Aranda*, 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).) The *Aranda* rule has survived the passage of Proposition 8. (*People v. Jacobs*, 195 Cal. App. 3d 1636, 1650, 241 Cal. Rptr. 550 (2d Dist. 1987).) Since Proposition 8, however, *Aranda* has been limited: if codefendant A testifies and denies that codefendant B was involved in the crime, the prosecutor may introduce evidence of a prior statement by A in which B is implicated. (*People v. Boyd*, 222 Cal. App. 3d 541, 562, 271 Cal. Rptr. 738 (4th Dist. 1990).) Moreover, in a court trial, one codefendant's extrajudicial statement that incriminates another need not be excluded, though of course, its admissibility is limited. (*People v. Walkkein*, 14 Cal. App. 4th 1401, 18 Cal. Rptr. 2d 383 (2d Dist. 1993).) The *Aranda* rule does not apply when the confession has been redacted to eliminate not only the codefendant's name but also any reference to his or her existence. (*Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).) However, when the codefendant's name is simply replaced by the use of a neutral pronoun, there must be a case-by-case analysis in light of the other trial evidence. “The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun.” (*People v. Fletcher*, 13 Cal. 4th 451, 456, 53 Cal. Rptr. 2d 572, 917 P.2d 187 (1996).) In *Fletcher*, the confession referred to the coparticipant as “a friend.” The Supreme Court concluded that the evidence at trial was such that a reasonable juror could not help but infer that the nonconfessing defendant was the “friend” referred to. Thus it found that admitting the confession was a constitutional violation. When a statement is redacted, the trial court must compare the unredacted and the redacted statements “to determine whether the redactions so distort the original statement as to result in prejudice to the defendant.” (*People v. Lewis*, 43 Cal.4th 415, 457 (2008); *People v. Stallworth*, 164 Cal.App.4th 1079, 1091–1103 (2008) [reversing a murder conviction because the redaction of defendant's statement prejudiced him.]) If the redaction does not prejudice

the defendant, a court may preclude the defendant from relying on section 356 to cross-examine a witness as to the omitted portions of his or her statement, when “inquiring into the ‘whole on the same subject’ would violate a co-defendant's rights under *Aranda*” (*Lewis*, at p. 458.)

In certain limited circumstances, statements of one codefendant that implicate others may be found to be declarations against interest and admissible against both the declarant and other codefendants in a joint trial. *People v. Greenberger* held that statements by defendants to friends who later testified for the prosecution at trial were so admissible and could be introduced against the non-testifying declarant and the other codefendants charged in the joint murder trial. *Greenberger* also upheld the trial court's refusal to grant a severance under *Aranda*. (*People v. Greenberger*, 58 Cal. App. 4th 298, 324–336, 68 Cal. Rptr. 2d 61 (2d Dist. 1997).) See the discussion in § 2:41.

[Evidence Code § 1228.1](#) provides that neither the signature of a parent or legal guardian on a child welfare services case plan nor the acceptance of any services prescribed in the plan shall constitute an admission of guilt or be used as evidence against the parent or guardian in court. ([Evidence Code § 1228.1\(a\)](#).) However, a parent or guardian's failure to cooperate without good cause in the provision of services specified in the plan may be used as evidence, if relevant, in certain juvenile proceedings conducted pursuant to [Welfare and Institutions Code §§ 300, 342, 366.21, 366.22, 387 or 388](#). ([Evidence Code § 1228.1\(b\)](#).) A child welfare services case plan is often utilized in juvenile dependency cases. It may contain a list of allegations against a parent as well as a prescribed set of remedial steps for the parent to take.

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§ 2:29. Liability for statements of another—Adoptive admissions

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West's Key Number Digest, [Evidence](#) 🔑220

West's Key Number Digest, [Criminal Law](#) 🔑407

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[C.J.S., Criminal Law §§ 1220, 1224, 1231, 1243](#)

[C.J.S., Evidence § 390](#)

A statement is not inadmissible hearsay if it is offered against a party and if after the statement was made and with knowledge of the contents the party has by words or other conduct manifested an adoption or belief in its truth. ([Evidence Code § 1221](#).) With adoptive admissions the operative facts occur after the statement; with authorized admissions they precede the statement. Authorized admissions are discussed in [§ 2:30](#).

“If a person is accused of committing a crime under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment of the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission.” ([People v. Preston](#), 9 Cal. 3d 308, 313–314, 107 Cal. Rptr. 300, 508 P.2d 300 (1973); accord, [People v. Davis](#), 36 Cal. 4th 510, 535, 31 Cal. Rptr. 3d 96, 115 P.3d 417 (2005); [People v. Silva](#), 45 Cal. 3d 604, 623, 247 Cal. Rptr. 573, 754 P.2d 1070 (1988).) The accusatory statement is not admitted for its truth, but only to supply meaning to the silence or conduct of the accused in the face of it. ([People v. Combs](#), 34 Cal. 4th 821, 842, 22 Cal. Rptr. 3d 61, 101 P.3d 1007 (2004), cert. denied, 125 S. Ct. 2549, 162 L. Ed. 2d 281 (U.S. 2005).) Once the accused has adopted the statements of another, the statements become his own admissions. ([Coombs](#), at 842.) In [People v. Pitts](#), 223 Cal. App. 3d 606, 850, 273 Cal. Rptr. 757 (5th Dist. 1990), testimony that the defendant was told that “there was no evidence because they had gotten rid

of everything, to which [the defendant] did not respond” was found to be an adoptive admission. (See also *People v. Edelbacher*, 47 Cal. 3d 983, 1010–1012, 254 Cal. Rptr. 586, 766 P.2d 1 (1989).) However, when there is nothing in the subject statement that refers to the defendant or accuses him or her of anything, there is nothing for the defendant to deny and no adoptive admission exists. (*People v. Carter*, 30 Cal. 4th 1166, 1196–1197, 135 Cal. Rptr. 2d 553, 70 P.3d 981 (2003), cert. denied, 540 U.S. 1124, 124 S. Ct. 1086, 157 L. Ed. 2d 922 (2004).)

The proponent must establish the statement was made under circumstances that would normally call for a response if the statement were untrue. (*People v. Riel*, 22 Cal. 4th 1153, 1189, 96 Cal. Rptr. 2d 1, 998 P.2d 969 (2000).) This exception can apply even if a “direct accusation in so many words” is not made. (*People v. Fauber*, 2 Cal. 4th 792, 852, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (1992).) In *People v. Geier*, 41 Cal. 4th 555, 590, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007), the defendant and his former girlfriend were discussing the death of a murder victim when she asked the defendant whether he had killed the victim for the insurance proceeds and he made no response. “Embedded in [the girlfriend’s] statement was an implied accusation that defendant had killed [the victim]. The jury could have found that defendant’s failure to respond to the accusation ... was tantamount to an admission.” (*People v. Geier*, 41 Cal. 4th 555, 590, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007).)

In *People v. Thoma*, 150 Cal. App. 4th 1096, 1102, 58 Cal. Rptr. 3d 855 (2d Dist. 2007) the court concluded that in determining whether a prior conviction qualifies as a strike, a court may not rely upon an adoptive admission made following the acceptance of the guilty plea in the prior case.

Once a defendant has been advised of the *Miranda* rights, it may be constitutionally improper to introduce evidence of post-accusation silence, at least to the extent that the accusations are made by a police officer or the defendant believes the police are monitoring the conversation. (*People v. Medina*, 51 Cal. 3d 870, 889–891, 274 Cal. Rptr. 849, 799 P.2d 1282 (1990).) However, in *Medina*, the court ruled that the defendant’s silence in response to an accusation by his sister in a nonmonitored setting was admissible, even post-*Miranda*. (See generally *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), discussed in § 5:21.)

The *Aranda* doctrine, discussed in § 2:28, prevents the prosecution from introducing a non-testifying codefendant’s statement that implicates another defendant in a joint trial. *Aranda* does not apply, however, when the prosecution proves that both defendants were present and joined in the discussion of the crime with a third person; each then has adopted the other’s admissions. (*People v. Osuna*, 70 Cal. 2d 759, 765, 76 Cal. Rptr. 462, 452 P.2d 678 (1969).) In *People v. Fauber*, the trial court properly admitted statements made by the codefendants in the presence of the defendant discussing the need to dispose of a body and a bicycle. Because the defendant “participated without demur” in the conversation, the adoptive admissions’ exception applied, even though there were no accusatory statements nor statements that called for a particular reply. (*People v. Fauber*, 2 Cal. 4th 792, 851–852, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (1992). See, also, *People v. Riel*, 22 Cal. 4th 1153, 1188–1199, 96 Cal. Rptr. 2d 1, 998 P.2d 969 (2000).) In *People v. Castille*, 108 Cal. App. 4th 469, 478–486, 133 Cal. Rptr. 2d 489 (1st Dist. 2003), cert. granted 124 S. Ct. 1653, 158 L. Ed. 2d 352 (2004), remanded for reconsideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), 541 U.S. 36, new opinion, 129 Cal. App. 4th 863, 29 Cal. Rptr. 3d 71 (2005), the police interviewed several suspects in a murder case jointly, and, at the end of the interview, each participant expressly agreed with everything that had been discussed. The trial court properly permitted the statements of each to be admitted against all as adoptive admissions. However, in *People v. Jennings*, 112 Cal. App. 4th 459, 472–474, 5 Cal. Rptr. 3d 243 (4th Dist. 2003), cert. denied, 541 U.S. 1078, 124 S. Ct. 2425, 158 L. Ed. 2d 992 (2004), the court declined to extend *Castille* to a

situation where there is a joint *custodial* interrogation, but each suspect does not expressly adopt the others' admissions, and the prosecution relies on one suspect's silence as an adoptive admission of another's statement. (*Jennings*, 112 Cal. App. 4th at 472; but, see, *People v. Castille*, 129 Cal. App. 4th 863, 879–880, 29 Cal. Rptr. 3d 71 (1st Dist. 2005), suggesting that the California Supreme Court's later opinion in *People v. Combs*, 34 Cal. 4th 821, 842, 22 Cal. Rptr. 3d 61, 101 P.3d 1007 (2004), cert. denied, 125 S. Ct. 2549, 162 L. Ed. 2d 281 (U.S. 2005), may effect the result in *Jennings*.)

If, at a pretrial hearing, a criminal defendant calls certain witnesses, the prosecution is not permitted to introduce a transcript of this testimony at trial against the defendant on the theory that it constitutes adoptive admissions. (*People v. Jaspal*, 234 Cal. App. 3d 1446, 1461–1463, 286 Cal. Rptr. 337 (5th Dist. 1991).)

In the civil context, an accusation of wrongdoing that should, but does not, provoke a denial is admissible. (*Bowles v. State Bar*, 48 Cal. 3d 100, 108, 255 Cal. Rptr. 846, 768 P.2d 65 (1989).) In *Bowles*, a letter was sent to an attorney accusing him of failing to communicate and provide service. Because the letter demanded a reply, the failure to respond constituted an adoptive admission. In *In re Neilson's Estate*, 57 Cal. 2d 733, 747, 22 Cal. Rptr. 1, 371 P.2d 745 (1962), the court found that a statement by a third party did not clearly call for a reply, and therefore silence was not properly construed as an adoptive admission. (*In re Neilson's Estate*, 57 Cal. 2d 733, 747, 22 Cal. Rptr. 1, 371 P.2d 745 (1962).)

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§ 2:30. Liability for statements of another—Authorized admissions

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[C.J.S., Criminal Law § 1233](#)

[C.J.S., Evidence §§ 366, 433 to 450](#)

A statement is not inadmissible hearsay if it is offered against a party and if the statement was made by one authorized by that party to make statements for that party concerning the subject matter of the statement. ([Evidence Code § 1222\(a\)](#).) This exception applies only if the party has authorized the speaker to make statements on that subject matter. ([O'Neill v. Novartis Consumer Health, Inc.](#), 147 Cal. App. 4th 1388, 1403, 55 Cal. Rptr. 3d 551 (2d Dist. 2007); [Rochlis v. Walt Disney Co.](#), 19 Cal. App. 4th 201, 217, 23 Cal. Rptr. 2d 793 (2d Dist. 1993).) It is insufficient to show that the statement related to an issue within the scope of the speaker's employment relationship with the party. ([Souza v. Pratico](#), 245 Cal. App. 2d 651, 664, 54 Cal. Rptr. 159 (1st Dist. 1966).) This exception “has been interpreted in California as only applying to high-ranking organizational agents who have actual authority to speak on behalf of the organization.” ([Thompson v. County of Los Angeles](#), 142 Cal. App. 4th 154, 169, 47 Cal. Rptr. 3d 702 (2d Dist. 2006).) In this respect, the California hearsay exception is narrower than its federal counter-part, which provides that “a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” is not hearsay. ([Federal Rules of Evidence](#), rule 801(d)(2)(D).)

It is often difficult to determine if the speaker is authorized to make statements as well as act in a particular sphere. This difficulty is enhanced because “the determination necessarily depends on the particular facts and circumstances of each case viewed in the light of the substantive law of *agency*, as distinct from evidence.”

O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 570, 69 Cal. Rptr. 2d 389 (4th Dist. 1997) (court looked to the declarant's high level role in the company as a significant factor in deciding to find the statement authorized); see also *Cruey v. Gannett Co.*, 64 Cal. App. 4th 356, 366, 76 Cal. Rptr. 2d 670 (1st Dist. 1998).) If so authorized, the statement is admissible even if its particulars were neither authorized nor contemplated. In *Miller v. Anson-Smith Constr. Co.*, a supervisor for a general contractor had authority to approve the subcontractor's work. The court found that the supervisor's letter of recommendation for the subcontractor to a third person could be introduced against the general contractor to prove that the subcontractor's work was of high quality. (*Miller v. Anson-Smith Const. Co.*, 185 Cal. App. 2d 161, 8 Cal. Rptr. 131 (3d Dist. 1960); see also *W. T. Grant Co. v. Superior Court*, 23 Cal. App. 3d 284, 100 Cal. Rptr. 179 (2d Dist. 1972), which held that a store manager's statement that the owner told him to sell repossessed goods as new was admissible.) In *Colarossi v. Coty US Inc.*, 97 Cal. App. 4th 1142, 1150, 119 Cal. Rptr. 2d 131 (4th Dist. 2002), the court avoided the difficult question of which statements by an employee were authorized, by finding that the employee's statements were admissible as the admission of a party opponent. The employee, though a manager of the defendant, was not, in fact, a party to the proceeding. The *Colarossi* analysis was based on a misreading of the federal case on which it relied, *E.E.O.C. v. Watergate at Landmark Condominium*, 24 F.3d 635, 638–640 (4th Cir. 1994). *Watergate* interpreted the federal hearsay exception for authorized admissions, discussed above, and simply concluded that certain volunteer, non-employees of the defendant were sufficiently involved in the challenged decision to terminate to be “agents” of the defendant. Under the federal rules, this agency was sufficient to establish a hearsay exception for statements made by the volunteers concerning the termination. Under our Evidence Code, however, finding that a declarant is a party's agent is insufficient, unless the agent was also authorized to make statements for that party concerning the subject matter of the statement. (*Evidence Code* § 1222(a).) *Colarossi* blurs this distinction between the state and the federal rules.

The authorization may be implied as well as expressed. In *Dincau v. Tamayose*, a husband and wife worked together to take care of their sick children. Statements made by one of them to a nurse while obtaining advice was deemed authorized by the other. (*Dincau v. Tamayose*, 131 Cal. App. 3d 780, 790, 182 Cal. Rptr. 855 (2d Dist. 1982).) The fact of authorization is to be proved by the normal rules of agency. (*Evidence Code* § 1222, Comment.) Thus, it must be established independently of the statements of the agent unless those statements are acquiesced in by the party. (*Dooley v. West American Commercial Ins. Co.*, 133 Cal. App. 58, 62, 23 P.2d 766 (2d Dist. 1933).)

The court, in its discretion, may either require proof of authorization before admitting the statement or admit the statement subject to such proof. The statement is admissible if there is sufficient evidence of authority to sustain a finding of it by the jury, even if the court itself is not persuaded. (*Evidence Code* § 1222(b).)

Simply because a party has hired an expert to testify in an unrelated case does not mean that the opinions recited by the expert are an authorized admission. “In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise.” (*O'Neill v. Novartis Consumer Health, Inc.*, 147 Cal. App. 4th 1388, 1404, 55 Cal. Rptr. 3d 551 (2d Dist. 2007).) Since the expert is not subject to the control of the party with respect to the testimony provided, the expert is not an agent.

Any statement made after the termination of the employment relationship is inadmissible under this section. (*Markley v. Beagle*, 66 Cal. 2d 951, 957, 59 Cal. Rptr. 809, 429 P.2d 129 (1967).)

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[C.J.S., Criminal Law §§ 1319 to 1348](#)

[C.J.S., Evidence § 450](#)

If the conditions set forth below are proved, a statement of a coconspirator offered against a party is not made inadmissible by the hearsay rule:

- A conspiracy existed. “A conspiracy ‘is an agreement between two or more persons (with the specific intent) to achieve an unlawful objective; coupled with an overt act by one of the conspirators in furtherance thereof’ Only prima facie evidence of a conspiracy is required to permit the trial court to admit evidence under the coconspirator's exception.” ([In re Hardy](#), 41 Cal.4th 977, 995–996 (2007).) A criminal defendant need not be charged with conspiracy to apply the coconspirator exception to the hearsay rule. ([People v. Ambrose](#), 183 Cal. App. 3d 136, 139, 227 Cal. Rptr. 885 (4th Dist. 1986).)
- The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong. ([Evidence Code § 1223\(a\)](#).) If the statement was made before the conspiracy began, it is inadmissible. In *People v. Morales*, there was no evidence that the declarant was conspiring with anyone to kill either victim at the time the statement was made. ([People v. Morales](#), 48 Cal. 3d 527, 551, 257 Cal. Rptr. 64, 770 P.2d 244 (1989).)
- The statement was made prior to or during the time that the party was participating in the conspiracy.

[Evidence Code § 1223\(b\)](#).) The conspiracy must be ongoing at the time the statement is made. Once the conspiracy has ended by commission of the crime that was its sole objective, subsequent statements by a former coconspirator against the defendant are inadmissible. Conspiracies are not considered still in operation merely because the conspirators act together to avoid detection and punishment after the commission of the crime. ([People v. Saling](#), 7 Cal. 3d 844, 853, 103 Cal. Rptr. 698, 500 P.2d 610 (1972).) The arrest of the primary conspirators may also terminate the conspiracy. ([People v. Pic'l](#), 114 Cal. App. 3d 824, 886, 171 Cal. Rptr. 106 (2d Dist. 1981).)

- The statement was made in furtherance of the objective of the conspiracy. ([Evidence Code § 1223\(a\)](#).) In *People v. Morales*, the court found that the proffered statement was mere boasting, not made “in furtherance” of any conspiracy. ([People v. Morales](#), 48 Cal. 3d 527, 552, 257 Cal. Rptr. 64, 770 P.2d 244 (1989).) In *People v. Hardy*, the court held that statements that merely narrate past events or consist of “gratuitous ramblings” are not to be deemed “in furtherance” of the conspiracy. However, if such a narration is designed to help coordinate alibis and avoid detection of an ongoing conspiracy, *Hardy* found it admissible. ([People v. Hardy](#), 2 Cal. 4th 86, 146–147, 5 Cal. Rptr. 2d 796, 825 P.2d 781 (1992).) In addition, statements that constitute attempts to recruit a person to join a conspiracy are made in furtherance of the conspiracy. (*In re Hardy*, 41 Cal.4th 977, 996 (2007).)

Comment

Determining the precise goal of the conspiracy is crucial. Consider a situation in which one spouse arranges the murder of the other whose life is insured. If the murder is the goal of the conspiracy, then once it has been accomplished, subsequent statements are inadmissible, even if the killer has not yet been paid. ([People v. Leach](#), 15 Cal. 3d 419, 432–435, 124 Cal. Rptr. 752, 541 P.2d 296 (1975).) Alternatively, if the objective is insurance fraud, then the aim of the conspiracy is to avoid blame for the death being attributed to the surviving spouse, since such blame would preclude recovery of the benefits. This lengthens the duration of the conspiracy, perhaps even to the time of trial. ([People v. Hardy](#), 2 Cal. 4th 86, 144, 5 Cal. Rptr. 2d 796, 825 P.2d 781 (1992).)

Evidence of the facts required to establish a conspiracy must be shown by evidence independent of the declaration itself. ([People v. Leach](#), 15 Cal. 3d 419, 430, 124 Cal. Rptr. 752, 541 P.2d 296 (1975); [People v. Herrera](#), 83 Cal. App. 4th 46, 65, 98 Cal. Rptr. 2d 911 (5th Dist. 2000).) The court may require that these preliminary facts be established before the statement is admitted, or, in its discretion, the court may admit the statement subject to such proof. ([Evidence Code § 1223\(c\)](#).)

This exception applies in civil as well as criminal cases. ([Ahrens v. Superior Court](#), 197 Cal. App. 3d 1134, 1151, 243 Cal. Rptr. 420 (1st Dist. 1988).)

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West's Key Number Digest, [Evidence](#)  225 to 236

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[C.J.S., Evidence §§ 293, 412 to 413, 418 to 431](#)

In civil cases, when a party's right to recover or potential liability is dependent on a third person's conduct or rights, statements by that third person may be admissible against the party. As Wigmore has pointed out, this is permitted because “ ‘the admissions of a person having virtually the same interests ... will in general be likely to be equally worthy of consideration’ as the admissions of the party.” (Wigmore, *California Evidence* (3d ed. 1940) § 1077, p. 118, quoted in [Markley v. Beagle](#), 66 Cal. 2d 951, 960, 59 Cal. Rptr. 809, 429 P.2d 129 (1967).)

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§ 2:33. Liability for statements of another—Derivative rights and duties—Declarant's liability or breach of duty in issue

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West's Key Number Digest, [Evidence](#) 🔑 225 to 252

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[C.J.S., Evidence §§ 293, 366, 412 to 413, 418 to 450](#)

When the liability, obligation, or duty of a party is based, at least in part, on the liability, obligation, or duty of a third person, or the claim or right asserted by a party in a civil case is barred or diminished by a breach of duty on the part of a third person, a statement by the third person is as admissible against the party as it would be against the declarant in an action involving that liability, obligation, duty, or breach of duty. ([Evidence Code § 1224](#).) This section is similar in effect to § 1230, declarations against interest, except that, to be admissible under [Evidence Code § 1224](#), the statement need not have been against interest when made.

In tort cases, when a party's liability is based on the doctrine of *respondeat superior*, this hearsay exception does not permit the employee-tortfeasor's statement to be introduced against the party, except in unusual circumstances. (See [Markley v. Beagle](#), 66 Cal. 2d 951, 958–960, 59 Cal. Rptr. 809, 429 P.2d 129 (1967).) *Labis v. Stopper* appears to be the only published case that finds such statements admissible. In *Labis v. Stopper*, the admissible statement related only a specific and detailed act by the employee with no conclusion as to fault and was made to a police officer on the day of the accident while the employee was still employed on the same job where the accident occurred. *Markley* sets forth a list of the type of cases where the exception in [§ 1224](#) may be relied on, which includes actions against sureties or guarantors, admissions of embezzlement by an employee in an action on the employer's indemnity bond, and admissions of one joint owner of an automobile in an action against the other. ([Labis v. Stopper](#), 11 Cal. App. 3d 1003, 89 Cal. Rptr. 926 (1st Dist. 1970); see [Markley v. Beagle](#), 66 Cal. 2d 951, 958–959, 59 Cal. Rptr. 809, 429 P.2d 129 (1967).) [Evidence Code § 1224](#) refers to “breach of duty” so as to admit statements of one whose breach is in issue without regard to whether that breach

creates liability or merely defeats a right asserted by the party. ([Evidence Code § 1224](#), Comment.)

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§ 2:34. Liability for statements of another—Derivative rights and duties—Judgment determining liability of third person

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[C.J.S., Judgments §§ 944, 946](#)

In a provision that complements [§ 1224](#), the [Evidence Code](#) also provides that when the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that third person is not inadmissible hearsay when offered to prove such liability, obligation, or duty. ([Evidence Code § 1302.](#))

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[C.J.S., Evidence §§ 293, 412 to 413, 418 to 431](#)

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 a third person, evidence of a statement by that third person made during the time the party now claims that third person was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant on an action involving that right, title, or interest. ([Evidence Code § 1225](#).) This exception permits the statements of predecessors in interest of either real or personal property to be admitted against the successors so long as the statement was made at a time after the party claims title vested in the predecessor and before the party claims title was divested. ([Evidence Code § 1225](#), Comment.)

In a parent's suit for injuries to a minor child, evidence of a statement by the child is not inadmissible hearsay if offered against the plaintiff. ([Evidence Code § 1226](#).)

In an action for wrongful death, evidence of a statement by the deceased is not inadmissible hearsay if offered against the plaintiff. ([Evidence Code § 1227](#).)

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§ 2:36. Statements of children in sexual and physical abuse cases—Corpus delicti

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[C.J.S., Criminal Law §§ 1288 to 1291, 1295 to 1301](#)

[Evidence Code § 1228](#) provides for the admissibility of certain statements by minor children, when the statements establish the elements of the crime, in order to admit the confession of a person charged with violating [§§ 261, 264.1, 285, 286, 288, 288a, 289](#) or [647a of the Penal Code](#). In order to admit the statements the court must find:

- The statement was made by a 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.
- The statement describes the child as a victim of sexual abuse.
- The statement was made prior to the defendant's confession. The court is to view with caution the testimony of a person recounting hearsay when there is evidence of personal bias or prejudice.
- There are no circumstances that would render the statement unreliable.
- The child is unavailable.
- The confession was memorialized in a trustworthy fashion by a law enforcement official.

The prosecution must give notice of its intent to use such a statement, in writing, at least 10 days prior to the hearing.

In a jury trial, this statement is admitted out of the presence of the jury, and solely for the purpose of determining the admissibility of the defendant's confession.

In *Creutz v. Superior Court*, the only appellate case to consider this statute, the court found that the statute should be construed strictly to permit the child's statements to come in only when the defendant had made a confession in which all elements of the offense were expressly admitted. In *Creutz*, the child had accused the defendant of three separate sexual offenses. He admitted touching her once inappropriately, but denied any improper intent. The court found that this was an admission, not a confession and refused to permit the court to infer the lewd intent required so that this hearsay exception could be utilized. (*Creutz v. Superior Court*, 49 Cal. App. 4th 822, 56 Cal. Rptr. 2d 870 (4th Dist. 1996).) *Creutz* did not discuss the constitutionality of the statute. However, the requirement that there be no significant inconsistencies between the defendant's confession and the child's declaration is a strong indicator of reliability that should permit the statute to withstand constitutional challenge. Furthermore, the hearsay statement is never presented to the jury. It simply provides evidence of the corpus delicti, which, at the time this statute was enacted, was a necessary predicate for the admission of the confession. Since the California Supreme Court has abrogated the corpus delicti rule as a limit on admissibility (*People v. Alvarez*, 27 Cal. 4th 1161, 119 Cal. Rptr. 2d 903, 46 P.3d 372 (2002); see the discussion in § 5:20), § 1228 no longer serves the purpose for which it was enacted.

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§ 2:37. Statements of children in sexual and physical abuse cases—Medical diagnosis or treatment

West's Key Number Digest

West's Key Number Digest, [Infants](#) 🔑20, 174

West's Key Number Digest, [Criminal Law](#) 🔑367

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1186 to 1188, 1190 to 1195, 1195, 1200, 1206 to 1208](#)

[C.J.S., Infants §§ 55, 125 to 137](#)

[Evidence Code § 1253](#) expands the admissibility of statements made for the purpose of medical diagnosis or treatment if: (1) the statement is made by a child under the age of 12; and (2) the statement describes defined acts of child abuse or neglect. This provision is discussed in [§ 2:56](#).

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§ 2:38. Statements of children in sexual and physical abuse cases—Exceptions for statements of sufficient reliability

West's Key Number Digest

West's Key Number Digest, [Infants](#) 🔑20

Legal Encyclopedias

[C.J.S., Infants §§ 125 to 137](#)

[Evidence Code § 1360](#) provides that in any criminal prosecution, a statement made by the victim, when under the age of 12, describing any act or attempted act of child abuse or neglect with or on the child by another is not barred by the hearsay rule if:

- 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. In *People v. Brodit*, the appellate court held that in determining whether the statement is reliable, the trial judge should rely on the following nonexclusive factors: “(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](#), 61 Cal. App. 4th 1312, 1329–1330, 72 Cal. Rptr. 2d 154 (1st Dist. 1998), citing [In re Cindy L.](#), 17 Cal. 4th 15, 29–30, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (1997).) Based on those factors, the decision to admit the statement was upheld in *Brodit*.
- The child either testifies at the hearing or is unavailable as a witness. If the child is unavailable as a witness, the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement.

The statute requires the proponent of the statement to notice the adverse party “sufficiently in advance of the proceedings in order to provide ... a fair opportunity to prepare to meet the statement.” ([Evidence Code §](#)

1360(b).) It defines “child abuse” to mean “an act proscribed by Penal Code § 273a, 273d, or 288.5, or any of the acts described in Penal Code § 11165.1.” It defines “child neglect” to mean “any of the acts described in Section 11165.2 of the Penal Code.” (Evidence Code § 1360(c).)

In *People v. Brodit*, the court upheld the constitutionality of this hearsay exception against an attack that it was nonreciprocal, and allowed only inculpatory evidence. (*People v. Brodit*, 61 Cal. App. 4th 1312, 1326, 72 Cal. Rptr. 2d 154 (1st Dist. 1998).) The court found that the exception could, in fact, be employed by the defense. In addition, the court found that even if the Legislature created one, among many, hearsay exception that can be used only by the prosecution, no due process violation would result. (*People v. Brodit*, 61 Cal. App. 4th 1312, 1326–1327, 72 Cal. Rptr. 2d 154 (1st Dist. 1998).) Finally, this hearsay exception can be used against a defendant charged with a crime that occurred before the exception was enacted without violating the state and federal ex post facto clauses. (*People v. Brodit*, 61 Cal. App. 4th 1312, 1327–1328, 72 Cal. Rptr. 2d 154 (1st Dist. 1998).) In *People v. Eccleston*, the court upheld the hearsay exception against a challenge that compliance with its provisions failed to satisfy the defendant's right to confront and cross-examine witnesses. (*People v. Eccleston*, 89 Cal. App. 4th 436, 107 Cal. Rptr. 2d 440 (1st Dist. 2001).) The United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) re-examined its Confrontation Clause jurisprudence. (See the discussion in §§ 2:111 to 2:114.) In cases where the child does not testify at the hearing, admission of her or his statement under this exception is problematic.

In *People v. Roberto V.*, the court held that the trial court erred in assuming, without conducting a hearing, that a four-year old child was not competent and was, therefore, unavailable for purposes of § 1360. (*People v. Roberto V.*, 93 Cal. App. 4th 1350, 1368–1369, 113 Cal. Rptr. 2d 804 (2d Dist. 2001).) The court also interpreted the requirement of notice “in advance of the proceeding” to mean that the notice must precede the beginning of the trial, and that trial begins when the jury is sworn. (*Roberto V.*, 93 Cal. App. 4th at 1370–1372.)

Two other hearsay exceptions that relate to minors are worth noting. There is a general child dependency hearsay exception (discussed in § 2:101) and a more limited exception in dependency proceedings where the child has testified at the preliminary hearing (discussed in §§ 2:21 to 2:26). There is no 12-year age limit for either of these exceptions.

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§ 2:39. Declarations against interest—In general

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West's Key Number Digest, [Evidence](#) 🔑272

West's Key Number Digest, [Criminal Law](#) 🔑411 to 418

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[C.J.S., Criminal Law §§ 1220, 1223 to 1224, 1226, 1235 to 1242, 1244 to 1246, 1253, 1252 to 1275, 1277, 1282 to 1291, 1295 to 1312](#)

[C.J.S., Evidence §§ 293 to 298](#)

To be admissible as a declaration against interest, an out-of-court statement must possess certain characteristics. First, the declarant must have sufficient knowledge of the subject matter. One court found a statement of a trust beneficiary that she had testamentary disposition as to a particular portion of the trust was inaccurate as to her share, and by its own terms showed she lacked sufficient knowledge of the will in dispute for her statement to be admitted as a declaration against interest. ([Estate of Huntington](#), 58 Cal. App. 3d 197, 209, 129 Cal. Rptr. 787 (2d Dist. 1976).) Second, the declarant must be unavailable. The doctrine of unavailability as it pertains to several hearsay exceptions is discussed in [§ 2:21](#). Finally the statement must be contrary to the declarant's interest.

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§ 2:40. Declarations against interest—Statement must be contrary to declarant's interest

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑272

West's Key Number Digest, [Criminal Law](#) 🔑411 to 418

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1220, 1223 to 1224, 1226, 1235 to 1242, 1244 to 1246, 1253, 1252 to 1275, 1277, 1282 to 1291, 1295 to 1312](#)

[C.J.S., Evidence §§ 293 to 298](#)

When made, the statement must be so far contrary to the declarant's interest that a reasonable person in that position would not have made the statement unless he or she believed it to be true. [Evidence Code § 1230](#) defines the declarant's interest broadly and admits a statement contrary to the declarant's pecuniary or proprietary interest, or one that subjects the declarant to civil or criminal liability, or tends to render invalid a claim by the declarant against another, or creates a risk of making the declarant an object of hatred, ridicule, or social disgrace in the community.

This component provides the “reliability test” for this hearsay exception. Where necessary, the court should probe beneath the surface to determine if the statement so impairs the declarant's interest that no reasonable person in that position would say it unless it was believed to be true. For example, if a declarant admits involvement in a serious crime, the court might still reject the statement if shown that this admission occurred after the declarant was granted immunity or while the declarant was serving consecutive life sentences. (See an excellent discussion of this in [People v. Gordon](#), 50 Cal. 3d 1223, 1280–1282, 270 Cal. Rptr. 451, 792 P.2d 251 (1990) (Justice Kennard, dissenting).) Presumably the same conclusion might be reached if a judgment-proof individual admitted civil liability.

In *Gordon*, the majority rejected a strong dissent to find a statement sufficiently against penal interest to be admissible. The defendant's uncle, when questioned by the police about a robbery, said that he had not been involved in it but had provided medical assistance to the defendant after the crime. The officer had told the uncle, before taking his statement, that he need not fear prosecution if he had taken no part in the robbery. Nevertheless, the court found that the statement was against the uncle's penal interest and thus admitted it. (*People v. Gordon*, 50 Cal. 3d 1223, 1249–1253, 270 Cal. Rptr. 451, 792 P.2d 251 (1990).) Under the circumstances of *Gordon*, the decision seems questionable. At most, the uncle implicated himself as an accessory, a relatively minor crime, and, in fact, he never admitted that he knew of the robbery before providing the assistance. Moreover, following the officer's assurances, a reasonable person in the uncle's position would not necessarily have understood that he was subjecting himself to penal consequences by making the statement.

In *People v. Duarte*, the California Supreme Court considered the prosecution's attempt to introduce an accomplice's statement to the police as a declaration against interest. (*People v. Duarte*, 24 Cal. 4th 603, 101 Cal. Rptr. 2d 701, 12 P.3d 1110 (2000).) It cautioned that “Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, *also* be exculpatory or have a net exculpatory effect.” (*People v. Duarte*, 24 Cal. 4th 603, 612, 101 Cal. Rptr. 2d 701, 12 P.3d 1110 (2000).) (Emphasis in original.) Since the accomplice's statement in *Duarte* contained a number of comments which served his own interests, the trial court's decision to admit was error, and the defendant's conviction was reversed. The court also commented on the practice of redacting such a statement to eliminate the exculpatory portions. “[R]edaction cannot enhance the underlying or general trustworthiness of a declaration as a whole. By its nature an after-the-fact process employed with respect to a previously existing declaration, redaction as a logical matter simply cannot bear on, let alone alter, the declarant's motives or any other circumstance that might affect a given declaration's fundamental reliability and inform a court's assessment thereof.” (*People v. Duarte*, 24 Cal. 4th 603, 618, 101 Cal. Rptr. 2d 701, 12 P.3d 1110 (2000).)

In *People v. Brown*, 31 Cal. 4th 518, 536, 3 Cal. Rptr. 3d 145, 73 P.3d 1137 (2003), cert. denied, 541 U.S. 1045, 124 S. Ct. 2160, 158 L. Ed. 2d 736 (2004), on the other hand, the court upheld the trial court's decision that the custodial statement of an accomplice to a murder naming the defendant as the shooter was admissible: “Although [the declarant] does not admit to firing the fatal shot, he knew he was being charged with murder, he admitted to hearing a gunshot, and he admitted to participating in stealing the victim's truck. These statements were clearly against his penal interest; his denial of having been the shooter did not absolve him of the crime to which he admitted.” While the court's conclusion about the effect of the declarant's denial may have been correct as a matter of substantive criminal law, it casts little light on the declarant's *motive* for laying the blame for the shooting on the defendant. That is, the declarant may well have believed his own liability was dramatically altered depending on who actually fired the fatal shot. Under *Duarte*, this motive seems critical to determining the statement's reliability.

The subtlety of the “against interest” rule is demonstrated in *People v. Hays*, in which a defendant was prosecuted for possession of marijuana found in a jacket. He sought to introduce a statement by D admitting ownership of the jacket. Since there was no evidence that D knew that marijuana had been found in the garment, the court found that D's statement was not against penal interest. (*People v. Hays*, 250 Cal. App. 2d 373, 377, 58 Cal. Rptr. 293 (2d Dist. 1967).) See also *People v. Hayes*, where the defendant was not permitted to introduce a juror's statement to his investigator admitting she had disobeyed the court's direction and read newspaper stories of the trial. Nothing in the record demonstrated that she “was aware that violating the court's admonition was

misconduct, let alone a serious offense, either as a contempt or a misdemeanor violation of a court order.” (*People v. Hayes*, 21 Cal. 4th 1211, 1257, 91 Cal. Rptr. 2d 211, 989 P.2d 645 (1999).)

Few cases have considered admission of a statement that “created a risk of making the declarant an object of hatred, ridicule, or social disgrace in the community.” In a homicide case, the victim's statement that she had attempted suicide was found admissible. (*People v. Parriera*, 237 Cal. App. 2d 275, 46 Cal. Rptr. 835 (5th Dist. 1965).)

This exception does not apply to any statement or part thereof that is not specifically dis-serving to the declarant. (*People v. Duarte*, 24 Cal. 4th 603, 612, 101 Cal. Rptr. 2d 701, 12 P.3d 1110 (2000); *People v. Smith*, 135 Cal. App. 4th 914, 922, 38 Cal. Rptr. 3d 1 (4th Dist. 2005).) This issue arises in two distinct contexts, which are not always adequately distinguished in the cases. First, assume an unavailable declarant, X, gives a statement admitting her guilt and also incriminating the defendant, D. For example, a witness is prepared to testify that X told him that X robbed a bank, and D assisted by drawing a floor plan of the bank. If the People seek to introduce X's statement in the prosecution of D, the court must determine if that part of the statement concerning D helps inculpate X, by showing X's knowledge of the details of the crime. If so, the statement concerning D complies with the requirements of § 1230. See, for example, *People v. Wilson*, a murder case where the defendant's wife told the police that the defendant had called her and told her to find the murder weapon and hide it. When she exercised the marital privilege and refused to testify at trial, the court allowed her prior statement as a declaration against her interest. It found the request by her husband dis-serving to her because it established the knowledge necessary to make her an accomplice. (*People v. Wilson*, 17 Cal. App. 4th 271, 275–277, 21 Cal. Rptr. 2d 420 (2d Dist. 1993).) Before admitting X's declaration, however, the court should consider the potential Sixth Amendment problems discussed in § 2:41.

The second context in which this issue arises occurs when X's statement incriminates her, but exonerates D. For example, a witness is prepared to testify that X told him she committed a bank robbery and an innocent man is in jail for the crime. In *People v. Lawley*, 27 Cal. 4th 102, 154, 115 Cal. Rptr. 2d 614, 38 P.3d 461 (2002), the Supreme Court found that the exculpatory portion of the hypothetical statement would not fit within the declaration against penal interest exception. This is presumably so, because it does not serve to incriminate the declarant. Such non-incriminating statements may be redacted. (*People v. Dixon*, 153 Cal.App.4th 985, 977 (2007).) A more difficult question arises if D is being prosecuted for driving the get-away car and X's declaration is that she committed the bank robbery, S drew up the floor plan and T drove the get-away car. If a court concluded that these added details demonstrated sufficient inside knowledge to increase the inculpatory nature of X's statement, it could admit the statement, subject to determining if it is reliable. (*Duarte*, 24 Cal. 4th at 611.) A criminal defendant may seek to introduce a declaration against interest made by a third person, in which the declarant admits guilt for the offense. In California the Supreme Court has directed trial courts to carefully review the circumstances of such a statement because there is a “general suspicion with which the law looks upon such declarations.” (*People v. Frierson*, 53 Cal. 3d 730, 746, 280 Cal. Rptr. 440, 808 P.2d 1197 (1991).) The Federal Rules of Evidence manifest a similar concern. Rule 804(b)(3) provides, “A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless the corroborating circumstances clearly indicate the trustworthiness of the statement.”

In an interpretation of *Federal Rules of Evidence*, rule 804(b)(3), which admits declarations against penal interest, the Supreme Court ruled that statements that are not self-inculpatory are inadmissible even if they are

contained in a broader narrative that is generally self-inculpatory. (*Williamson v. U.S.*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994).) In *Williamson*, A gave statements to a federal agent incriminating himself and B in drug trafficking. In the trial of B, A was properly found to be unavailable and his statement implicating B was admitted as a declaration against interest. The Supreme Court reversed.

The proponent of a statement who relies on this exception need not show that the in-court witness is credible. (*People v. Cudjo*, 6 Cal. 4th 585, 608, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (1993).)

That a hearsay statement is sufficiently adverse to the declarant's interest is a preliminary fact to be determined under *Evidence Code* § 405 by the court before the statement is admitted in front of the jury. (*People v. Huggins*, 182 Cal. App. 3d 828, 832, 227 Cal. Rptr. 547 (6th Dist. 1986).)

The determination of whether an out-of-court statement by an accomplice against a defendant is against the declarant's interest may well hinge on the identity of the auditor. As the Advisory note to the *Federal Rules of Evidence*, Rule 804(b)(3) states: "Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no trouble qualifying." See the discussion of *People v. Greenberger*, 58 Cal. App. 4th 298, 324–336, 68 Cal. Rptr. 2d 61 (2d Dist. 1997) in § 2:28.

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§ 2:41. Declarations against interest—Constitutionality

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West's Key Number Digest, [Criminal Law](#) 🔑 662

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[C.J.S., Criminal Law §§ 1514 to 1531, 1535 to 1541](#)

The discussion of the application of the Confrontation Clause to hearsay statements admitted in criminal cases against the accused is now contained in §§ [2:111](#) to [2:114](#).

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§ 2:42. Prior inconsistent statements of witnesses

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑266

West's Key Number Digest, [Witnesses](#) 🔑379 to 397

West's Key Number Digest, [Criminal Law](#) 🔑417(14)

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[C.J.S., Criminal Law §§ 1302, 1310 to 1311](#)

[C.J.S., Evidence §§ 259 to 260, 285 to 286, 311 to 313, 319, 324, 326](#)

[C.J.S., Witnesses §§ 674 to 754](#)

Evidence of a statement made by a witness is not inadmissible hearsay if the statement is inconsistent with the witness's testimony at the hearing and is offered in compliance with § 770. ([Evidence Code § 1235](#).) Compliance with [§ 1235](#) ensures that a prior inconsistent statement is admissible not only to impeach the witness but also for the truth of the facts asserted in the statement. ([People v. Hawthorne](#), 4 Cal. 4th 43, 55, 14 Cal. Rptr. 2d 133, 841 P.2d 118 (1992).) However, an extrajudicial statement repudiated under oath is insufficient, in a capital case, to establish aggravating, violent criminal conduct beyond a reasonable doubt in the penalty phase. ([People v. Montiel](#), 5 Cal. 4th 877, 929, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993).)

To be admissible, extrinsic evidence of the inconsistent statement must be offered in compliance with [Evidence Code § 770](#), which provides that “[u]nless 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 [or her] an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action.” [Evidence Code § 1235](#) does not admit to prior statements of a witness that are not inconsistent with testimony even

though the statements were made in the same conversation in which the inconsistent statements were made. (*Benson v. Honda Motor Co.*, 26 Cal. App. 4th 1337, 1349, 32 Cal. Rptr. 2d 322 (2d Dist. 1994).)

If after a witness has been excused and is no longer available, a party learns of a statement inconsistent with testimony given by that witness, the party should be able to introduce it without complying with [Evidence Code § 770\(a\)](#) or (b). (See [Evidence Code § 770](#), Comment.)

A party may introduce an inconsistent statement if the witness was given “an opportunity to explain or to deny the statement.” ([Evidence Code § 770\(a\)](#).) Few cases have defined that phrase. One court held that providing a witness with a 60–page deposition transcript taken 18 months earlier and asking him, “Now, at that time and place, were all of these questions asked and all of these answers given?” was insufficient because it did not provide “a realistic opportunity to explain or deny any specific statement contained therein.” (*Bossi v. State of California*, 119 Cal. App. 3d 313, 325, 174 Cal. Rptr. 93 (3d Dist. 1981).) Another court held that a realistic opportunity to explain or deny the prior statement requires reference to more than one of the following: (1) “the people involved in the conversation”; (2) “its time and place”; or (3) “the specific statements that were made during it.” (*People v. Garcia*, 224 Cal. App. 3d 297, 304, 273 Cal. Rptr. 666 (4th Dist. 1990).) The *Garcia* court held that asking the witness, “Did you ever tell anyone that unless Mr. G. gave you a certain amount of money, you would get him in trouble?” was an insufficient opportunity to explain or deny.

In *Colarossi v. Coty US Inc.*, 97 Cal. App. 4th 1142, 1150–1151, 119 Cal. Rptr. 2d 131 (4th Dist. 2002), the court held that, in a summary judgment motion, a statement inconsistent with one presented on behalf of the moving party is admissible for the truth of the matter, though the witness was never presented with an opportunity to explain or deny the inconsistency in her deposition. Because the reason for this requirement is to assist the trier of fact in assessing credibility, there was “ ‘no compelling reason’ to provide the witness with an opportunity to explain or deny his statements.” (*Colarossi*, 97 Cal. App. 4th at 1151.)

The statement must be inconsistent, but the inconsistency may be implied as well as expressed. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO*, 227 Cal. App. 2d 675, 699, 39 Cal. Rptr. 64 (1st Dist. 1964).)

To be admissible for the truth, and not simply for impeachment, the statement must be inconsistent with the statements of a witness who actually testifies at the trial. The prosecution cannot first introduce the preliminary hearing testimony of an unavailable witness and then impeach it with prior inconsistent statements of that witness. (*People v. Williams*, 16 Cal. 3d 663, 668–669, 128 Cal. Rptr. 888, 547 P.2d 1000 (1976); cited with approval in *People v. Karis*, 46 Cal. 3d 612, 654, 250 Cal. Rptr. 659, 758 P.2d 1189 (1988) and *People v. Hitchings*, 59 Cal. App. 4th 915, 921, 69 Cal. Rptr. 2d 484 (1st Dist. 1997).) However, when evidence of prior inconsistent statements is admitted against a witness at a preliminary hearing or prior trial of the same criminal matter and that witness is unavailable at a subsequent proceeding, if former testimony of the witness is admitted pursuant to [Evidence Code § 1291](#), evidence of the prior inconsistent statements is also admissible if it consists of (a) a videotaped statement if it was introduced at the prior proceeding; or (b) a transcript, containing the statements, of the prior proceeding. ([Evidence Code § 1294\(a\)](#).) When such evidence is introduced against a party, that party may examine or cross-examine any person who testified at the prior proceeding as to the prior inconsistent statements of the witness. ([Evidence Code § 1294\(b\)](#).)

A party can impeach his or her own witness with a prior inconsistent statement whether or not the witness's

testimony damaged or surprised the party. ([Evidence Code § 1235](#), Comment.)

Where the entire testimony of a witness is that he or she does not recollect a particular incident, an earlier statement describing the incident is inadmissible since it is not inconsistent with the present testimony. ([People v. Sam](#), 71 Cal. 2d 194, 77 Cal. Rptr. 804, 454 P.2d 700 (1969).) The same result occurs when a witness refuses to testify about an incident. Earlier statements about the incident are not inconsistent with this. ([People v. Rojas](#), 15 Cal. 3d 540, 548, 125 Cal. Rptr. 357, 542 P.2d 229 (1975).) However, when a witness testifies to part of an incident and denies recollection of the rest and the court disbelieves the failure to recall, this deliberate evasion is deemed inconsistent with any prior statement discussing the incident and the prior statement is admissible. ([In re Deon D.](#), 208 Cal. App. 3d 953, 961–962, 256 Cal. Rptr. 490 (2d Dist. 1989) relying on [People v. Green](#), 3 Cal. 3d 981, 988–989, 92 Cal. Rptr. 494, 479 P.2d 998 (1971).) In fact, where the trial judge finds that the memory loss is evasive and false, a total denial of recollection may be impeached with a prior statement discussing the incident. ([People v. Ledesma](#), 39 Cal. 4th 641, 710–712, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).) As the court noted in [People v. Perez](#), the key “is not whether the witness selectively remembers some and forgets other circumstances, but rather whether the record supports a finding that the forgetfulness at trial is deliberately evasive.” ([People v. Perez](#), 82 Cal. App. 4th 760, 764, 98 Cal. Rptr. 2d 522 (2d Dist. 2000); see, also, [People v. Johnson](#), 3 Cal. 4th 1183, 1219–1220, 14 Cal. Rptr. 2d 702, 842 P.2d 1 (1992).) Thus, *Green* has not been limited to those cases where the witness testified to part of the incident and falsely denied recollection of the rest.

When a court admits a prior statement because it believes that the witness is being evasive, it need make no specific finding of this on the record. ([People v. Pinholster](#), 1 Cal. 4th 865, 937, 4 Cal. Rptr. 2d 765, 824 P.2d 571 (1992).)

Even if a witness feigns memory loss, a defendant has an adequate opportunity to cross-examine. Thus, admission of a prior inconsistent statement in this circumstance is not a violation of the federal Confrontation Clause. ([People v. Gunder](#), 151 Cal. App. 4th 412, 420, 59 Cal. Rptr. 3d 817 (3d Dist. 2007).)

In [People v. Fierro](#), the California Supreme Court approved, for the first time, the use of a prior inconsistent statement to impeach a witness who testified that she did not remember, when there was no indication that this testimony was evasive or false. In fact, the witness was the wife of the murder victim in the case and appeared quite cooperative with the prosecutor examining her. *Fierro* held that the prior statement could be used whenever it was inconsistent “in effect” with the testimony at trial. This holding could be interpreted to permit any significant forgotten fact to be introduced through a prior statement. ([People v. Fierro](#), 1 Cal. 4th 173, 221, 3 Cal. Rptr. 2d 426, 821 P.2d 1302 (1991).)

A party who calls a witness who has made prior inconsistent statements cannot preclude opposing counsel from introducing those statements by asking the witness on direct examination if the statements were made and eliciting an acknowledgment and the explanation that they were lies. ([People v. Brown](#), 35 Cal. App. 4th 1585, 1595–1597, 42 Cal. Rptr. 2d 155 (4th Dist. 1995).)

This hearsay exception is constitutional ([People v. Green](#), 3 Cal. 3d 981, 985, 92 Cal. Rptr. 494, 479 P.2d 998 (1971)), even when it is applied to multiple levels of hearsay. ([People v. Zapien](#), 4 Cal. 4th 929, 950–958, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (1993).)

California Rules of Court, rule 1616(c) provides, among other things, that evidence introduced at an arbitration may not be used as affirmative evidence, or by way of impeachment at a subsequent trial. This prevails over § 1235 and precludes use of a prior inconsistent statement made at an arbitration by a witness at the trial. (*Jimena v. Alesso*, 36 Cal. App. 4th 1028, 43 Cal. Rptr. 2d 18 (2d Dist. 1995).)

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Simons California Evidence Manual

Justice Mark B. Simons

Chapter
2. Hearsay Evidence

B. Hearsay Exceptions

§ 2:43. Prior consistent statements of witnesses

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑266

West's Key Number Digest, [Witnesses](#) 🔑414(2)

West's Key Number Digest, [Criminal Law](#) 🔑417(14)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1302, 1310 to 1311](#)

[C.J.S., Evidence §§ 259 to 260, 285 to 286, 311 to 313, 319, 324, 326](#)

[C.J.S., Witnesses §§ 781, 783 to 787](#)

Evidence of a statement previously made by a witness is not inadmissible hearsay if the statement is consistent with the testimony at the hearing and is offered in compliance with [Evidence Code § 791](#). ([Evidence Code § 1236](#).) Compliance with [§ 1236](#) ensures that a prior consistent statement is admissible not only to rehabilitate the credibility of a witness but also for the truth of the matter asserted. ([Evidence Code § 1236](#), Comment.)

To be admissible, the consistent statement must be offered in compliance with [Evidence Code § 791](#), which provides that a prior consistent statement is admissible if offered after a statement inconsistent with the witness's testimony has been introduced and the consistent statement was made before the inconsistent statement. A prior consistent statement is also admissible if offered after an express or implied charge has been made that the testimony is recently fabricated or influenced by bias or other improper motive and the consistent statement was made before the bias or improper motive arose. In [People v. Hillhouse](#), 27 Cal. 4th 469, 117 Cal. Rptr. 2d 45, 40 P.3d 754 (2002), cert. denied, 537 U.S. 1114, 123 S. Ct. 869, 154 L. Ed. 2d 789 (2003), the trial court properly allowed the prosecution to introduce evidence of a consistent statement given prior to the witness's plea agreement because the defense had claimed that the witness was testifying falsely against the defendant due to that

agreement. (*Hillhouse*, 27 Cal. 4th at 491.)

If a party has attacked a witness's testimony by charging that it was influenced by more than one improper motive, a statement consistent with the testimony may be introduced if it was made before any of the improper motives arose. In *People v. Hayes*, the defense had attacked a prosecution witness's credibility by showing that he was on probation and had charges pending against him. A consistent statement made after he was already on probation but before the new charges were filed was admitted because it was made before one of the motives to fabricate arose. (*People v. Hayes*, 52 Cal. 3d 577, 609, 276 Cal. Rptr. 874, 802 P.2d 376 (1990); see also *People v. McCowan*, 85 Cal. App. 3d 675, 681, 149 Cal. Rptr. 611 (1st Dist. 1978), (a consistent statement was admitted, though made after, not before, an inconsistent statement, because the consistent statement was made before an alleged recent fabrication).)

By its terms, § 791 requires that the prior consistent statement must be made before the improper motive arose or a prior inconsistent statement was uttered. One exception exists: If a cross-examiner suggests that the witness “did not speak of the matter when it would have been natural to speak” and the witness's silence is alleged to be inconsistent with trial testimony “then the prior consistent statement can be introduced to disprove the alleged prior silence.” (*People v. Williams*, 102 Cal. App. 4th 995, 1011–1012, 125 Cal. Rptr. 2d 884 (2d Dist. 2002), citing *People v. Gentry*, 270 Cal. App. 2d 462, 473, 76 Cal. Rptr. 336 (3d Dist. 1969).)

Warning

Though no case has so held, the logic of *Hayes* would appear to dictate that if a prior consistent statement is made in between two inconsistent statements, the prior consistent would be admissible on the basis that it had preceded one of them. Since this would only apply if both inconsistent statements were admitted, counsel might wisely consider only introducing the first inconsistent statement, which would preclude admission of the consistent declaration. In *Hayes*, the same result could have been reached if the party opposing introduction of the consistent statement had elected to introduce only the first of the motives to fabricate.

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§ 2:44. Past recollection recorded

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West's Key Number Digest, [Evidence](#) 🔑355(6)

West's Key Number Digest, [Criminal Law](#) 🔑435

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1395 to 1396, 1422 to 1423](#)

[C.J.S., Evidence §§ 904 to 915, 918 to 920, 928 to 931, 973, 976, 1023 to 1025](#)

Evidence of a statement previously made by the witness is not inadmissible hearsay under [Evidence Code § 1237\(a\)](#), if the following factors are established:

- The statement would have been admissible if made by the witness while testifying.
- The statement concerns a matter about which the witness has insufficient present recollection to permit a full and accurate testimony.
- The statement is contained in a writing that:
 - Was made at a time when the fact recorded actually occurred or was fresh in the witness's memory;
 - Was made by the witness, under the witness's direction or by some other person for the purpose of recording the witness's statement at the time it was made;
 - Is offered after the witness testifies that the statement he or she made was a true statement of such fact; and

- Is authenticated as an accurate record of the statement.

In *People v. Miller*, there was a lapse of time (apparently a matter of weeks) between the witness overhearing certain incriminating statements and her report of this to the police officer who took her statement. In addition, the witness never testified the facts were fresh in her mind at the time she relayed them to the officer. This did not preclude admission of the statement as past recollection recorded, and the court was entitled to find from all the circumstances that the statements overheard were still fresh in her mind. In addition, if the witness testifies he or she was “trying to tell the truth” when making the statement to the person who recorded it, this is sufficient. (*People v. Miller*, 46 Cal. App. 4th 412, 422, 424, 53 Cal. Rptr. 2d 773 (4th Dist. 1996).)

This hearsay exception should be distinguished from the use of a writing to refresh recollection. Present recollection refreshed (which is discussed in § 3:39) involves the use of a writing for no reason other than to refresh the memory of the witness. The writing has no independent evidentiary value. By contrast, in past recollection recorded, a review of the writing by the witness fails to refresh recollection. Assuming the writing meets the foundational requirements above, it has evidentiary value and may be read into evidence as past recollection recorded. With both doctrines, the writing, itself, may not be received in evidence unless offered by the adverse party. (*Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1491–1492, 250 Cal. Rptr. 819 (2d Dist. 1988); see also *In re Berman*, 48 Cal. 3d 517, 525, 256 Cal. Rptr. 802, 769 P.2d 984 (1989).)

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§ 2:45. Prior identification of persons

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West's Key Number Digest, [Evidence](#) 🔑 317(14)

West's Key Number Digest, [Criminal Law](#) 🔑 339.5, 421(6)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 359 to 361, 435, 1083 to 1103, 1166 to 1168, 1175](#)

[C.J.S., Evidence § 259](#)

Evidence of a statement previously made by a witness is not inadmissible hearsay under [Evidence Code § 1238](#), if each of the following factors are established:

- The statement would have been admissible if made by the witness while testifying.
- The statement is an identification of a party or another as a person who participated in a crime or other occurrence.
- The statement was made at a time when the crime or other occurrence was fresh in the witness's memory.
- The statement is offered after the witness testifies that he or she made the identification and that it was a true reflection of his or her opinion at that time.

The admissible prior identification may consist of the witness's identification at a lineup of the defendant or another as the perpetrator ([People v. Boyd](#), 222 Cal. App. 3d 541, 567, 271 Cal. Rptr. 738 (4th Dist. 1990)), the witness's description to the police of the perpetrator ([People v. Hatfield](#), 273 Cal. App. 2d 745, 748–749, 78 Cal. Rptr. 805 (1st Dist. 1969)), or a drawing of the perpetrator as described by the witness to a police artist. ([People v. Imbler](#), 57 Cal. 2d 711, 716, 21 Cal. Rptr. 568, 371 P.2d 304 (1962).)

If a witness is given an opportunity to identify the defendant, for example, at a lineup, and fails to do so, this failure to identify is not admissible under [Evidence Code § 1238](#). It should, however, be admissible under [Evidence Code § 1235](#), as an inconsistent statement, if the witness identifies the defendant at a subsequent hearing.

For many years the rule was that an extrajudicial identification not confirmed at trial was insufficient, standing alone, to sustain a conviction. ([People v. Gould](#), 54 Cal. 2d 621, 631, 7 Cal. Rptr. 273, 354 P.2d 865 (1960) (overruled by, [People v. Cuevas](#), 12 Cal. 4th 252, 48 Cal. Rptr. 2d 135, 906 P.2d 1290 (1995)).) The *Gould* rule was abandoned in [People v. Cuevas](#), 12 Cal. 4th 252, 48 Cal. Rptr. 2d 135, 906 P.2d 1290 (1995). In *Cuevas*, the court held that “the sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test.” ([People v. Cuevas](#), 12 Cal. 4th 252, 257, 48 Cal. Rptr. 2d 135, 906 P.2d 1290 (1995).)

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§ 2:46. Spontaneous statements

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West's Key Number Digest, [Evidence](#) 🔑120

West's Key Number Digest, [Criminal Law](#) 🔑362

Legal Encyclopedias

[C.J.S., Criminal Law §§ 596 to 597, 1126, 1186 to 1188, 1190 to 1195, 1198, 1200, 1203 to 1211, 1213, 1216 to 1218](#)

[C.J.S., Evidence §§ 348 to 363](#)

Evidence of a statement is not inadmissible hearsay pursuant to ([Evidence Code § 1240](#)), if it:

- Purports to narrate, describe, or explain an act, condition, or event perceived; and
- Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

To render statements admissible under this exception “it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstances of the occurrence causing it.” ([People v. Poggi, 45 Cal. 3d 306, 318, 246 Cal. Rptr. 886, 753 P.2d 1082 \(1988\)](#).) Further, “a hearsay statement, even if otherwise spontaneous, is admissible only if it relates to an event the declarant perceived personally.” ([People v. Phillips, 22 Cal. 4th 226, 92 Cal. Rptr. 2d 58, 991 P.2d 145 \(2000\)](#).) The theory underlying this exception is that the declarant's lack of opportunity for reflection and thus the absence of sufficient time for deliberate fabrication supply an adequate assurance

of the statement's trustworthiness. (*Box v. California Date Growers Assn.*, 57 Cal. App. 3d 266, 272, 129 Cal. Rptr. 146 (4th Dist. 1976).)

As used, “spontaneous” describes actions undertaken without deliberation or reflection. Reliability depends primarily on the mental state of the speaker, not the nature of the statement. (*People v. Brown*, 31 Cal. 4th 518, 541, 3 Cal. Rptr. 3d 145, 73 P.3d 1137 (2003), cert. denied, 541 U.S. 1045, 124 S. Ct. 2160, 158 L. Ed. 2d 736 (2004).) In *People v. Morrison*, 34 Cal. 4th 698, 719, 21 Cal. Rptr. 3d 682, 101 P.3d 568 (2004), cert. denied, 126 S. Ct. 160 (U.S. 2005), the court held that a “spontaneous statement of names as to ‘who did it’ described the event [the declarant] perceived [and] ... may be admissible where the declarant was the victim of the crime and made the identifying remarks while under the stress of excitement caused by experiencing the crime.” The decision whether to admit a statement as a spontaneous utterance is within the trial court's discretion. (*People v. Pearch*, 229 Cal. App. 3d 1282, 1290, 280 Cal. Rptr. 584 (4th Dist. 1991).) In *Pearch*, the court found that the trial court abused its discretion in finding the statement spontaneous, because there was no evidence as to what event was described in the statement, when that event occurred, or whether the declarant was still under the effect of the event at the time of the statement. (*People v. Pearch*, 229 Cal. App. 3d 1282, 1290, 280 Cal. Rptr. 584 (4th Dist. 1991).)

Neither a lapse of time between the event and the statement nor the fact that the declarations resulted from a series of questions necessarily precludes admissibility under this section. So long as the statements were made “under the stress of excitement and while the reflective powers were still in abeyance,” they are admissible. (*People v. Washington*, 71 Cal. 2d 1170, 1176, 81 Cal. Rptr. 5, 459 P.2d 259 (1969); accord: *People v. Ledesma*, 39 Cal. 4th 641, 708–709, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).) In *Washington*, the statements were obtained as a result of questioning one hour after the incident and were admitted because the declarant had been unconscious during the interim period. (*People v. Washington*, 71 Cal. 2d 1170, 1176, 81 Cal. Rptr. 5, 459 P.2d 259 (1969).) In *In re Damon H.*, the statements were admitted because the declarant was highly upset during the 30–minute interval between the incident and the statements. (*In re Damon H.*, 165 Cal. App. 3d 471, 475, 211 Cal. Rptr. 623 (3d Dist. 1985).) In deciding admissibility, the court may consider: (1) the length of time between the incident and the statements; (2) whether they were made in response to questions or not; and (3) whether the questions were suggestive. (*People v. Poggi*, 45 Cal. 3d 306, 320, 246 Cal. Rptr. 886, 753 P.2d 1082 (1988); accord: *People v. Pedroza*, 147 Cal. App. 4th 784, 791–792 (2007).) In *Poggi*, the statements made in response to the questions asked (one of which was suggestive) were admissible even though they were made 30 minutes after the incident. (*People v. Poggi*, 45 Cal. 3d 306, 320, 246 Cal. Rptr. 886, 753 P.2d 1082 (1988).) In *People v. Brown*, 31 Cal. 4th 518, 541, 3 Cal. Rptr. 3d 145, 73 P.3d 1137 (2003), cert. denied, 541 U.S. 1045, 124 S. Ct. 2160, 158 L. Ed. 2d 736 (2004), a statement made two and one-half hours after the crime was admitted as a spontaneous declaration. (See *People v. Raley*, 2 Cal. 4th 870, 893–894, 8 Cal. Rptr. 2d 678, 830 P.2d 712 (1992) [18–hour period]; *In re Emilye A.*, 9 Cal. App. 4th 1695, 1713, 12 Cal. Rptr. 2d 294 (4th Dist. 1992) [gap of “day or two”].)

The statement must narrate, describe, or explain an act, condition, or event. A description of the perpetrator is permissible even if it describes the perpetrator in relation to other incidents. For example, in the murder case of *People v. Farmer*, the victim's statement that the perpetrator had purchased drugs from a roommate and was “on the telephone list” was admitted. (*People v. Farmer*, 47 Cal. 3d 888, 904, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).) In *People v. Arias*, the defendant was convicted of murder based, in part, on the testimony of a witness who related the statement of Ms. N that while sexually assaulting her, the defendant had admitted the murder.

The defendant's statement was an admission, admissible under [Evidence Code § 1220](#). ([People v. Arias](#), 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (1996).) The Supreme Court found Ms. N's statement to the witness a spontaneous declaration, despite the defendant's contention it did not “narrate, describe or explain an act condition or event perceived by the declarant.” The court found the incriminating statement was an act or event “which she personally perceived during the course of the kidnapping, robbery, and sexual assaults to which he had just subjected her. One may infer that defendant's boast was used to threaten or control Ms. N during her ordeal. Nothing in the words or purpose of the ‘spontaneous declaration’ exception makes it inapplicable when the ‘act’ or ‘event’ perceived or recounted is a statement implicating its declarant in another crime.” ([People v. Arias](#), 13 Cal. 4th 92, 150, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (1996).)

Warning

Arias reaches the correct conclusion, but its faulty logic could vastly expand this hearsay exception. If the “act” or “event” is in fact the incriminating statement, then anytime a person tells the police the defendant has confessed and the person is obviously shocked at having heard the confession, the prosecutor could argue that the officer should be able to testify as to the double hearsay. A better analysis of the facts in *Arias* would be that the “act” or “event” was the rape and Ms. N's description of that act properly included the statements made by the perpetrator during its commission.

Even if the declarant is incompetent to testify, the statements may be admissible. Thus, in *In re Damon H.*, the declarant's spontaneous utterance was admitted even though he was found too young to testify. ([In re Damon H.](#), 165 Cal. App. 3d 471, 475, 211 Cal. Rptr. 623 (3d Dist. 1985); see also [People v. Orduno](#), 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (4th Dist. 1978).) In *People v. Gallego*, the declarant had been hypnotized and his testimony was excluded, but a spontaneous utterance on the same subject made prior to the hypnosis was admitted. ([People v. Gallego](#), 52 Cal. 3d 115, 175, 276 Cal. Rptr. 679, 802 P.2d 169 (1990); compare [People v. Provencio](#), 210 Cal. App. 3d 290, 302, 258 Cal. Rptr. 330 (4th Dist. 1989), where the spontaneous utterance of an unidentified declarant was admitted. In *Provencio*, it was assumed that the declarant had personal knowledge of the occurrence.) The competency question often arises in juvenile court dependency proceedings when the social services report is introduced and it contains hearsay statements of a young child. If the child was not competent at the time the statements were made, then the hearsay exception that would normally apply ([In re Malinda S.](#), 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244 (1990)) does not apply ([In re Daniel Z.](#), 10 Cal. App. 4th 1009, 1018, 13 Cal. Rptr. 2d 139 (1st Dist. 1992)). However, if the statements qualify as spontaneous declarations, they may be admitted even though the declarant was incompetent. ([In re Emilye A.](#), 9 Cal. App. 4th 1695, 1712–1713, 12 Cal. Rptr. 2d 294 (4th Dist. 1992).)

The proponent of the statement has the burden of establishing its admissibility. The trial court's ruling will not be overturned unless its discretion was abused. ([People v. Miron](#), 210 Cal. App. 3d 580, 583, 258 Cal. Rptr. 494 (5th Dist. 1989).) In *Miron*, a declaration containing conclusions, not simply observations, was excluded. ([People v. Miron](#), 210 Cal. App. 3d 580, 583, 258 Cal. Rptr. 494 (5th Dist. 1989).)

In criminal cases, the prosecution may introduce a hearsay statement pursuant to this exception only if it does not violate the federal Confrontation Clause contained in the Sixth Amendment. See the discussion that begins in [§ 2:111](#).

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§ 2:47. Contemporaneous statements

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West's Key Number Digest, [Evidence](#) 🔑120

West's Key Number Digest, [Criminal Law](#) 🔑362

Legal Encyclopedias

[C.J.S., Criminal Law §§ 596 to 597, 1126, 1186 to 1188, 1190 to 1195, 1198, 1200, 1203 to 1211, 1213, 1216 to 1218](#)

[C.J.S., Evidence §§ 348 to 363](#)

A statement is not inadmissible hearsay if it is offered to explain, qualify, or make understandable conduct of the declarant and was made while the declarant was engaged in that conduct. ([Evidence Code § 1241](#).) Where a person's conduct is relevant but equivocal, a statement accompanying it may be admitted to explain and make the conduct understandable. ([Evidence Code § 1241](#), Comment.)

Comment

This hearsay exception is closely related to the verbal act doctrine, except that a “verbal act” is not hearsay. A contemporaneous statement is hearsay, but admissible. For example, if the defendant points a gun at another and says, “Your money or your life!” his words are admissible even if they are untrue, that is, he would not really kill the victim. This statement is a verbal act. On the other hand, if a defendant prosecuted for attempted murder pointed a pistol at the victim and said, “I’ll kill you for doing that!” these words are admitted for their truth and serve to defeat any contention by the defendant that the gun fired accidentally. This is a contemporaneous statement. ([People v. Marchialette](#), 45 Cal. App. 3d 974, 980, 119 Cal. Rptr. 816 (2d Dist. 1975).)

The contemporaneous statement hearsay exception frequently arises in conveyance cases. Verbal or written

statements of a grant or contemporaneous with a disputed transaction are admissible either to show that the transfer was absolute or to show that the grantee took subject to conditions. ([Mecchi v. Picchi](#), 245 Cal. App. 2d 470, 478, 54 Cal. Rptr. 1 (1st Dist. 1966).)

California's contemporaneous statement exception is far narrower than the exception for present sense impressions contained in [Rule 803\(1\) of the Federal Rules of Evidence](#). Rule 803(1) provides: “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” is not excluded by the hearsay rule.

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§ 2:48. Dying declaration

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West's Key Number Digest, [Death](#) 🔑62

West's Key Number Digest, [Evidence](#) 🔑275.5

West's Key Number Digest, [Homicide](#) 🔑1075 to 1097

Legal Encyclopedias

[C.J.S., Death § 149](#)

[C.J.S., Evidence § 288](#)

A statement is not inadmissible hearsay ([Evidence Code § 1242](#)) if it:

- Was made by a dying person,
- Concerns the cause and circumstances of the person's death,
- Was made on the individual's personal knowledge, and
- Was made under a sense of immediately impending death.

Historically, this exception was premised on the notion that a dying person no longer has any temporal self-serving purposes to be furthered and that one facing death will tell the truth. (See [People v. Smith](#), 214 Cal. App. 3d 904, 910–911, 263 Cal. Rptr. 155 (2d Dist. 1989).)

The principal condition for finding this exception is that the declaration be made under a sense of impending death. See *People v. Tahl*, which held that although the victims did not die for several days, their belief that they were about to die justified admissibility of their declarations. ([People v. Tahl](#), 65 Cal. 2d 719, 724–725, 56

[Cal. Rptr. 318, 423 P.2d 246 \(1967\).](#)) Counsel should address the following factors in attempting to persuade the court on this issue:

- The victim's physical condition.
- The nature and seriousness of the wounds.
- The victim's conduct.
- The victim's statements and knowledge of the gravity of the condition

In *People v. Black*, the court relied on these factors and found a statement admissible even though at one point the declarant said he thought he was recovering. Simply because a dying person says “please don't let me die” does not prevent a finding that there was a sense of impending death. ([People v. Black, 96 Cal. App. 3d 846, 851–852, 158 Cal. Rptr. 449 \(1st Dist. 1979\)](#); [People v. Sims, 5 Cal. 4th 405, 458–459, 20 Cal. Rptr. 2d 537, 853 P.2d 992 \(1993\).](#)) A declaration by a victim describing the circumstances of the assault made after the victim has voluntarily rejected life support is admissible under this hearsay exception. ([People v. Adams, 216 Cal. App. 3d 1431, 265 Cal. Rptr. 568 \(3d Dist. 1990\).](#))

In *People v. Gatson*, the court carefully examined the requirement that the statement “concerns the cause and circumstances of the person's death” before finding admissible the decedent's statement, “They robbed me.” ([People v. Gatson, 60 Cal. App. 4th 1020, 1024–1026, 70 Cal. Rptr. 2d 729 \(2d Dist. 1998\).](#))

The declarant must, in fact, be dead at the time of the hearing, though the federal hearsay exception for dying declarations requires only that the declarant be unavailable. (See [Federal Rules of Evidence, Rule 804\(b\)\(2\)](#), Advisory Committee Note.) In criminal cases, the prosecution may introduce a hearsay statement pursuant to this exception only if it does not violate the federal Confrontation Clause contained in the Sixth Amendment. See the discussion that begins in § 2:111. In [People v. Monterroso, 34 Cal. 4th 743, 764–765, 22 Cal. Rptr. 3d 1, 101 P.3d 956 \(2004\)](#), the court held that dying declarations are an exception to the rule requiring cross-examination of all testimonial.

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§ 2:49. Statement of mental or physical state—To prove then-existing state of mind or physical sensation

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑268

West's Key Number Digest, [Criminal Law](#) 🔑419(2.20)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

Statements concerning the declarant's then-existing state of mind, emotion, or physical sensation are not inadmissible hearsay if offered to prove the declarant's state of mind, emotion, or physical sensation at that time if it is an issue in the action. ([Evidence Code § 1250\(a\)\(1\)](#).) The statement must not have been made under circumstances that indicate its lack of trustworthiness. ([Evidence Code § 1252](#); see also the discussion in [§ 2:57](#).)

If the declarant's then-existing state of mind is not an issue in the action, this hearsay exception is inapplicable. In one case, the declarant said he saw the victims alive after the date of the alleged murder. Since the declarant's state of mind was irrelevant, the out-of-court statement was inadmissible. ([People v. Douglas](#), 50 Cal. 3d 468, 514, 268 Cal. Rptr. 126, 788 P.2d 640 (1990).) In another case, an officer arrested a defendant with a pager, returned calls on the pager, and was given orders for cocaine. These orders were not admissible under the state of mind exception because the declarant's state of mind was not an issue. The court found, however, that the statements were admissible because they were not hearsay. ([People v. Bullock](#), 226 Cal. App. 3d 380, 389, 277 Cal. Rptr. 63 (3d Dist. 1990).)

If the declarant's then-existing state of mind is in issue, this hearsay exception applies. A personal injury plaintiff's complaints of pain to a neighbor, in trustworthy circumstances, are admissible. ([Evidence Code § 1250](#), Comment.) Another case held that properly conducted surveys are admissible as statements of present

state of mind if the state of mind of those surveyed is in dispute. (See [Leighton v. Old Heidelberg, Ltd.](#), 219 Cal. App. 3d 1062, 1082–1083, 268 Cal. Rptr. 647 (2d Dist. 1990).)

Unlike [Federal Rules of Evidence, rule 803\(4\)](#), the California Evidence Code has no specific hearsay exception for statements made to a doctor for purposes of diagnosis and treatment. However, statements of current mental or physical sensation are admissible under [§ 1250](#), whether or not made to a physician. Statements of previous mental or physical condition are admissible under [§ 1251](#) (discussed in [§ 2:55](#)). Note, that under [§§ 1250 and 1251](#), there is no requirement that the statements be made to a treating physician, as opposed to a retained expert. In fact, as noted above, the statements need not be made to a doctor at all. Under [§ 1252](#) (discussed in [§ 2:57](#)), the statements are inadmissible if made under circumstances indicating untrustworthiness. Statements made to a doctor and relied upon by a different expert in forming an opinion are admissible to show the information upon which an opinion is based, but not for the truth of the matter. (See the discussion in [§ 4:23](#); see, also, [People v. Brown](#), 49 Cal. 2d 577, 585, 320 P.2d 5 (1958); [Johnson v. Aetna Life Ins. Co.](#), 221 Cal. App. 2d 247, 252, 34 Cal. Rptr. 484 (4th Dist. 1963).)

In criminal cases, the prosecution may introduce a hearsay statement pursuant to this exception only if it does not violate the federal Confrontation Clause contained in the Sixth Amendment. See the discussion that begins in [§ 2:111](#).

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§ 2:50. Statement of mental or physical state—To prove state of mind or physical sensation at any other time

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 268

West's Key Number Digest, [Criminal Law](#) 🔑 419(2.20)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

Statements of the declarant's then-existing state of mind, emotion, or physical sensation are not inadmissible hearsay if offered to prove the declarant's state of mind, emotion, or physical sensation at any other time when that is an issue in the action. ([Evidence Code § 1250\(a\)\(1\)](#).)

By a process of inferential reasoning, one may conclude that a declarant who, under trustworthy circumstances, expresses a certain state of mind, had that same mental state soon before and soon after the declaration. *People v. Heckathorne* held that a defendant's statement of intent the night before a homicide helped establish his intent at the time of the shooting. ([People v. Heckathorne](#), 202 Cal. App. 3d 458, 461, 248 Cal. Rptr. 399 (4th Dist. 1988).) In *People v. Oliver*, a case where the defendant was charged with involuntary manslaughter, the court admitted a statement by the defendant that she knew a drug overdose was life threatening to help establish her state of mind several years later when the victim overdosed in her presence. ([People v. Oliver](#), 210 Cal. App. 3d 138, 152, 258 Cal. Rptr. 138 (1st Dist. 1989).) In *People v. Lang*, evidence that the defendant had made a generic threat, "I'll kill anyone that screws with me," one month before a homicide, was admissible to prove his state of mind at the time of the killing. ([People v. Lang](#), 49 Cal. 3d 991, 264 Cal. Rptr. 386, 782 P.2d 627 (1989); [People v. Oliver](#), 210 Cal. App. 3d 138, 152, 258 Cal. Rptr. 138 (1st Dist. 1989).)

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§ 2:51. Statement of mental or physical state—To explain conduct of declarant

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[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

Statements of the declarant's then-existing state of mind, emotion, or physical sensation are not inadmissible hearsay if offered to prove or explain acts or conduct of the declarant. ([Evidence Code § 1250\(a\)\(2\).](#))

A declarant's prior statement of intent to do an act is admissible under [§ 1250\(a\)\(2\)](#) to prove that the declarant in fact did the act. ([Evidence Code § 1250](#), Comment.) Thus, if a murder victim told a friend she was going to a particular site, just before disappearing, the friend could so testify in a subsequent prosecution. If independent evidence placed the defendant at the same site at approximately the same time, the victim's declaration would provide a link in the chain of guilt. What if, however, the victim had told her friend she intended to go to the site and meet the defendant? Is that entire statement admissible under [§ 1250\(a\)\(2\)](#) to show that both the victim and the defendant met? In a decision that preceded adoption of the Evidence Code, the California Supreme Court in [People v. Alcalde](#), 24 Cal. 2d 177, 148 P.2d 627 (1944) answered in the affirmative, noting that the trial court issued a limiting instruction that the statement was admitted only to prove the decedent's intent. ([Alcalde](#), 24 Cal. 2d at 184–188.) Justice Traynor, in a strong dissent, pointed out “The declaration of the deceased that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went out with her.” ([Alcalde](#), 24 Cal. 2d at 189.) *Alcalde* was cited with approval in the Comment to [§ 1250](#) for the proposition that a statement of intent is admissible to prove that the declarant so acted. The Com-

ment does not mention that the declaration admitted in *Alcalde* referenced the defendant. Though Traynor's logic seems irrefutable, *Alcalde* remains the law. For example, in *People v. Jones*, 13 Cal. 4th 535, 547–548, 54 Cal. Rptr. 2d 42, 917 P.2d 1165 (1996) the court admitted, under § 1250, the statement of the murder victim to her daughter shortly before leaving her residence that she was going to “Oakland with Troy [the defendant]” and that “if she didn't come back to call Aunt Bobbi.” (See, also, *People v. Melton*, 44 Cal. 3d 713, 739–740, 244 Cal. Rptr. 867, 750 P.2d 741 (1988); and *People v. Han*, 78 Cal. App. 4th 797, 806, 93 Cal. Rptr. 2d 139 (4th Dist. 2000).)

In *People v. Griffin*, 33 Cal. 4th 536, 15 Cal. Rptr. 3d 743, 93 P.3d 344 (2004), in the penalty phase of a capital case, the prosecution was permitted to introduce evidence that the victim told a friend shortly before the victim's death that the defendant had been molesting her and if the defendant tried to do so later that day she would tell him that she was going to tell her mother. (At pp. 576–577.) This statement was admissible under § 1250 because it reflected “her intent to confront defendant, even though the occurrence of such a confrontation itself depended on defendant's continued fondling Moreover [the] statement was offered to prove her future conduct in accordance with the intent expressed in her statement, namely that she in fact confronted defendant prior to the murder (*Griffin*, 33 Cal. 4th at 579.)

In *People v. Geier*, 41 Cal. 4th 555, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007), the defendant, a Caucasian, was prosecuted for rape and murder. Because there was evidence the victim had sexual relations with the defendant the night she was killed, evidence that she had told a witness that “she preferred muscular African-American men as sexual partners” was relevant under section 1250, subdivision (a) to the issue of consent, and was properly admitted for its truth. (*People v. Geier*, 41 Cal. 4th 555, 585–587, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007).)

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Statements of the victim's then-existing fear of the defendant may or may not be hearsay depending on whether they are introduced for the truth of the matter. If introduced for the truth of the matter, that is to show that the victim feared the defendant, they are still not inadmissible hearsay if offered to prove (1) the victim's state of mind before, during, or after the statement; or (2) that the victim acted in accordance with the fear expressed, but only if either of these issues is in dispute in the action. ([Evidence Code § 1250\(a\)\(1\)](#) and (2).) Examples of this hearsay exception follow. A discussion of statements of fear that are admitted for non-hearsay purposes is contained in [§ 2:53](#).

A homicide victim's out-of-court statement of fear of a defendant, though relevant to prove the defendant committed the murder, is inadmissible hearsay for that purpose. ([People v. Hernandez](#), 30 Cal. 4th 835, 872, 134 Cal. Rptr. 2d 602, 69 P.3d 446 (2003).) However such a statement is admissible under the exception set forth in [Evidence Code § 1250](#) when introduced to prove conduct of the victim in conformity with that state of mind (fear) when that conduct is in dispute. ([People v. Noguera](#), 4 Cal. 4th 599, 621, 15 Cal. Rptr. 2d 400, 842 P.2d 1160 (1992).) For example, in [People v. Guerra](#), 37 Cal. 4th 1067, 1114, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006), a murder victim's statements prior to the crime that she was afraid of the defendant “were clearly probative of her lack of consent to the sexual intercourse in the attempted rape.” And, in [People v. Milner](#), the victim's statements of suspicion and dislike of the defendant were admissible to rebut defendant's contention that he had

no reason to kill the victim because the victim was going to give him a job. (*People v. Milner*, 45 Cal. 3d 227, 248, 246 Cal. Rptr. 713, 753 P.2d 669 (1988).) In *People v. Waidla* and *People v. Sakarias* (two cases involving the same piece of evidence introduced against co-participants in a capital murder), the victim's statement of fear of the defendants was properly admitted to prove that they had obtained her property without her consent. (*People v. Waidla*, 22 Cal. 4th 690, 719–723, 94 Cal. Rptr. 2d 396, 996 P.2d 46 (2000); *People v. Sakarias*, 22 Cal. 4th 596, 628–630, 94 Cal. Rptr. 2d 17, 995 P.2d 152 (2000).) In *People v. Escobar*, the defendant put the victim's state of mind in issue by presenting evidence and argument that the victim's aggressive conduct created sufficient provocation to establish that the killing was no more than a voluntary manslaughter. This permitted the prosecution to rebut with statements by the victim to a friend three weeks before the killing that she was afraid the defendant was going to kill her if she told him she was getting a divorce. (*People v. Escobar*, 82 Cal. App. 4th 1085, 1102–1104, 98 Cal. Rptr. 2d 696 (1st Dist. 2000).) See a general discussion of such cases in *Hernandez*, 30 Cal. 4th at 872–873. In a slight variant of these cases, in *People v. Cox*, 30 Cal. 4th 916, 958–959, 135 Cal. Rptr. 2d 272, 70 P.3d 277 (2003), cert. denied, 540 U.S. 1051, 124 S. Ct. 808, 157 L. Ed. 2d 702 (2003), the Supreme Court held that the prosecution was entitled to introduce evidence that a witness to a homicide had stated she feared the perpetrator (the defendant) to explain why the witness delayed reporting the crime and to rebut the defense claim of recent fabrication.

Such statements are irrelevant if no dispute concerning the victim's conduct exists. (*People v. Jablonski*, 37 Cal. 4th 774, 820, 38 Cal. Rptr. 3d 98, 126 P.3d 938 (2006), cert. denied, 2006 WL 1674158 (U.S. 2006).) In *People v. Arcega*, the court ruled that the trial judge erred by admitting the victim's statements of fear since there was no dispute as to the victim's conduct immediately preceding her death. (*People v. Arcega*, 32 Cal. 3d 504, 526–527, 186 Cal. Rptr. 94, 651 P.2d 338 (1982); see also *People v. Ireland*, 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580 (1969).) In *People v. Ruiz*, the court found error in the admission of the victims' statements of fear about the defendant. The statements were irrelevant except to prove that their fears were justified and that the defendant killed them, which is improper hearsay. (*People v. Ruiz*, 44 Cal. 3d 589, 608, 244 Cal. Rptr. 200, 749 P.2d 854 (1988); see the discussion in § 2:53.)

Statements of the victim's fear of the defendant have a high potential for undue prejudice and should be admitted only after careful consideration under Evidence Code § 352. (*People v. Thompson*, 45 Cal. 3d 86, 103, 246 Cal. Rptr. 245, 753 P.2d 37 (1988).) In *Thompson*, the admission of the single statement by the victim was approved on appeal. In *People v. Coleman*, the decision to admit several letters from the victim, some of which discussed the defendant's past conduct in addition to the victim's fears, was disapproved. (*People v. Coleman*, 38 Cal. 3d 69, 92–93, 211 Cal. Rptr. 102, 695 P.2d 189 (1985).) Note that written statements by the decedent discussing past infliction of physical injury by the defendant or the threat thereof may be admissible under the hearsay exception set forth in Evidence Code § 1370, discussed in § 2:109. *People v. Millwee* provides an example of the trial court initially excluding evidence of the victim's fear and distrust of the defendant under § 352 because it had little importance to the prosecution case, and then, following defendant's testimony concerning his amicable relationship with her, reversing its decision and admitting the evidence. (*People v. Millwee*, 18 Cal. 4th 96, 126–128, 74 Cal. Rptr. 2d 418, 954 P.2d 990 (1998).)

In criminal cases, the prosecution may introduce a hearsay statement pursuant to this exception only if it does not violate the federal Confrontation Clause contained in the Sixth Amendment. See the discussion that begins in § 2:111.

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[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

There is a distinction between a statement by a declarant of his or her then-existing state of mind to prove that state of mind and a statement of other facts from which the declarant's state of mind is derived circumstantially. The latter is not hearsay. ([Evidence Code § 1250](#), Comment; see [Colarossi v. Coty US Inc.](#), 97 Cal. App. 4th 1142, 1150, 119 Cal. Rptr. 2d 131 (4th Dist. 2002) [Statement by department manager that she intended to get revenge on every person who cooperated with a prior sexual harassment investigation was admissible as circumstantial evidence that she believed she had been wronged and harbored ill will toward those she held responsible.]. See, also, [Rufo v. Simpson](#), 86 Cal. App. 4th 573, 584–587, 103 Cal. Rptr. 2d 492 (2d Dist. 2001) for a general discussion of this difference.) Consider, for example, a homicide case, where the defendant is charged with the rape and murder of the victim. The defendant claims to have had consensual sex with the victim shortly before her death but denies responsibility for the death. The prosecutor seeks to introduce a statement made by the victim shortly before the crime, “I am afraid of [the defendant],” in order to prove the victim would not have gone with him to a remote spot to engage in consensual sexual relations. This statement is admitted for its truth and is likely admissible pursuant to [Evidence Code § 1250](#). (See the discussion in [§ 2:52](#).) If, alternatively, the prosecutor sought to introduce the victim's statement, “Everybody says that Tom is dangerous,” the statement is admitted not for its truth, but to prove circumstantially that the victim had a state of mind inconsistent with going with him to a remote location. This is not hearsay. (See [People v. Green](#), 27 Cal. 3d 1, 23, 164 Cal. Rptr. 1, 609 P.2d 468 (1980); [People v. Ventura](#), 1 Cal. App. 4th 1515, 1519, 2 Cal. Rptr. 2d 586

(2d Dist. 1991).) Compare *People v. Smithey*, where the Supreme Court approved the admission of the victim's out-of-court statement that the defendant had stolen from her to dispute the defendant's testimony that the two had a friendly relationship and the victim had invited him into her home on the day of the crime. (*People v. Smithey*, 20 Cal. 4th 936, 970–971, 86 Cal. Rptr. 2d 243, 978 P.2d 1171 (1999).) See, also, *In re Dorinda A.*, where the minor's out-of-court statement that her father had molested her was properly admitted in a dependency case, not for the truth of the matter, but to show that the minor was afraid of her father and believed he had harmed her. (*In re Dorinda A.*, 10 Cal. App. 4th 1657, 1662–1663, 13 Cal. Rptr. 2d 653 (2d Dist. 1992).) In *People v. Mendoza*, 42 Cal.4th 686, 697–698, evidence that defendant's wife told defendant that his step-daughter had accused him of molesting her was admissible, not for its truth, but to prove a motive for killing the step-daughter.

The distinction between the statements in the first two examples in the paragraph above is somewhat subtle and has, on occasion, been ignored by the appellate courts. For example in *People v. Thompson*, the defendant was charged with rape and murder. He admitted consensual intercourse. The prosecution was permitted to introduce the victim's question to a friend, made earlier the same evening, whether “if she went with Tom [the defendant], ‘Do you think Tom would kill me?’ ” Correctly analyzed, the statement is not hearsay because it is not admitted for the truth of the matter. The court, however, assumed it was hearsay and then admitted it under § 1250. (*People v. Thompson*, 45 Cal. 3d 86, 102–104, 246 Cal. Rptr. 245, 753 P.2d 37 (1988).) *People v. Romero*, 149 Cal. App. 4th 29, 37–38, 56 Cal. Rptr. 3d 678 (4th Dist. 2007) is subject to the same criticism. *Romero* held that in a murder case, if the defendant relies on self-defense, the victim's statements about threats made by the defendant are admissible under section 1250. The statements regarding the defendant's threats should have been admitted as circumstantial evidence of the victim's fearful state of mind, not for the truth of the matter. This fear would then be relevant to disprove the victim was the aggressor.

In *People v. Ortiz*, the court considered one additional example. Assume the fact situation discussed in connection with the *Green* case, above, but the statement of the victim is “Tom has beaten me on several occasions.” This statement is not admissible to prove Tom committed the assaults. Moreover, *Ortiz* notes “if the evidence is offered to prove the declarant feared [the defendant], and as a result of this mental state would not have accompanied him, the statement only has the proffered evidentiary value if the declarant is truthful when describing the event. If the statement is a lie it cannot constitute circumstantial evidence of fear.” (*People v. Ortiz*, 38 Cal. App. 4th 377, 390, 44 Cal. Rptr. 2d 914 (1st Dist. 1995).) In *People v. Hamilton*, the Supreme Court barred use of such statements for this reason. (*People v. Hamilton*, 55 Cal. 2d 881, 13 Cal. Rptr. 649, 362 P.2d 473 (1961).) *Ortiz* held that this complete bar no longer existed and that the trial court must weigh the probative value of such evidence against the possibility that the jury will be unable to understand any limiting instruction given or that the evidence will unduly prejudice the defendant. In *Ortiz*, the court upheld the trial judge's admission of such statements. (*People v. Ortiz*, 38 Cal. App. 4th 377, 391–392, 44 Cal. Rptr. 2d 914 (1st Dist. 1995); see, also, *Rufo v. Simpson*, 86 Cal. App. 4th 573, 596–599, 103 Cal. Rptr. 2d 492 (2d Dist. 2001).) Note that the enactment of Evidence Code § 1370 creates a hearsay exception for statements made relating prior physical assaults (or the threats of same) under certain circumstances. Thus, if the statement noted above, “Tom has beaten me on several occasions,” is made in writing, electronically recorded, or made to a law enforcement officer, it may be admissible to prove that Tom committed prior assaults. Evidence Code § 1370 is discussed in § 2:109.

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[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

Evidence of a statement of memory or belief to prove the fact remembered or believed is hearsay and inadmissible. ([Evidence Code § 1250\(b\)](#).) Any statement of a past event is, in effect, a statement of the declarant's then-existing state of mind, a memory or belief about that past event. If this were admissible under [§ 1250](#), the protections of the hearsay rule would be severely impaired. ([Evidence Code § 1250](#), Comment; see [People v. Lee](#), 219 Cal. App. 3d 829, 840, 268 Cal. Rptr. 595 (4th Dist. 1990).)

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[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

Evidence of a statement of the declarant's state of mind, emotion, or physical sensation at a time prior to the statement is not inadmissible hearsay if ([Evidence Code § 1251](#)):

- The declarant is unavailable, and
- The statement is offered to prove such prior state of mind, emotion, or physical sensation when it is an issue in the action.

The declarant must be unavailable. ([People v. Aguilar](#), 218 Cal. App. 3d 1556, 1567, 267 Cal. Rptr. 879 (2d Dist. 1990).) The statement is inadmissible if made under circumstances indicating a lack of trustworthiness. ([Evidence Code § 1252](#), discussed in [§ 2:57](#).)

A statement of previous mental condition or previous physical sensation, for example, pain, is admissible only when the previous state is in issue. If the statement of the past condition is to be used as circumstantial evidence of some other fact, it is inadmissible. ([Evidence Code § 1251\(b\)](#), and Comment.) Thus, under [Evidence Code § 1250](#), a statement of present intent or sensation may be used to prove its truth or, circumstantially, to prove prior or subsequent intent or sensation. Under [Evidence Code § 1251](#), however, a statement of past intent or sensation ("Last October my leg was so painful I couldn't walk") is admissible only to prove what it says and

not to prove, circumstantially, that the declarant had such pain before or after the time discussed or that the declarant acted in accordance with that pain.

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§ 2:56. Statement of mental or physical state—Statements by child who is victim of abuse or neglect

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[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

[C.J.S., Infants §§ 55, 125 to 137](#)

[Evidence Code § 1253](#) provides that subject to the trustworthiness requirements of § 1252 (see [§ 2:57](#)), evidence of a statement is not hearsay if the following is true:

- 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 general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Relying on federal cases interpreting an analogous provision, the court, in *People v. Brodit*, held that a child's statements "describing the nature and circumstances of sexual abuse, made in the course of a child sexual abuse examination," including a statement identifying a member of her family as the abuser, are admissible because they are "reasonably pertinent to diagnosis or treatment." (*People v. Brodit*, 61 Cal. App. 4th 1312, 1330–1331, 72 Cal. Rptr. 2d 154 (1st Dist. 1998); *In re Daniel W.*, 106 Cal. App. 4th 159, 165, 130 Cal. Rptr. 2d 412 (4th Dist. 2003).) In addition, when such statements are made to a psychologist, even one who is unlicensed, they are admissible under this hearsay exception despite the reference in the statutory language to "medical diagnosis." (*People v. Brodit*, 61 Cal. App. 4th 1312, 1332, 72 Cal. Rptr. 2d 154 (1st Dist. 1998).)

- The statement was made by one who is a minor at the time of the proceedings and was under 12 at the time of the statement.
- The statement describes any act or attempted act of child abuse or neglect. These terms are defined in the statute.

[Evidence Code § 1250](#) permits evidence of statements of present pain, symptoms, or sensations, but only to prove the declarant's state of mind or conduct. [Evidence Code § 1253](#) appears to admit the child's statement for all purposes, so long as it was “made for purposes of medical diagnosis or treatment” and describes child abuse or neglect.

[Evidence Code § 1251](#) admits statements concerning past pain, symptoms or sensations, but not to prove “any fact other than such state of mind, emotion or physical sensation.” In addition [§ 1251](#) requires that the declarant be unavailable. [Evidence Code § 1253](#) appears to admit the child's statements of past pain, symptoms, or sensations for all purposes and requires no proof of unavailability.

Finally, [Evidence Code § 1253](#) expressly admits statements concerning the “inception or general character of the cause or external source thereof [of the symptoms, pain or sensation] insofar as reasonably pertinent to diagnosis or treatment.” No comparable provision exists in the article of the Evidence Code relating to statements of mental or physical state.

In *People v. Brodit*, the court upheld the constitutionality of this hearsay exception against an attack that it was nonreciprocal, and allowed only inculpatory evidence. ([People v. Brodit](#), 61 Cal. App. 4th 1312, 1326, 72 Cal. Rptr. 2d 154 (1st Dist. 1998).) The court found that the exception could, in fact, be employed by the defense. In addition, even if the Legislature has created one, among many, hearsay exception that can be used only by the prosecution, no due process violation would result. ([People v. Brodit](#), 61 Cal. App. 4th 1312, 1326–1327, 72 Cal. Rptr. 2d 154 (1st Dist. 1998).) Finally, this hearsay exception can be used against a defendant charged with a crime that occurred before the exception was enacted without violating the state and federal ex post facto clauses. ([People v. Brodit](#), 61 Cal. App. 4th 1312, 1327–1328, 72 Cal. Rptr. 2d 154 (1st Dist. 1998); see also discussion of *Brodit* in [§ 2:38](#).)

Note the related hearsay exceptions for children under 12 in sexual and physical abuse cases. [Evidence Code § 1228](#) permits the statements of the child to be introduced to establish the corpus delicti in order to introduce a confession by the defendant. (See the discussion in [§ 2:36](#).) [Evidence Code § 1360](#) admits the statements of the child describing child abuse if there are sufficient indicia of reliability. (See the discussion in [§ 2:38](#).)

In criminal cases, the prosecution may introduce a hearsay statement pursuant to this exception only if it does not violate the federal Confrontation Clause contained in the Sixth Amendment. See the discussion that begins in [§ 2:111](#).

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[C.J.S., Criminal Law §§ 1156 to 1158, 1175 to 1177](#)

[C.J.S., Evidence §§ 314, 325, 327 to 328](#)

Evidence of a statement of present or past mental or physical state is inadmissible if made under circumstances that indicate its lack of trustworthiness. ([Evidence Code § 1252](#).)

“The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.” ([People v. Gordon](#), 50 Cal. 3d 1223, 1251, 270 Cal. Rptr. 451, 792 P.2d 251 (1990), cited in [People v. Edwards](#), 54 Cal. 3d 787, 820, 1 Cal. Rptr. 2d 696, 819 P.2d 436 (1991).) The court in *People v. Edwards* refused to allow a defendant who had not testified to introduce his notebook prepared after the homicide and his taped statement to the police because each was untrustworthy. “When defendant made the statements ... [h]e knew he had killed ... one girl and had wounded a second. He had a compelling motive to deceive and seek to exonerate himself from, or at least minimize his responsibility for, the shootings.”

In *People v. Karis*, the court permitted the prosecution to introduce statements by the defendant that were made during a conversation with a friend, whom the defendant often visited, in the home of the friend, on the occasion of a social visit. The declarant was under no compulsion to speak. The circumstances did not suggest any motive to lie, or to exaggerate on the defendant's part. There was no suggestion that the statements were made with a motive to manufacture evidence. Thus, they were found admissible. ([People v. Karis](#), 46 Cal. 3d

612, 635, 250 Cal. Rptr. 659, 758 P.2d 1189 (1988).)

In *People v. Howard*, the court found trustworthy statements made where there was no motive to deceive, at a time when the declarant was “in a rage” without an opportunity to reflect. (*People v. Howard*, 44 Cal. 3d 375, 405, 243 Cal. Rptr. 842, 749 P.2d 279 (1988).)

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§ 2:58. Business records—Defined

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[C.J.S., Criminal Law §§ 1395 to 1396, 1400 to 1403](#)

[C.J.S., Evidence §§ 904 to 915, 917 to 923, 928 to 931, 965 to 966, 1023, 1025](#)

Pursuant to [Evidence Code § 1271](#), a writing made as a record of an act, condition, or event is not inadmissible hearsay when offered to prove the act, condition, or event if:

- The writing was made in the regular course of business;
- The writing was made at or near the time of the act, condition, or event;
- The custodian or other qualified witness testifies to the writing's identity and mode of preparation; and
- The sources of information and method and time of preparation were such as to indicate its trustworthiness.

The appellate courts have granted trial judges wide discretion in determining if a proper foundation for a business record has been laid. (*In re Troy D.*, 215 Cal. App. 3d 889, 902, 263 Cal. Rptr. 869 (4th Dist. 1989).) In addition, appellate courts have required a party who objects to a business record to specifically designate the precise foundational defect. (*People v. Dorsey*, 43 Cal. App. 3d 953, 960, 118 Cal. Rptr. 362 (5th Dist. 1974).) To preserve a lack of foundation objection to a proffered business record, counsel should take care to note which of the four requirements set forth above has not been met.

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§ 2:59. Business records—Regular course of business

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑351

West's Key Number Digest, [Criminal Law](#) 🔑436(2)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1395 to 1396, 1400 to 1403](#)

[C.J.S., Evidence §§ 904 to 915, 917 to 923, 928 to 931, 965 to 966, 1023, 1025](#)

A business includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether or not for profit. ([Evidence Code § 1270](#).) This broad definition of “business” means that this hearsay exception overlaps the one for official records, discussed in [§ 2:69](#). The purpose of the business records exception is to eliminate the need to call each witness involved in preparing the record and substitute the record of the transaction instead. ([County of Sonoma v. Grant W.](#), 187 Cal. App. 3d 1439, 1451, 232 Cal. Rptr. 471 (1st Dist. 1986).)

Examples of applications of the “regular course of business” requirement follow:

- A special report or record of a nonrecurring act or event, if made in the regular course of business, is admissible under this hearsay exception. ([Witkin, California Evidence \(3d ed.\) § 766, p. 745.](#))
- When a business (“A”) regularly keeps invoices from its supplier to show the cost of the product received and to verify that it had in fact been received and used, the invoices, though prepared by the supplier, are kept in the regular course of A's business and therefore can be introduced by A as a business record. ([Exclusive Florists, Inc. v. Kahn](#), 17 Cal. App. 3d 711, 715, 95 Cal. Rptr. 325 (4th Dist. 1971).)
- Simply because the law mandates the preparation of a record does not mean that the record was made in

the “regular course of business.” For example, a motor vehicle accident report prepared by one of the drivers, though done pursuant to law and under penalty of perjury, is not made in the regular course of the driver's business and is, therefore, inadmissible as a business record. (*Daniels v. Department of Motor Vehicles*, 33 Cal. 3d 532, 536, 541, 189 Cal. Rptr. 512, 658 P.2d 1313 (1983).)

- Records prepared in anticipation of a lawsuit and not in the regular course of the preparer's business are inadmissible. (*Gee v. Timineri*, 248 Cal. App. 2d 139, 148, 56 Cal. Rptr. 211 (2d Dist. 1967).) Some companies have divisions in charge of investigating accidents involving the company and preparing reports on them. Though such reports are prepared in the regular course of this division's business, they should not be admitted without determining the purpose for which they were prepared. If such accident reports are designed to improve the safety performance of the organization and not simply prepared for the lawsuit, they should be admitted if the sources of information and the method of preparation are trustworthy. (See § 2:62). Some companies, for instance medical laboratories, can be retained to prepare reports that a party intends to use in pending litigation. These reports are admissible. (*County of Sonoma v. Grant W.*, 187 Cal. App. 3d 1439, 1452, 232 Cal. Rptr. 471 (1st Dist. 1986); see also *In re Feiock*, 180 Cal. App. 3d 649, 225 Cal. Rptr. 748 (4th Dist. 1986), judgment vacated, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988) (in a contempt proceeding for failure to pay child support, pay records compiled by the district attorney's office are admissible business records; the records are not prepared primarily for litigation).)

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§ 2:60. Business records—Writing must record an act, condition, or event

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West's Key Number Digest, [Evidence](#) 🔑351

West's Key Number Digest, [Criminal Law](#) 🔑436(2)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1395 to 1396, 1400 to 1403](#)

[C.J.S., Evidence §§ 904 to 915, 917 to 923, 928 to 931, 965 to 966, 1023, 1025](#)

The phrase “act, condition or event” is quite broad and covers virtually anything that can be noted. It is rare that an effort to introduce a document as a business record fails because of a lack of compliance with this requirement. Even expert opinion has been admitted. Thus, in *County of Sonoma v. Grant W.*, an expert's blood analysis in a paternity matter was admitted as a business record; the analysis was found to be an “act.” (*County of Sonoma v. Grant W.*, 187 Cal. App. 3d 1439, 1450, 232 Cal. Rptr. 471 (1st Dist. 1986).) In *Nichols v. McCoy*, the court allowed the defendant in a wrongful death case to introduce evidence from the coroner's report of the decedent's blood alcohol level under the business record exception. (*Nichols v. McCoy*, 38 Cal. 2d 447, 240 P.2d 569 (1952).)

In some circumstances, usually in the medical area, an expert's conclusion has been excluded. Thus, in *Godfrey v. Steinpress*, the court found that a doctor's opinion in a medical record concerning the cause of plaintiff's headaches was inadmissible. (*Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 184, 180 Cal. Rptr. 95 (5th Dist. 1982).) In *People v. Young*, the court ruled that psychiatric records “tend to be opinions, rather than the record ‘of an act, condition or event’ which is admissible A psychiatric diagnosis is often merely the reasoning or thought process of the psychiatrist rendering the opinion, and as such cannot be deemed to be the record of an ‘act, condition or event.’ ” (*People v. Young*, 189 Cal. App. 3d 891, 912, 234 Cal. Rptr. 819 (2d Dist. 1987); see also *People v. Reyes*, 12 Cal. 3d 486, 503, 116 Cal. Rptr. 217, 526 P.2d 225 (1974).) But note that a medical

doctor's diagnosis that a patient has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen and is admissible. (*People v. Williams*, 187 Cal. App. 2d 355, 365, 9 Cal. Rptr. 722 (2d Dist. 1960), cited with approval in *People v. Reyes*, 12 Cal. 3d 486, 503, 116 Cal. Rptr. 217, 526 P.2d 225 (1974).) In *People v. Beeler*, 9 Cal. 4th 953, 980–981, 39 Cal. Rptr. 2d 607, 891 P.2d 153 (1995), the Supreme Court held that a doctor's opinion on cause of death contained in an autopsy report was admissible under the business records exception. The court went on to hold that all of the doctor's relevant conclusions were comparable to the diagnosis of a broken femur and, therefore, admissible. Those conclusions included the location of the entrance wound, that the wound was “free of gunpowder, burns or stipling,” the direction of the bullet track and that the shot pierced the heart.

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§ 2:61. Business records—At or near the time of the event

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West's Key Number Digest, [Evidence](#) 🔑351

West's Key Number Digest, [Criminal Law](#) 🔑436(2)

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[C.J.S., Criminal Law §§ 1395 to 1396, 1400 to 1403](#)

[C.J.S., Evidence §§ 904 to 915, 917 to 923, 928 to 931, 965 to 966, 1023, 1025](#)

This foundational requirement assures that the entry was made at a time when the event was fresh in the mind of the recorder. The cases generally do not set forth any particular framework for this timeliness requirement. If it is unclear when the business entry was made, and there is no testimony concerning custom and practice in regard to timeliness, the court cannot assume that the entry was made “at or near the time of the event.” In *Rodwin Metals, Inc. v. Western Non-Ferrous Metals*, plaintiff sought to prove the weight and metallic content of lead fume it sold by introducing an assay report. The report was dated but there was no evidence when the fume was analyzed, though the analysis had been requested two months before the date of the report. The court found this to be insufficient to establish the “at or near the time” requirement. ([Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc.](#), 10 Cal. App. 3d 219, 224, 88 Cal. Rptr. 778 (2d Dist. 1970).)

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§ 2:62. Business records—Trustworthiness

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West's Key Number Digest, [Evidence](#) 🔑351

West's Key Number Digest, [Criminal Law](#) 🔑436(2)

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[C.J.S., Criminal Law §§ 1395 to 1396, 1400 to 1403](#)

[C.J.S., Evidence §§ 904 to 915, 917 to 923, 928 to 931, 965 to 966, 1023, 1025](#)

The sources of information for the business record and the method and time of its preparation must indicate its trustworthiness. The records will be inadmissible where the evidence fails to show how they were prepared or the sources of information used for the entries made. One court held that an accident report filled out by one driver is inadmissible against the other in a license suspension proceeding, in part because the custodian of that record, the Department of Motor Vehicles, could not provide testimony on the report's identity or mode of preparation. ([Daniels v. Department of Motor Vehicles](#), 33 Cal. 3d 532, 536, 541, 189 Cal. Rptr. 512, 658 P.2d 1313 (1983).)

It is unnecessary for the proponent to identify the employee who made the business entries. For example, in an embezzlement case, the prosecution called the owner of the victim's gas station to describe how the business records established that in excess of 8,000 gallons of gasoline had not been delivered. At the end of each business day an employee would measure the gasoline in the tanks with a stick and then write the stick reading on a piece of paper and leave it on the owner's desk. The reading was checked by the employee who opened the station in the morning. The owner then entered the figure in a permanent record and destroyed the note. Even though the owner could not identify either employee who performed the stick readings, the records were found to be sufficiently trustworthy. ([People v. Williams](#), 36 Cal. App. 3d 262, 274–275, 111 Cal. Rptr. 378 (2d Dist. 1973).)

The reliability of business records depends primarily on the requirement that they be based on the firsthand observation of someone whose job it is to know the facts recorded and who has a business duty to observe and report. ([Evidence Code § 1271](#), Comment.) For this reason, accident reports prepared by police officers are usually inadmissible. The sources of the information are normally civilian witnesses who have no business duty to observe or relate the information accurately to the officer. ([Carlton v. Department of Motor Vehicles](#), 203 Cal. App. 3d 1428, 1432, 250 Cal. Rptr. 809 (2d Dist. 1988); accord: [People v. Ayers](#), 125 Cal. App. 4th 988, 994–996, 23 Cal. Rptr. 3d 242 (5th Dist. 2005).) In [Daniels v. DMV](#), 33 Cal.3d 532, 537–538, 189 Cal.Rptr 512 (1983), the court ruled an accident report submitted to the Department of Motor Vehicles by the vehicle owner was not a business record. In [Zanone v. City of Whittier](#), 162 Cal.App.4th 174, 191–192 (2008), the court held that exit questionnaires are not business records because the departing police officers were not acting on behalf of their employer in the *ordinary course* of their own business.

In one case, the prosecution introduced evidence that a search of a police department database revealed that no sex offenses similar to the ones alleged against the defendant had been committed in the same geographic area before the defendant moved to California or after he was arrested. The Court of Appeal reversed finding the police report sources for the data base were inadequate in terms of their trustworthiness, because they are based on the “observations of victims and witnesses who have no official duty to observe and report the relevant facts.” ([People v. Hernandez](#), 55 Cal. App. 4th 225, 240, 63 Cal. Rptr. 2d 769 (4th Dist. 1997).)

The custodian of the records need not testify. Any qualified witness may testify about the foundational requirements, including one who supervised the work performed. ([County of Sonoma v. Grant W.](#), 187 Cal. App. 3d 1439, 1451, 232 Cal. Rptr. 471 (1st Dist. 1986).)

Bank records have been treated differently than ordinary business and financial records of a private enterprise and admitted without specific testimony as to the method of preparation. ([People v. Dorsey](#), 43 Cal. App. 3d 953, 960–961, 118 Cal. Rptr. 362 (5th Dist. 1974), cited with approval in [People v. Lugashi](#), 205 Cal. App. 3d 632, 642, 252 Cal. Rptr. 434 (2d Dist. 1988).)

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§ 2:63. Business records—Computer-generated records

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West's Key Number Digest, [Evidence](#) 🔑 351

West's Key Number Digest, [Criminal Law](#) 🔑 436(2), 436(6)

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[C.J.S., Criminal Law §§ 1395 to 1396, 1400 to 1403](#)

[C.J.S., Evidence §§ 904 to 915, 917 to 923, 928 to 931, 965 to 966, 1023, 1025](#)

When offered for their truth, computer-generated records must qualify under a hearsay exception. (But see the exception discussed in [§ 2:2](#) for computer-generated records of computer internal calculations.) Normally the proponent relies on the business records exception. The trial court has wide discretion in deciding if the foundational requirements for this exception have been satisfied. The witness through whom the computer records are introduced is qualified if that witness generally understands the system's operation and possesses sufficient skill and knowledge to properly use the system and explain the resultant data, even if the witness is unable to perform every task from initial design and programming to final printout. ([People v. Lugashi](#), 205 Cal. App. 3d 632, 640–641, 252 Cal. Rptr. 434 (2d Dist. 1988).)

Testimony on the acceptability, accuracy, maintenance, and reliability of computer hardware and software need not be introduced, particularly where the data consists of retrieval of automatic inputs rather than computations based on manual entries. ([People v. Lugashi](#), 205 Cal. App. 3d 632, 642, 252 Cal. Rptr. 434 (2d Dist. 1988).)

The requirement that the computer record be made “at or near the time of the event” applies to the entry of the data, not the retrieval of the data. ([Aguimatang v. California State Lottery](#), 234 Cal. App. 3d 769, 798, 286 Cal. Rptr. 57 (3d Dist. 1991).)

Special rules also exist to make certain printed representations of computer information or computer programs exceptions to the secondary evidence rule unless the opposing party introduces evidence that such printed representations are inaccurate or unreliable. ([Evidence Code § 1552\(a\)](#), discussed in [§ 2:105](#); see also [Evidence Code § 255](#).)

Computer-generated records of criminal convictions properly certified by the court clerk are subject to special rules of admissibility. See the discussion in §§ [2:102](#) to [2:104](#).

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§ 2:64. Business records—Relying on absence of an entry in business record

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑147

West's Key Number Digest, [Criminal Law](#) 🔑387

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1020, 1109](#)

[C.J.S., Evidence §§ 2, 209, 508](#)

Under [Evidence Code § 1272](#), evidence of the absence of a business record of an asserted act, condition, or event is not inadmissible hearsay if offered to prove the nonexistence of the act, condition, or event if:

- In the regular course of business, records of all such acts, conditions, or events were made at or near their occurrence and were preserved; and
- The sources of information and method and time of preparation of these records were such that the absence of such a record is a trustworthy indication that the act, condition, or event did not occur or exist.

Properly authenticated business records or testimony by the custodian of those records are admissible to establish the absence of a business entry. However, affidavits attesting to the presence or absence of such entries are hearsay and, in a criminal matter, their admission violates the defendant's constitutional rights. ([People v. Dickinson](#), 59 Cal. App. 3d 314, 318, 130 Cal. Rptr. 561 (1st Dist. 1976).)

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§ 2:65. Business records—Compliance with subpoena duces tecum for business records

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑16

Legal Encyclopedias

[C.J.S., Witnesses §§ 2, 21, 32 to 52](#)

When a subpoena duces tecum for business records is served on a business that is neither a party nor the place where a cause of action arose, it is sufficient for compliance if the custodian or other qualified witness makes a timely delivery, by mail or otherwise, of a true, legible, and durable copy of all the records subpoenaed to the clerk or judge of the court, together with the affidavit described in [Evidence Code § 1561](#). The delivery is timely if made within five days of receipt of the subpoena in criminal cases, fifteen days in civil cases, or within the time agreed by the party serving the subpoena and the custodian or other qualified witness for both civil and criminal cases. ([Evidence Code § 1560\(b\)](#).) The copy of the records shall be double sealed and directed to the appropriate person. (See [Evidence Code § 1560\(c\)](#), to identify the appropriate recipient.) Absent the party's agreement otherwise, the sealed records shall be opened only at the time of the hearing, in the presence of all parties or counsel. ([Evidence Code § 1560\(d\)](#).)

As an alternate to the procedures discussed above, the subpoenaing party may direct the witness to make the records available for inspection or copying under appropriate conditions. ([Evidence Code § 1561\(e\)](#).)

If the original records would have been admitted as business records had the custodian or other qualified witness personally testified to the matters in the affidavit, the copy of the records is admissible. The affidavit(s) filed pursuant to [§ 1561](#) is admissible as to the matters stated therein, which are presumed true. ([Evidence Code § 1562](#).)

Reasonable costs incurred in civil proceedings by any non-party witness in providing business records in re-

sponse to a subpoena duces tecum may be charged against the party serving the subpoena according to the formula set forth in [Evidence Code § 1563](#).

The party serving the subpoena can require the personal attendance of the custodian and production of the original records. ([Evidence Code § 1564](#).)

[Evidence Code § 1562](#) provides that a record submitted pursuant to this procedure is admissible into evidence only if it would be admissible if the custodian had been present and testified to the matters as stated in the affidavit, and if the requirements of [Evidence Code § 1271](#) (the business records exception) have been complied with. In *Taggart v. Super Seer Corp.*, the Court of Appeal held compliance with the affidavit requirements of [§ 1561](#) does not automatically satisfy the requirements of the business records exception, because the declaration need not state the “identity” or “mode of preparation” of the records. (*Taggart v. Super Seer Corp.*, 33 Cal. App. 4th 1697, 40 Cal. Rptr. 2d 56 (4th Dist. 1995).) The Legislature responded to *Taggart* by amending [§ 1561](#) to require the affidavit to include the identity of the records and a description of the mode of preparation of the records. ([Evidence Code § 1561\(a\)\(4\)](#) and (5).) When the non-party business possesses records that it did not prepare, it may be unable to attest to those aspects of the records relevant to their authenticity and trustworthiness, [section 1561 \(a\) \(3\)-\(5\)](#). In such circumstances, the court should decline to enforce the subpoena. (*Cooley v. Superior Court*, 140 Cal. App. 4th 1039, 45 Cal. Rptr. 3d 183 (2d Dist. 2006).)

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§ 2:66. Official records and other official writings—Defined

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑333

West's Key Number Digest, [Criminal Law](#) 🔑429

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 834 to 840, 844 to 854, 856, 862, 923](#)

Pursuant to [Evidence Code § 1280](#), a writing made as a record of an act, condition, or event is not inadmissible hearsay when offered to prove the act, condition, or event if:

- The writing was made by and within the scope of duty of a public employee;
- The writing was made at or near the time of the act, condition, or event; and
- The sources of information and method and time of preparation were such as to indicate its trustworthiness.

A public employee includes an “agent” of a public entity. (Section 195; [Bhatt v. Department of Health Services for State](#), 133 Cal. App. 4th 923, 929–930, 35 Cal. Rptr. 3d 335 (2d Dist. 2005).)

The “timeliness requirement is not to be judged by arbitrary or artificial time limits, measured by hours or days or even weeks.” ([People v. Martinez](#), 22 Cal. 4th 106, 128, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (2000).) In [Glatman v. Valverde](#), 146 Cal. App. 4th 700, 703–705, 53 Cal. Rptr. 3d 319 (4th Dist. 2006), the court upheld the trial court's decision that a one-week delay between the analysis of a driver's blood alcohol level and the preparation of a forensic report was not timely.

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§ 2:67. Official records and other official writings—Relationship to business records exception

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West's Key Number Digest, [Evidence](#) 🔑333

West's Key Number Digest, [Criminal Law](#) 🔑429

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 834 to 840, 844 to 854, 856, 862, 923](#)

Any writing prepared by a public employee that qualifies as a business record would also qualify as an official record. The same showing of trustworthiness is required for both official and business records. ([Evidence Code § 1280](#), Comment.) However, unlike a business record, to introduce an official record the proponent need not provide testimony as to identity and mode of preparation in every case; judicial notice or other independent evidence may be used to establish the foundation. ([Evidence Code § 1280](#), Comment; [Snelgrove v. Department of Motor Vehicles](#), 194 Cal. App. 3d 1364, 1374, 240 Cal. Rptr. 281 (1st Dist. 1987).) Thus, a copy of an autopsy report is admissible without testimony if it is properly certified as a true copy ([Evidence Code § 1530](#)), and the court takes judicial notice that the doctor whose name appears on it is the coroner ([Evidence Code § 452](#)) and presumes that the signature of that public employee is genuine ([Evidence Code § 1453](#)). (Jefferson, California Evidence Benchbook (2d ed. 1982) § 5.1, p. 248.) Testimony on this foundational requirement is excused because we assume public officials do their duty. It is this official duty that serves as the sufficient element of trustworthiness, justifying admission of the hearsay statement. ([Fisk v. Department of Motor Vehicles](#), 127 Cal. App. 3d 72, 78–79, 179 Cal. Rptr. 379 (2d Dist. 1981).)

The statutory presumption that official duty has been performed ([Evidence Code § 664](#)) may be used to help lay the foundation for an official writing. This presumption shifts the burden to the adverse party to prove that the method of preparation of the official writing was untrustworthy. ([Preis v. American Indemnity Co.](#), 220 Cal.

App. 3d 752, 759, 269 Cal. Rptr. 617 (2d Dist. 1990); *Snelgrove v. Department of Motor Vehicles*, 194 Cal. App. 3d 1364, 1375, 240 Cal. Rptr. 281 (1st Dist. 1987).) One court considered the suspension of a driver's license in an administrative proceeding conducted by the Department of Motor Vehicles. The suspension was based on the sworn report of a police officer who related his observations, including the results of the breath test he had performed. The court upheld the suspension and found that the presumption in § 664 provided sufficient indicia of trustworthiness to satisfy the official records hearsay exception, in the absence of contrary evidence by the driver. (*Wilson v. Zolin*, 9 Cal. App. 4th 1104, 1107, 11 Cal. Rptr. 2d 870 (5th Dist. 1992).) However, in *Glatman v. Valverde*, 146 Cal. App. 4th 700, 705–706, 53 Cal. Rptr. 3d 319 (4th Dist. 2006), the court refused to rely on section 664 to create a presumption that the analysts who determined a driver's blood alcohol level recorded the test results in a timely manner.

Under this exception, the statements of those who prepare an official record concerning their personal observations as well as the observations of others who were acting pursuant to their official duty to observe and accurately report facts are admissible. (*Gananian v. Zolin*, 33 Cal. App. 4th 634, 39 Cal. Rptr. 2d 384 (1st Dist. 1995).) An officer's sworn statement of his observations as well as those made by another officer were properly admitted in a license revocation proceeding. (*Gananian v. Zolin*, 33 Cal. App. 4th 634, 639–640, 39 Cal. Rptr. 2d 384 (1st Dist. 1995); *McNary v. Department of Motor Vehicles*, 45 Cal. App. 4th 688, 693–695, 53 Cal. Rptr. 2d 55 (4th Dist. 1996).) In *Hildebrand v. Department of Motor Vehicles*, 152 Cal. App. 4th 1562, 1571, 62 Cal. Rptr. 3d 234 (4th Dist. 2007), this principle was extended to admit a police report relating the observation of a firefighter. However, if the source of a statement is not a public employee with a duty to observe and report, the assumed trustworthiness is absent and the statement is inadmissible. For example, a robbery witness's observation of the license plate of the robber's car was phoned in to the police. A police report containing this observation was held inadmissible as an official record because the witness was not a public employee. (*People v. Baeske*, 58 Cal. App. 3d 775, 779–781, 130 Cal. Rptr. 35 (2d Dist. 1976); *Alvarez v. Jacmar Pacific Pizza Corp.*, 100 Cal. App. 4th 1190, 1204–1207, 122 Cal. Rptr. 2d 890 (2d Dist. 2002).) In addition, police accident reports that depend on information provided by civilian witnesses are inadmissible. In a related area, a petitioner challenged reliance on the official records hearsay exception to admit a police officer's statement on the ground that the only basis for concluding that the document was prepared by a police officer was the “document itself.” The court rejected that argument finding that “Evidence Code § 1453 reflects an implicit policy decision that if a document ‘purports’ to be signed by a public employee acting in an official capacity, the likelihood of its authenticity is sufficiently high that in the absence of evidence to the contrary it should be found authentic.” (*Poland v. Department of Motor Vehicles*, 34 Cal. App. 4th 1128, 1136, 40 Cal. Rptr. 2d 693 (1st Dist. 1995).) Thus the moving party was not required to prove the authenticity of the document by extrinsic evidence.

With the one exception discussed above, the business records exception requirements parallel those for the official records exception. With both, the method of preparation and sources of information must be shown, although the official records exception does not require testimony on sources and methods. If the evidence, including judicial notice, fails to establish each foundational fact, neither hearsay exception is available. (*People v. Matthews*, 229 Cal. App. 3d 930, 940, 280 Cal. Rptr. 134 (1st Dist. 1991); *In re Shannon C.*, 179 Cal. App. 3d 334, 343, 224 Cal. Rptr. 516 (3d Dist. 1986).)

Special rules also exist that make it easier to authenticate an official record and use a copy of it as evidence despite the secondary evidence rule. (Evidence Code § 1530; see also § 8:17 et seq. for discussion of secondary evidence rule.) Thus, copies of documents like coroner's reports or engineering and traffic surveys are com-

monly introduced into civil and criminal proceedings without any accompanying testimony. For example, assume a party seeks to introduce a traffic and engineering survey attested to by a specific traffic engineer. An objection based on the secondary evidence rule would be defeated by compliance with [Evidence Code §§ 1530 and 1532](#). [Evidence Code § 1530](#) provides that a purported copy of a writing in the custody of a public entity is prima facie evidence of the contents of that writing if it is certified as a correct copy by a public employee with custody of the writing. [Evidence Code § 1531](#) defines what the attestation or certificate must state. Under [Evidence 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] public employee of any public entity in the United States.” Thus, authenticity is established. (See [People v. Flaxman](#), 74 Cal. App. 3d Supp. 16, 20–22, 141 Cal. Rptr. 799 (App. Dep’t Super. Ct. 1977).)

Warning

Compliance with [Evidence Code §§ 1453 and 1530](#) establish only authenticity and an exception to the secondary evidence rule. [Evidence Code § 1280](#) must be complied with to overcome a hearsay objection. (In [re Shannon C.](#), 179 Cal. App. 3d 334, 343, 224 Cal. Rptr. 516 (3d Dist. 1986).)

This exception has been employed to introduce records of county criminalistics laboratories when the employee who performed the work is not available. For example, a laboratory report prepared by one county criminalist, which provided the opinion that a substance found in the defendant’s possession was cocaine, may be admissible into evidence based on the testimony of a different county criminalist. In one case, a second county criminalist identified the reports prepared by the first and detailed the tests and procedures used by all county criminalists. She further testified that these procedures were standard in the industry and that the first criminalist’s notes indicated that she had followed the normal procedures. ([People v. Parker](#), 8 Cal. App. 4th 110, 117, 10 Cal. Rptr. 2d 38 (5th Dist. 1992).) For a discussion of the admissibility of such evidence under the 6th Amendment, see [People v. Geier](#), 41 Cal. 4th 555, 593–607, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007), discussed in [§ 2:121](#). In another case, the court properly admitted into evidence a report prepared by an employee of the police department fingerprint laboratory, which stated that she had sprayed ninhydrin on an object and discovered and photographed two fingerprints found on it. The court found further that the proponent of the record established that it was prepared at or near the time of the act, condition, or event by introducing testimony that the employee was obligated to do so. ([People v. Champion](#), 9 Cal. 4th 879, 916, 39 Cal. Rptr. 2d 547, 891 P.2d 93 (1995).)

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§ 2:68. Official records and other official writings—Examples of official records and writings

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West's Key Number Digest, [Evidence](#) 🔑333

West's Key Number Digest, [Criminal Law](#) 🔑429

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 834 to 840, 844 to 854, 856, 862, 923](#)

Examples of official records and writings include the following:

- A reporter's transcript of a court proceeding. ([People v. Abarca](#), 233 Cal. App. 3d 1347, 1350, 285 Cal. Rptr. 213 (4th Dist. 1991).)
- Postal receipt. ([Preis v. American Indemnity Co.](#), 220 Cal. App. 3d 752, 759, 269 Cal. Rptr. 617 (2d Dist. 1990).)
- Police department document, time stamped, to show time information received. ([People v. Lazanis](#), 209 Cal. App. 3d 49, 52, 257 Cal. Rptr. 180 (2d Dist. 1989).)
- Prior juvenile court petitions that had been sustained to show knowledge of the wrongfulness of conduct. ([In re Nirran W.](#), 207 Cal. App. 3d 1157, 1161, 255 Cal. Rptr. 327 (1st Dist. 1989).)
- A teletype record of California law enforcement that showed a prior drunk-driving conviction. ([People v. McClary](#), 200 Cal. App. 3d Supp. 11, 13, 246 Cal. Rptr. 626 (App. Dep't Super. Ct. 1988).)
- Uncertified computer printouts of a defendant's criminal history (CLETS) to prove that a conviction oc-

curred. ([People v. Martinez](#), 22 Cal. 4th 106, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (2000).) See also the Criminal Convictions Record Act, [Evidence Code § 452.5\(a\)](#) (discussed in §§ 2:102 to 2:104), which applies only to records created on or after July 1, 1997.

- Signed restraining order. ([People v. Zack](#), 184 Cal. App. 3d 409, 419, 229 Cal. Rptr. 317 (2d Dist. 1986).)
- Engineering and traffic surveys. ([People v. Flaxman](#), 74 Cal. App. 3d Supp. 16, 21, 141 Cal. Rptr. 799 (App. Dep't Super. Ct. 1977).)
- Autopsy report to establish cause of death. ([People v. Wardlow](#), 118 Cal. App. 3d 375, 388, 173 Cal. Rptr. 500 (2d Dist. 1981).)
- Record of vital statistic. A writing made as a record of a birth, fetal death, death, or marriage is not inadmissible hearsay 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. ([Evidence Code § 1281](#).)
- Finding by authorized federal employee of presumed death. [Evidence Code § 1282](#) permits a written finding of the fact of death and of the date, circumstances, and place of disappearance to be admitted over a hearsay objection if made by a federal employee authorized under the Federal Missing Persons Act. Any finding of the date of presumed death is inadmissible. ([Evidence Code § 1282](#), and Comment.)
- A record by a federal employee that a person is missing, captured, or the like. The report must be prepared by a federal employee authorized by federal law to make such a report in order to be admissible. ([Evidence Code § 1283](#).)

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§ 2:69. Official records and other official writings—Certification of official and recorded writings

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West's Key Number Digest, [Evidence](#) 🔑 338 to 349

West's Key Number Digest, [Criminal Law](#) 🔑 430

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 879 to 880, 882 to 903](#)

[C.J.S., Patents § 179](#)

[Evidence Code § 1530](#) provides that “(a) A purported copy of a writing in the custody of a public entity, or of an entry in such 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 ... and the copy is attested or certified as a correct copy of the writing or entry by a public employee ... having the legal custody of the writing” Section 1531 provides, “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”

In *In re Kirk*, in its consideration of the applicability of the certification requirement to the Sexually Violent Predator Act, the court discussed the underlying purposes of certification. First, it serves to implement the secondary evidence rule. Second, it ensures that any copy is properly authenticated. Third, certification helps ensure that the hearsay contained in the document is sufficiently trustworthy. (*In re Kirk*, 74 Cal. App. 4th 1066, 1073–1075, 88 Cal. Rptr. 2d 648 (1st Dist. 1999).) Finding these concerns applicable, the court held that the certification requirements applied to probable cause hearings in sexually violent predator cases.

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§ 2:70. Official records and other official writings—Statement of the absence of a public record

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West's Key Number Digest, [Evidence](#) 🔑147

West's Key Number Digest, [Criminal Law](#) 🔑387

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[C.J.S., Criminal Law §§ 1020, 1109](#)

[C.J.S., Evidence §§ 2, 209, 508](#)

A writing made by a 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 inadmissible hearsay when offered to prove the absence of a record in that office. ([Evidence Code § 1284](#).) This writing must be properly authenticated. ([Evidence Code § 1284](#), Comment.)

This provision parallels [Evidence Code § 1530](#), which permits the existence and content of a public record to be proved by a copy attested or certified by its custodian.

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§ 2:71. Official records and other official writings—Criminal Convictions Record Act

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Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 834 to 840, 844 to 854, 856, 862, 923](#)

[Evidence Code § 452.5\(b\)](#) (discussed in §§ [2:102](#) to [2:104](#)), which became effective in 1997, made a significant change in the official records hearsay exception. A record of conviction certified pursuant to [Evidence Code § 1530\(a\)](#), is now admissible pursuant to [Evidence Code § 1280](#) “to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of prison term, or other act, condition, or event recorded by the record.”

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§ 2:72. Former testimony—Offered against party who offered it

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West's Key Number Digest, [Criminal Law](#) 🔑 539 to 548

West's Key Number Digest, [Evidence](#) 🔑 575 to 583

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

Former testimony is not inadmissible hearsay if the declarant is unavailable and the former testimony is offered against the person who offered it in evidence in his or her own behalf on the former occasion or against the successor in interest of such person. ([Evidence Code § 1291\(a\)\(1\)](#).) Thus, if a criminal defendant calls a witness at the preliminary hearing, that testimony may be introduced against the defendant at trial without any showing of a similarity of interest and motive for the defendant's examination of the witness at the two proceedings. It would also appear that the testimony of a witness called by the prosecution at a grand jury hearing could be introduced against the prosecution at a subsequent trial if the witness is unavailable at that trial.

At the re-trial of a criminal case, if a defendant invokes the privilege against self-incrimination, his or her prior testimony in the first trial may be introduced by the prosecution under [§ 1291](#). ([People v. Malone](#), 112 Cal. App. 4th 1241, 5 Cal. Rptr. 3d 741 (3d Dist. 2003).)

In addition, where a defendant represented himself in his first trial, statements he made during closing argument may properly be introduced against him in his second trial. ([People v. Kiney](#), 151 Cal. App. 4th 807, 812–816, 60 Cal. Rptr. 3d 168 (3d Dist. 2007).)

“Unavailable” is defined in [§§ 2:21 to 2:27](#).

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§ 2:73. Former testimony—Offered against party who had right to cross-examine

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West's Key Number Digest, [Criminal Law](#) 🔑539 to 548

West's Key Number Digest, [Evidence](#) 🔑575 to 583

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

Former testimony is not inadmissible hearsay if the declarant is unavailable and the party against whom the former testimony is offered was a party to the action 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 the party has at the hearing. ([Evidence Code § 1291\(a\)\(2\)](#).) Thus, if a witness is called by a plaintiff in a civil trial and the defendant had the right and opportunity to cross-examine, the transcript of that testimony may be introduced by plaintiff at a second trial involving the same defendant if the witness is unavailable.

“Unavailable” is defined in §§ [2:2](#) to [2:27](#). The Supreme Court found that a trial court could properly admit the transcript of the preliminary examination of a prior conviction to prove the prior was a “serious felony” as defined by [Penal Code §§ 667\(a\)](#) and [1192.7\(c\)](#). In its holding, the court found that the unavailability requirement was satisfied, even without proof that the witnesses to the prior offense were, in fact, unavailable because *People v. Guerrero* barred the prosecution from calling them. (*People v. Reed*, 13 Cal. 4th 217, 224–229, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (1996); *People v. Guerrero*, 44 Cal. 3d 343, 243 Cal. Rptr. 688, 748 P.2d 1150 (1988).)

The Supreme Court refused to limit this hearsay exception in capital cases. It found that the former testimony of an accomplice who later asserts his Fifth Amendment rights is admissible against a defendant in a cap-

ital case. ([People v. Malone](#), 47 Cal. 3d 1, 23–25, 252 Cal. Rptr. 525, 762 P.2d 1249 (1988).)

This hearsay exception is constitutional. ([People v. Wharton](#), 53 Cal. 3d 522, 590, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).)

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§ 2:74. Former testimony—Former testimony defined

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West's Key Number Digest, [Criminal Law](#) 🔑 539 to 548

West's Key Number Digest, [Evidence](#) 🔑 575 to 583

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

Former testimony means testimony given under oath in: (1) another action or earlier proceeding in the same action; (2) a deposition taken in another action; (3) an arbitration proceeding if the evidence offered is a verbatim transcript thereof; or (4) specified administrative proceedings. ([Evidence Code § 1290](#).)

The admissibility of depositions taken in the same action are governed by [Code of Civil Procedure §§ 2016.010 to 2036.050](#) (civil cases) and [Penal Code §§ 1335 to 1345](#) (criminal cases). As the Comment to [§ 1290](#) makes clear, “the former testimony exception was not intended to apply to deposition testimony taken in the same action.” ([N.N.V. v. American Assn. of Blood Banks](#), 75 Cal. App. 4th 1358, 89 Cal. Rptr. 2d 885 (4th Dist. 1999).) In fact, section 2025.620 (b) “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.” ([Haluck v. Ricoh Electronics, Inc.](#), 151 Cal. App. 4th 994, 1004–1005, 60 Cal. Rptr. 3d 542 (4th Dist. 2007).)

Depositions in criminal cases conducted under [sections 1335 to 1345](#) are called “conditional examinations.” Where a defendant has had an adequate opportunity to cross-examine a witness at a conditional examination and that witness is unavailable at trial, the prosecutor may introduce the testimony given at the examination without violating the Confrontation Clause. ([People v. Jurado](#), 38 Cal. 4th 72, 115, 41 Cal. Rptr. 3d 319, 131 P.3d 400

(2006), cert. denied, 127 S. Ct. 383, 166 L. Ed. 2d 276 (U.S. 2006).)

The rules covering use of depositions at a civil trial are set forth in [Code of Civil Procedure § 2025.620](#), which provides as follows:

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:

(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.

(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.

(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.

(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.

(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.

(f) Substitution of parties does not affect the right to use depositions previously taken.

(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.

Code of Civil Procedure section 2025.620, subdivision (c)(1) permits the introduction of deposition testimony if “[t]he deponent lives more than 150 miles from the place of the ... hearing.” Hearsay may be utilized to establish this preliminary fact. (*Monroy v. City of Los Angeles*, 164 Cal.App.4th 248, 264 (2008).)

Code of Civil Procedure § 2035.060 sets forth the procedure for perpetuating deposition testimony before the filing of a complaint. A petition must be filed and notice provided to adverse parties. Such a deposition “may be used, in any action involving the same subject matter that is brought in a court of the State of California, in accordance with section 2025.620 against any party ... named in the petition as an expected adverse party.” In *N.N.V. v. American Assn. of Blood Banks*, inadequate notice precluded use of the deposition against a party, and the proponent was not permitted to rely on Evidence Code §§ 1290 to 1293 (governing former testimony) to admit the deposition. (*N.N.V. v. American Assn. of Blood Banks*, 75 Cal. App. 4th 1358, 1394–1397, 89 Cal. Rptr. 2d 885 (4th Dist. 1999).)

When a party in a civil case wishes to introduce a deposition taken in a different case, Evidence Code § 1292 governs. (*Byars v. SCME Mortgage Bankers, Inc.*, 109 Cal. App. 4th 1134, 1149–1150, 135 Cal. Rptr. 2d 796 (4th Dist. 2003).) In *Byars*, the court noted that admitting a deposition under this section is “problematic since depositions generally function as a discovery device where examination of one’s own client is typically avoided so as not to reveal a weakness in the case or to prematurely disclose a defense.” Finding that the defendant in the earlier case did not have a “similar motive to cross-examine the witness as did SCME in this case,” the appellate court affirmed the trial court’s decision to exclude the deposition. (*Byars*, 109 Cal. App. 4th at 1149–1150.)

Penal Code § 1335 provides that in certain circumstances the defense and the prosecution (in non-capital cases) may conditionally examine a witness. Penal Code § 1336 sets forth the bases for such an examination. Sections 1337 to 1344 prescribe the procedures to be followed in obtaining the conditional examination. Penal Code § 1343 provides “the testimony given by the witness must be reduced to writing.” Despite Evidence Code § 250, which defines “writing” broadly enough to include videotapes (see the discussion in § 2:4), the court in *People v. Watkins* held that a videotape of the deposition could not be introduced against a defendant at the criminal trial. (*People v. Watkins*, 45 Cal. App. 4th 485, 53 Cal. Rptr. 2d 13 (3d Dist. 1996).) In response to *Watkins*, Penal Code § 1343 was amended to permit video-recording of the deposition testimony. Penal Code § 1345 defines when the deposition may be read in evidence. In *People v. Thompson*, the court noted an anomaly between Penal Code § 1336(a), which permits a conditional examination to be taken for several different reasons, including “When a material witness ... is about to leave the state,” and Penal Code § 1345, which governs admission of the examination. Section 1345 requires that the court find that the witness is unavailable within the meaning of Evidence Code § 240 in order to admit the examination. Section 240 does not list absence from the state as a type of unavailability. (*People v. Thompson*, 61 Cal. App. 4th 1269, 1277–1281, 76 Cal. Rptr. 2d 267 (3d Dist. 1998).) Interpreting § 240 in a “pragmatic” way, the court found that “absence from the state” justified taking the examination and permitted admission of the examination at trial.

Penal Code §§ 1349 to 1362 set forth the procedure for obtaining and introducing an examination of a witness residing out of the state. This is commonly referred to as a deposition of a witness on commission. Pursuant

to [§ 1349](#), only the defendant may have such a witness examined and the application may not be made until after the filing of an information or an indictment. Pursuant to [§ 1362](#), a deposition taken under commission “may be read in evidence by either party on the trial if the court finds that the witness is unavailable as a witness within the meaning of [Evidence Code § 240](#).”

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§ 2:75. Former testimony—Right and opportunity to cross-examine

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West's Key Number Digest, [Criminal Law](#) 🔑544

West's Key Number Digest, [Evidence](#) 🔑578

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[C.J.S., Criminal Law §§ 1475 to 1477](#)

[C.J.S., Evidence § 484](#)

As the Comment to [Evidence Code § 1291](#) notes, the requirement of a “right and opportunity to cross-examine” ensures that the primary objection to hearsay, a lack of opportunity to cross-examine the declarant, is inapplicable. Thus, if several related cases arise involving many plaintiffs but only one defendant, this section permits testimony in an early trial to be reused against the defendant in a later trial, with a different plaintiff. Since the people of the State of California are a party to all criminal actions, testimony in any one case introduced for or against a defendant may be used by a different defendant in an entirely unrelated case, if the evidence otherwise meets the tests of admissibility. ([Evidence Code § 1291](#), Comment.)

The appellate courts have found no opportunity to cross-examine when some “defect” existed in either the witness or the adverse party. Thus, the witness's mental or physical disabilities at the time of the earlier hearing have been found to deprive a criminal defendant of the opportunity for meaningful cross-examination. ([People v. Brock](#), 38 Cal. 3d 180, 188, 211 Cal. Rptr. 122, 695 P.2d 209 (1985).) But see [U.S. v. Owens](#), 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988), where the Supreme Court held that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ ” ([Owens](#), 484 U.S. at 559.) In *Owens*, the victim of a violent assault, who testified that he remembered an earlier identification of defendant as his assailant, but could not remember the assault itself or seeing his assailant, was found to be sufficiently subject to cross-examination to sat-

isfy the 6th Amendment and the applicable federal hearsay rule. In *People v. Wilson*, 36 Cal. 4th 309, 30 Cal. Rptr. 3d 513, 114 P.3d 758 (2005), cert. denied, 126 S. Ct. 1617, 164 L. Ed. 2d 336 (U.S. 2006), our Supreme Court concluded that § 1291 is complied with even if “ ‘subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony’ ” (*Wilson*, 36 Cal. 4th at 343) and even if the defendant did not fully avail himself of the opportunity to conduct cross-examination at the earlier proceeding. (*Wilson*, 36 Cal. 4th at 346; *People v. Harris*, 37 Cal. 4th 310, 333, 33 Cal. Rptr. 3d 509 (2005), cert. denied 126 S. Ct. 1655, 164 L. Ed. 2d 411 (2006).)

Where a young witness is unavailable at trial after a finding of incompetence to testify, the admissibility of her prior testimony at the preliminary hearing is dependent on whether she was competent then. Appropriate deference must be given to the magistrate's finding of competence at the preliminary hearing if such a finding was made. (Compare *People v. Liddicoat*, 120 Cal. App. 3d 512, 174 Cal. Rptr. 649 (1st Dist. 1981) with *People v. Lyons*, 10 Cal. App. 4th 837, 844, 13 Cal. Rptr. 2d 112 (1st Dist. 1992).) If the court is persuaded that the translation of a non-English-speaking witness's former testimony is inaccurate, then the defendant did not have an adequate opportunity to cross-examine. (*People v. Johnson*, 46 Cal. App. 3d 701, 120 Cal. Rptr. 372 (2d Dist. 1975).) Finally, if the defendant was not mentally competent at the time of the prior hearing, no real opportunity to cross-examine existed, even if the defendant was represented by counsel. (*Stevenson v. Superior Court*, 91 Cal. App. 3d 925, 930, 154 Cal. Rptr. 476 (1st Dist. 1979).)

If a trial court improperly refuses to appoint counsel in a criminal trial, and the defendant is forced to represent himself, a reversal of the conviction may result. If witnesses become unavailable prior to the retrial, their earlier testimony is not admissible at the second trial. (*Pointer v. Texas*, 380 U.S. 400, 406–408, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).) In *People v. Jones*, the court explained that “This is *not* because defendant's right to counsel would have been violated ... but because the assistance of counsel tends to promote effective cross-examination ... Even ineffective assistance of counsel at the first trial need not render former testimony inadmissible, unless the ineffective assistance actually affected the cross-examination.” (*People v. Jones*, 66 Cal. App. 4th 760, 766, 78 Cal. Rptr. 2d 265 (4th Dist. 1998) (emphasis in original).) In *Jones*, the court was faced with a defendant who had been incorrectly denied the right to represent himself at the first trial. The trial court's decision to admit the prior testimony of a witness who was unavailable at the second trial was upheld. The defendant “never pointed to any particular deficiency in the cross-examination. Although he claimed he would have cross-examined differently, he never precisely explained *what* he would have done differently. Therefore he never showed his cross-examination would have been more effective.” (*People v. Jones*, 66 Cal. App. 4th 760, 768, 78 Cal. Rptr. 2d 265 (4th Dist. 1998) (emphasis in original).)

In one case, the defense objected to introduction of the prior testimony of an unavailable witness, given at the preliminary hearing, on the basis that defense counsel at that hearing had been incompetent. As an offer of proof, trial counsel stated that the earlier lawyer “never read the reports, didn't know the elements of the offenses, didn't know the exposure, never spoke to the witnesses.” The trial court's decision not to hold a hearing was upheld by the Court of Appeal, which reviewed the transcript of the preliminary hearing and found on the basis of that record counsel was not ineffective. (*People v. Ceja*, 26 Cal. App. 4th 78, 87–88, 31 Cal. Rptr. 2d 475 (2d Dist. 1994).)

Warning

In 1990, the voters enacted Proposition 115, which substantially altered the nature of the preliminary hearing in felony cases. Among other changes, [Penal Code § 866\(b\)](#), was added, which provides that the preliminary hearing should not be used for purposes of discovery. Undoubtedly, this will reduce the permissible cross-examination of some witnesses. In attempting to limit such examination, however, the prosecution must be mindful that an excessive limitation might prevent use of the testimony at a later hearing.

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[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

The decision as to whether the adverse party has a similar interest and motive in the two proceedings rests on practical considerations and is not resolved simply by finding that the party had a similar position in the two cases. (*O'Neill v. Novartis Consumer Health, Inc.*, 147 Cal. App. 4th 1380, 1404 (2007).) The Comment to [Evidence Code § 1291](#) notes an example: Testimony from a deposition taken but not introduced in trial in a former action should be excluded in the present hearing if the judge determines that the deposition was taken for discovery purposes and that, to avoid the premature revelation of a weakness in the case, the party did not thoroughly cross-examine the witness. (See also [Gatton v. A.P. Green Services, Inc.](#), 64 Cal. App. 4th 688, 693, 75 Cal. Rptr. 2d 523 (1st Dist. 1998); [Wahlgren v. Coleco Industries, Inc.](#), 151 Cal. App. 3d 543, 546–547, 198 Cal. Rptr. 715 (4th Dist. 1984).) In addition in *People v. Sanders*, the trial court refused to let the defense introduce a transcript of testimony given at a motion to suppress by a witness who was absent at the trial. At the motion to suppress the witness had testified that another witness, who the police had relied on in obtaining an arrest warrant, had lied. The prosecution at the earlier hearing was interested only in establishing that the police reasonably relied on the information given. No effort was made at that hearing to challenge the credibility of the now-absent witness, because it was largely irrelevant to the issue then under consideration. For this reason the court upheld the trial court's conclusion that the prosecution's interest and motive was not similar at the suppression hearing and the trial and its decision to exclude the transcript. ([People v. Sanders](#), 11 Cal. 4th 475, 525–526, 12 Cal. 4th 783c, 46 Cal. Rptr. 2d 751, 905 P.2d 420 (1995).)

In a criminal case, the prosecution has often been permitted to use at trial the former testimony of a witness given during the preliminary examination in the same case, despite the defense contentions that: (1) it had less incentive to cross-examine the witness at the preliminary examination than at trial; and (2) defense counsel failed to ask the witness certain questions at the examination. (*People v. Smith*, 30 Cal. 4th 581, 611, 134 Cal. Rptr. 2d 1, 68 P.3d 302 (2003), cert. denied, 124 S. Ct. 1169, 157 L. Ed. 2d 1208 (U.S. 2004); *People v. Zapien*, 4 Cal. 4th 929, 974–976, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (1993); *People v. Guerra*, 37 Cal. 3d 385, 427, 208 Cal. Rptr. 162, 690 P.2d 635 (1984).) In *In re Jones*, the California Supreme Court noted an exception to this. In *Jones*, a prosecution witness at the preliminary examination, Marlow, related certain incriminating statements made by a codefendant of Jones. Counsel for Jones had properly objected at that hearing that the statements were hearsay as to his client, and the court had admitted the testimony only against the codefendant. At trial, the court found Marlow was unavailable and admitted the preliminary hearing testimony against Jones. The Supreme Court found that Jones' trial attorney was incompetent because he did not object that since “Marlow's testimony at the preliminary hearing was admitted against [the codefendant] only, [Jones] lacked the ‘right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing,’ and thus, the statement was inadmissible under Evidence Code § 1291(a).” (*In re Jones*, 13 Cal. 4th 552, 572, 54 Cal. Rptr. 2d 52, 917 P.2d 1175 (1996).)

If after the preliminary hearing a witness informs the prosecutor that he or she lied and will invoke the Fifth Amendment at trial to avoid a perjury charge, one court has suggested that the better procedure is to require the prosecution to offer the witness immunity before permitting the prosecution to introduce that witness's former testimony at trial. (*People v. Garner*, 207 Cal. App. 3d 935, 941, 255 Cal. Rptr. 257 (2d Dist. 1989).) The California Supreme Court has held that, in the “unusual circumstances of this case” the testimony of a witness at a preliminary hearing may be presented at trial if the witness is unavailable because the witness has invoked the Fifth Amendment at trial due to a claimed fear of prosecution for previously lying to the police regarding the crime charged against the defendant. (*People v. Seijas*, 36 Cal. 4th 291, 304–306, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (2005).)

In *People v. Wharton*, the prosecution was permitted to use a preliminary hearing transcript of a rape victim from an earlier prosecution of the defendant in the penalty phase of the defendant's current trial. The defendant's contention that the objective of the two hearings was different and his interest and motive were not sufficiently similar was rejected. (*People v. Wharton*, 53 Cal. 3d 522, 589–590, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).) The prosecution has also been permitted to use the guilt phase testimony of a witness at a subsequent retrial of the penalty phase. (*People v. Frank*, 51 Cal. 3d 718, 732, 274 Cal. Rptr. 372, 798 P.2d 1215 (1990).) Finally, the prosecution has been permitted to use the trial testimony of the defendant in its case-in-chief in a subsequent retrial. (*People v. O'Connell*, 152 Cal. App. 3d 548, 553, 199 Cal. Rptr. 542 (1st Dist. 1984).) This case provides an example of prior testimony being admitted through a witness who heard it rather than through reading a transcript of it. (See *People v. Malone*, 112 Cal. App. 4th 1241, 5 Cal. Rptr. 3d 741 (3d Dist. 2003).)

In *People v. Alcala*, the trial court, in a second trial, found a witness unavailable and permitted the prosecution to use that witness's testimony in the first trial against the defendant. The Supreme Court approved this decision, even though events had occurred after the first trial which would have altered counsel's cross-examination of the witness. (*People v. Alcala*, 4 Cal. 4th 742, 783–784, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (1992).)

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§ 2:77. Former testimony—Limits on using former testimony of defendant

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 539 to 548

West's Key Number Digest, [Evidence](#) 🔑 575 to 583

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

The testimony of a probationer at an earlier revocation hearing cannot be used against him or her at the subsequent trial on related criminal charges except for impeachment or rebuttal. ([People v. Coleman](#), 13 Cal. 3d 867, 889, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975).) A juvenile's statements made at a fitness hearing cannot be used against him or her in the later criminal trial. ([Ramona R. v. Superior Court](#), 37 Cal. 3d 802, 210 Cal. Rptr. 204, 693 P.2d 789 (1985).) These statements may, however, be used to impeach inconsistent testimony of the juvenile at that trial. ([People v. Macias](#), 16 Cal. 4th 739, 66 Cal. Rptr. 2d 659, 941 P.2d 838 (1997).)

At the re-trial of a criminal case, if a defendant invokes the privilege against self-incrimination, his or her prior testimony in the first trial may be introduced by the prosecution under [Evidence Code § 1291](#). ([People v. Malone](#), 112 Cal. App. 4th 1241, 5 Cal. Rptr. 3d 741 (3d Dist. 2003).)

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§ 2:78. Former testimony—Evidentiary objections to introduction of former testimony when same party

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West's Key Number Digest, [Criminal Law](#) 🔑 539 to 548

West's Key Number Digest, [Evidence](#) 🔑 575 to 583

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

Pursuant to [Evidence Code § 1291\(b\)](#), the admissibility of former testimony is subject to the same limitations and objections as though the declarant were testifying at the hearing except that:

- Objections to the form of the question that were not made at the time the former testimony was given cannot be raised.
- Objections based on competency or privilege that did not exist at the time the former testimony was given cannot be raised.
- If a competency issue did exist and was litigated with the witness being found competent in the earlier proceeding, the judge in the present proceeding must abide by the prior ruling if it is supported by sufficient evidence. ([People v. Liddicoat](#), 120 Cal. App. 3d 512, 174 Cal. Rptr. 649 (1st Dist. 1981).)

When former testimony is introduced and such testimony was given at a preliminary hearing or former trial of the same criminal matter, prior inconsistent statements made by that witness and introduced at that hearing are not inadmissible hearsay if the evidence of such statements consists of (a) a videotaped statement introduced at the prior proceeding; or (b) a transcript, containing the statements, of the prior proceeding. ([Evidence Code § 1294](#), which is discussed in [§ 2:42](#).)

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§ 2:79. Former testimony—Party different in former action

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West's Key Number Digest, [Criminal Law](#) 🔑539 to 548

West's Key Number Digest, [Evidence](#) 🔑575 to 583

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1168, 1475 to 1481](#)

[C.J.S., Evidence §§ 478 to 491](#)

Former testimony is not inadmissible hearsay in a civil action even if introduced against one not a party to the former action if the declarant is unavailable and the issue is such that the party to the action in which the former testimony was given had the right and opportunity to cross-examine with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing. ([Evidence Code § 1292\(a\)](#).) As the Comment to [Evidence Code § 1292](#) notes, if one occurrence gives rise to a series of cases involving several plaintiffs and one defendant, testimony given against the plaintiff in the first action could be introduced against other plaintiffs in subsequent actions. This hearsay exception is seen as sufficiently trustworthy for civil cases because the former adverse party had the right and opportunity to cross-examine the declarant with a motive and interest similar to that of the current adverse party. ([Evidence Code § 1292](#), Comment.)

In the civil trial of O.J.Simpson, the defense could not rely on [§ 1292](#) to introduce former testimony of Mark Fuhrman, who the prosecution called as its own witness in the earlier criminal case. Though the plaintiff in the civil case may have had similar interests to the prosecution, the prosecution had not had the right and opportunity to *cross-examine* the witness in the first proceeding. ([Rufo v. Simpson](#), 86 Cal. App. 4th 573, 604–607, 103 Cal. Rptr. 2d 492 (2d Dist. 2001).)

Though this exception is only available in civil proceedings, the former testimony may have been given in a

criminal proceeding. ([Pena v. Toney](#), 98 Cal. App. 3d 534, 540, 160 Cal. Rptr. 4 (3d Dist. 1979).)

The admissibility of such testimony is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony is not subject to objections based on competency or privilege, which did not exist at the time the former testimony was given. ([Evidence Code § 1292\(b\)](#).)

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§ 2:80. Former testimony—Made at preliminary examination by minor child as complaining witness

West's Key Number Digest

West's Key Number Digest, [Infants](#)  [207](#), [173](#)

Legal Encyclopedias

[C.J.S., Infants §§ 40, 44 to 45, 54 to 55, 58 to 59, 62, 66 to 67, 69 to 70](#)

The former testimony of a minor child as a complaining witness at a preliminary examination is not inadmissible hearsay if offered in a dependency hearing pursuant to [Welfare and Institutions Code § 300](#), and the issues are such that a defendant in the proceeding in which the former testimony was given had the right and opportunity to cross-examine the witness with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the dependency proceeding. ([Evidence Code § 1293](#).)

This former testimony exception is limited to noncriminal proceedings and is believed trustworthy because the former adverse party had the right and opportunity to cross-examine the declarant with a motive and interest similar to that of the current adverse party. Its constitutionality has been upheld. (*In re Elizabeth T.*, [9 Cal. App. 4th 636](#), [12 Cal. Rptr. 2d 10](#) (3d Dist. 1992).)

Additional hearsay exceptions for children in sexual and physical abuse cases are discussed in §§ [2:36](#) to [2:38](#).

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§ 2:81. Miscellaneous hearsay exceptions—Judgment of conviction of crime punishable as felony

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑265(11), 207(4)

West's Key Number Digest, [Judgment](#) 🔑951(2)

Legal Encyclopedias

[C.J.S., Evidence §§ 364, 367, 397 to 398, 469 to 470](#)

[C.J.S., Judgments §§ 944, 946](#)

A final judgment adjudging one guilty of a crime punishable as a felony is not inadmissible hearsay when offered in a civil action to prove any fact essential to the judgment. ([Evidence Code § 1300](#).) Once admitted, the substantive rules of res judicata and collateral estoppel determine the effect of the evidence. ([Miller v. Superior Court](#), 168 Cal. App. 3d 376, 381, 214 Cal. Rptr. 125 (2d Dist. 1985).) If the crime was punishable as a felony, it is admissible even if a misdemeanor sentence was imposed. ([Evidence Code § 1300](#), Comment.)

If the felony conviction resulted from a plea of guilty or no contest, the convicted person may relitigate “issues of guilty conduct or intent in a subsequent civil trial, although the plea, whether guilty or no contest, is relevant and admissible against the convicted felon to show his or her factual guilt.” ([Calvillo-Silva v. Home Grocery](#), 19 Cal. 4th 714, 737, 80 Cal. Rptr. 2d 506, 968 P.2d 65 (1998) (Werdegar, dissenting); [Teitelbaum Furs, Inc. v. Dominion Ins. Co.](#), 58 Cal. 2d 601, 605–606, 25 Cal. Rptr. 559, 375 P.2d 439 (1962).) The majority in *Calvillo-Silva* apparently concluded that this rule does not apply in cases involving [Civil Code § 847](#), which provides that in certain circumstances an owner of real property is not liable for injuries that occur on the property during the injured person's commission of certain listed felonies. Even if the injured person's conviction resulted from a plea bargain, he or she may not contest the applicability of [§ 847](#). ([Calvillo-Silva v. Home Grocery](#), 19 Cal. 4th 714, 736, 80 Cal. Rptr. 2d 506, 968 P.2d 65 (1998).)

A thoroughly litigated misdemeanor conviction is also admissible in a case where it has collateral estoppel effect. In *Mueller*, a defendant convicted of assault and battery later sued the same victims. Her prior misdemeanor conviction was admissible and had collateral estoppel effect. ([Mueller v. J. C. Penney Co.](#), 173 Cal. App. 3d 713, 721, 219 Cal. Rptr. 272 (4th Dist. 1985).)

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§ 2:82. Miscellaneous hearsay exceptions—Indemnity or warranty action by judgment debtor

West's Key Number Digest

West's Key Number Digest, [Judgment](#)  [951\(2\)](#)

Legal Encyclopedias

[C.J.S., Judgments §§ 944, 946](#)

The hearsay rule does not prevent a judgment debtor from introducing evidence of a prior final judgment in an action that seeks to recover indemnity, enforce a warranty, or recover for breach of a warranty substantially the same as the warranty found breached by the judgment. ([Evidence Code § 1301.](#))

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§ 2:83. Miscellaneous hearsay exceptions—Statement of own family history

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 285 to 297

West's Key Number Digest, [Criminal Law](#) 🔑 419

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218

[C.J.S., Evidence](#) §§ 299 to 305

A statement by an unavailable declarant of his or her own family history is not inadmissible hearsay, even though the declarant had no means of acquiring personal knowledge of the matter declared, unless the statement was made under circumstances that indicate its lack of trustworthiness. Family history concerns birth, marriage, divorce, a parent-child relationship, relationship by blood or marriage, race, ancestry, or other similar fact. ([Evidence Code § 1310.](#))

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§ 2:84. Miscellaneous hearsay exceptions—Statement of another's family history

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 285 to 297

West's Key Number Digest, [Criminal Law](#) 🔑 419

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218

[C.J.S., Evidence](#) §§ 299 to 305

A statement concerning the family history (as defined in [§ 2:83](#)) of one other than the declarant is not inadmissible hearsay if: (a) the declarant is unavailable; (b) the declarant was related to the other by blood or marriage or was so intimately associated with the other's family as to be likely to have had accurate information concerning the matter and made the statement on information from the other or a relative of the other or on reputation in the other's family; and (c) the statement was not made under circumstances indicating its lack of trustworthiness. ([Evidence Code § 1311](#).)

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§ 2:85. Miscellaneous hearsay exceptions—Statement of family history contained in certain records

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑287

West's Key Number Digest, [Criminal Law](#) 🔑431

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1395 to 1024](#)

[C.J.S., Evidence § 305](#)

A statement concerning family history (as defined in [§ 2:83](#)) is not inadmissible hearsay if it is contained in:

- Family bibles or other family books or charts, engravings on rings, family portraits, urns, crypts or tombstones, and the like. ([Evidence Code § 1312.](#))
- A writing made as a record of a church, religious denomination or society, if the writing was made as a record of an act, condition, or event that would be admissible under § 1271 (business records). ([Evidence Code § 1315.](#))
- A certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and the maker was a person authorized to perform the acts reported in the certificate by law or by the religious denomination or society and the certificate was issued at the time and place of the ceremony or within a reasonable time thereafter. ([Evidence Code § 1316.](#))

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§ 2:86. Miscellaneous hearsay exceptions—Reputation of family history

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑322

West's Key Number Digest, [Criminal Law](#) 🔑421

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1167, 1175 to 1177](#)

[C.J.S., Evidence §§ 279, 282, 505](#)

Reputation among members of a family concerning family history (as defined in [§ 2:83](#)) is not inadmissible hearsay. ([Evidence Code § 1313](#).)

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§ 2:87. Miscellaneous hearsay exceptions—Reputation in community regarding a resident

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West's Key Number Digest, [Evidence](#) 🔑322

West's Key Number Digest, [Criminal Law](#) 🔑421

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1167, 1175 to 1177](#)

[C.J.S., Evidence §§ 279, 282, 505](#)

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 inadmissible hearsay. ([Evidence Code § 1314.](#))

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§ 2:88. Miscellaneous hearsay exceptions—Reputation in community regarding history, interest in property, or boundaries

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑324

West's Key Number Digest, [Criminal Law](#) 🔑421

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1166 to 1167, 1175 to 1177](#)

[C.J.S., Evidence §§ 279, 281 to 282](#)

Reputation in a community is not inadmissible hearsay if it concerns:

- An event of general history of the community, state, or nation and the event was of importance to the community. ([Evidence Code § 1320.](#))
- The interest of the public in property in the community and the reputation arose before controversy. ([Evidence Code § 1321.](#))
- Boundaries of or customs affecting land in the community and the reputation arose before controversy. ([Evidence Code § 1322.](#))

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§ 2:89. Miscellaneous hearsay exceptions—Statements regarding boundaries

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  274

Legal Encyclopedias

[C.J.S., Evidence §§ 289, 293, 296, 320](#)

A statement concerning the boundary of land is not inadmissible hearsay if the declarant is unavailable and had sufficient knowledge of the subject, but the statement is inadmissible if made under circumstances such as to indicate its lack of trustworthiness. ([Evidence Code § 1323](#).)

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§ 2:90. Miscellaneous hearsay exceptions—Conveyances and wills

West's Key Number Digest

West's Key Number Digest, [Wills](#) 🔑297

West's Key Number Digest, [Evidence](#) 🔑353

Legal Encyclopedias

[C.J.S., Evidence §§ 967 to 972](#)

[C.J.S., Wills §§ 597, 601, 604 to 605, 607 to 608](#)

A statement contained in a deed, will, or other writing purporting to affect an interest in real or personal property is not inadmissible hearsay if the matter stated was relevant to the writing's purpose and would be relevant to an issue as to an interest in the property and the post-statement dealings with the property have not been inconsistent with the statement's truth. ([Evidence Code § 1330](#).)

A statement by a declarant, unavailable as a witness, that the declarant has or has not made a will, or has or has not revoked a will, or that identifies the will is not inadmissible hearsay unless it was made under circumstances such as to indicate its lack of trustworthiness. ([Evidence Code § 1260](#).)

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§ 2:91. Miscellaneous hearsay exceptions—Claims against estates

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  [317\(18\)](#)

Legal Encyclopedias

[C.J.S., Evidence §§ 259, 269](#)

A statement offered in an action upon a claim or demand against the estate of the declarant is not inadmissible hearsay if it was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by the declarant while the recollection was clear, unless the statement was made under circumstances that indicate its lack of trustworthiness. ([Evidence Code § 1261](#).) When one makes a claim against an estate, one may testify about transactions with the decedent underlying the claim. [Evidence Code § 1261](#) “balances” this by allowing hearsay statements of the decedent to be admitted if personal knowledge and recent perception and evidence of trustworthiness are shown. ([Evidence Code § 1261](#), Comment.)

Simply because the decedent's statement was self-serving does not necessarily require exclusion. However, the statement must have been made at a time when the matter had recently been perceived by the declarant. ([Estate of Luke](#), 194 Cal. App. 3d 1006, 1017, 240 Cal. Rptr. 84 (2d Dist. 1987).)

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§ 2:92. Miscellaneous hearsay exceptions—Ancient writings

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  372

Legal Encyclopedias

[C.J.S., Evidence §§ 1010 to 1021](#)

A statement is not inadmissible hearsay if it is contained in a writing more than 30 years old and has generally been acted on as true by those with an interest in the matter. ([Evidence Code § 1331.](#))

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§ 2:93. Miscellaneous hearsay exceptions—Published compilations

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  360

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[C.J.S., Evidence §§ 1003 to 1009](#)

A statement, other than an opinion, contained in a tabulation, list, or other published compilation is not inadmissible hearsay if the compilation is generally used and relied on in the course of a business, as defined in § 1270. ([Evidence Code § 1340](#).) In the case of *In re Michael G.*, an officer testified that he had arrested the defendant in possession of a spray paint can and that the defendant appeared under the influence of toluene. The label on the can listed toluene as one of the ingredients and the trial court properly admitted the label into evidence under the published compilations hearsay exception. The Court of Appeal found that “a label including (rather than excluding) a hazardous substance is inherently trust-worthy” and it took judicial notice that the label was generally used and relied on as accurate in the course of business. (*In re Michael G.*, 19 Cal. App. 4th 1674, 1678, 24 Cal. Rptr. 2d 260 (2d Dist. 1993).)

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§ 2:94. Miscellaneous hearsay exceptions—Historical works

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑360

West's Key Number Digest, [Criminal Law](#) 🔑439

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1395 to 1396, 1404](#)

[C.J.S., Evidence §§ 1003 to 1009](#)

Historical works, books of science or art, and published maps or charts by persons indifferent between the parties are not inadmissible hearsay when offered to prove facts of general notoriety and interest. ([Evidence Code § 1341](#).) The historical works exception is generally confined to “ancient facts” and does not extend to the work of a living author within reach of court process. ([Osborn v. Irwin Memorial Blood Bank](#), 5 Cal. App. 4th 234, 261, 7 Cal. Rptr. 2d 101 (1st Dist. 1992).) In [Deutsch v. Masonic Homes of California, Inc.](#), 164 Cal.App.4th 748, 765–767 (2008), the court affirmed the trial court's decision to exclude “highly disputed” excerpts from a book “describing what was known and being done or what was not known and not being done about child sexual abuse between 1960 and the present.”

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§ 2:95. Miscellaneous hearsay exceptions—Abducted or murdered witnesses in criminal cases

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 417, 419

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[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1300, 1302, 1304 to 1312](#)

[Evidence Code § 1350](#) provides that, in a criminal proceeding charging a serious felony (as defined in [Penal Code § 1192.7\(c\)](#) or any violation of [Health and Safety Code §§ 11351, 11352, 11378, or 11379](#)), evidence of a statement is not inadmissible hearsay if the declarant is unavailable and all of the following are true:

- 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. ([Evidence Code § 1350\(a\)\(1\)](#).)
- 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. ([Evidence Code § 1350\(a\)\(2\)](#).)
- 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. ([Evidence Code § 1350\(a\)\(3\)](#).)
- The statement was made under circumstances that indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion. ([Evidence Code § 1350\(a\)\(4\)](#).)

- The statement is relevant to the issues to be tried. ([Evidence Code § 1350\(a\)\(5\)](#).)
- The statement is corroborated by other evidence that 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. ([Evidence Code § 1350\(a\)\(6\)](#).)
- The prosecution must serve written notice on the defendant at least 10 days prior to the hearing or show good cause for the failure to do so. ([Evidence Code § 1350\(b\)](#).)

If the statement is offered during trial, the court's determination shall be made outside the jury's presence in the hearing described in [Evidence Code § 1350\(c\)](#).

This hearsay exception is discussed and applied in [People v. Zambrano, 41 Cal. 4th 1082, 1143–1147, 63 Cal. Rptr. 3d 297, 163 P.3d 4 \(2007\)](#).)

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§ 2:96. Miscellaneous hearsay exceptions—Sworn statements regarding gang-related crimes

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[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218](#)

[Evidence Code § 1231](#) provides that statements made by a declarant who is now deceased is not inadmissible hearsay if the proponent establishes each of the following:

- The statement concerns acts or events within the personal knowledge of the declarant, which are relevant to a gang-related prosecution (pursuant to the California Street Terrorism Enforcement and Prevention Act, commencing with [Penal Code § 186.20](#)). ([Evidence Code § 1231](#)(a) and (c).)
- 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. ([Evidence Code § 1231](#)(b).)
- 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. ([Evidence Code § 1231](#)(d).) A peace officer may administer and certify oaths for purposes of this hearsay exception. ([Evidence Code § 1231.2](#).)
- The declarant died from other than natural causes. ([Evidence Code § 1231](#)(e).)
- 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 hearsay exception circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

- 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.
- Whether the declarant had a bias or motive for fabricating the statement, and the extent of any bias or motive.
- Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.
- Whether the statement was a statement against the declarant's interest.
- The proponent of the statement must notify the adverse party of 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. ([Evidence Code § 1231.1.](#))
- 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. ([Evidence Code § 1231.3.](#))
- If evidence of a statement is introduced pursuant to this hearsay exception, the jury may not be told that the declarant died of other than natural causes, but shall merely be informed that the declarant is unavailable. ([Evidence Code § 1231.4.](#))

Comment

[Evidence Code § 1231.3](#) provides that a limited category of law enforcement officers may testify as to the declarations admissible pursuant to this hearsay exception. Given these restrictions, it seems unlikely that anyone other than such an officer can so testify. What is less clear is whether the verbatim record that must exist as to the statement can be introduced into evidence. Obviously the transcript of the preliminary hearing may be admissible pursuant to [Evidence Code §§ 1290 et seq.](#) Nothing in the article relating to this new hearsay exception provides for introduction of the verbatim record. It is not unlikely that the appellate courts will restrict admissibility to law enforcement officers who will need to meet the qualifications set out in [§ 1231.3](#).

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§ 2:97. Proceedings exempt from hearsay rule—Preliminary examinations

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[C.J.S., Criminal Law § 464](#)

Hearsay statements may be presented as evidence to establish probable cause at a preliminary examination if the statements are testified to by a law enforcement officer or honorably retired law enforcement officer with five years of law enforcement experience or a law enforcement officer who has 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. ([Penal Code § 872\(b\)](#).)

The law enforcement officer may relate these hearsay statements only if he or she is an investigating officer in the case and can meaningfully assist the magistrate in evaluating the reliability of the statements. ([Whitman v. Superior Court](#), 54 Cal. 3d 1063, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (1991).) Multiple hearsay is inadmissible. ([Montez v. Superior Court](#), 4 Cal. App. 4th 577, 5 Cal. Rptr. 2d 723 (2d Dist. 1992).)

Hearsay statements may be admitted under [Penal Code § 872\(b\)](#), even though the declarant is incompetent, at least in child molestation cases. ([People v. Daily](#), 49 Cal. App. 4th 543, 551–552, 56 Cal. Rptr. 2d 787 (2d Dist. 1996).)

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§ 2:98. Proceedings exempt from hearsay rule—Probation violation hearings

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[C.J.S., Criminal Law § 2162](#)

Hearsay evidence is admissible at probation revocation hearings when accompanied by reasonable indicia of reliability. Thus, in one case the prosecution was permitted to introduce evidence of a car rental receipt and hotel receipt to prove that the defendant was in Chicago because the defendant's signature appeared on both. ([People v. Maki](#), 39 Cal. 3d 707, 716, 217 Cal. Rptr. 676, 704 P.2d 743 (1985).) In another case, a police officer at a probation violation hearing was permitted to read a criminalist's report into evidence to prove that the substance found in the defendant's possession was a dangerous drug. ([People v. Brown](#), 215 Cal. App. 3d 452, 263 Cal. Rptr. 391 (1st Dist. 1989).) Finally, in [People v. O'Connell](#), 107 Cal. App. 4th 1062, 1065–1067, 132 Cal. Rptr. 2d 665 (3d Dist. 2003), the court permitted the prosecutor to introduce a one-page report from the manager of a treatment program defendant had been ordered to attend stating that he had missed every assigned session. The court found that the report was similar to other documentary evidence admitted at probation violation hearings and was prepared contemporaneously with the events described and specifically for the hearing. ([O'Connell](#), 107 Cal. App. 4th at 1066–1067; accord: [People v. Abrams](#), 158 Cal.App.4th 396, 404 (2007).) Note that this report did not contain information that was evaluative in nature, e.g. statements that “defendant was present but failed to cooperate” or “appeared under the influence of alcohol.” While *O'Connell* seems correct on its facts, a report reflecting the writer's *opinion* that the defendant has acted in a manner inconsistent with the terms of probation should not be admitted without compliance with the *Arreola* requirements discussed below. Support for this distinction can be found in [People v. Shepherd](#), 151 Cal. App. 4th 1193, 1198–1203, 60 Cal. Rptr. 3d 616 (1st Dist. 2007). In *Shepherd*, the appellate court found that a probation officer should not be permitted to testify that an alcohol program director had told him that the defendant had been terminated from the program after smelling of

and testing positive for alcohol because the *Arreola* good cause test had not been complied with. Note, *Shepherd* disagreed with the conclusion in *Brown* that the admissibility of lab test results in probation violation proceedings are governed by a separate, more liberal standard. (*People v. Shepherd*, 151 Cal. App. 4th 1193, 1203, 60 Cal. Rptr. 3d 616 (1st Dist. 2007).)

The Supreme Court in *People v. Winsom* refused to approve use of the transcript of a witness's prior preliminary hearing testimony at the probation revocation proceeding because the witness was not legally unavailable and no good cause existed for ignoring the hearsay rule. (*People v. Winsom*, 29 Cal. 3d 711, 175 Cal. Rptr. 621, 631 P.2d 55 (1981).) *Winsom* was reaffirmed in *People v. Arreola*, despite the fact that the *Arreola* defendant was given notice before the preliminary hearing that the transcript of the testimony admitted at that hearing would be used in a subsequent probation revocation proceeding. *Arreola* did not, however, close the door on all hearsay evidence at the violation hearing. It reaffirmed *Maki*. In addition, it noted the need for live testimony was not so great where it served only to establish foundational requirements for “laboratory reports, invoices or receipts.” (*People v. Arreola*, 7 Cal. 4th 1144, 1157, 31 Cal. Rptr. 2d 631, 875 P.2d 736 (1994).) Finally, it held the showing of good cause for the absence of a live witness must be evaluated on a case-by-case basis in the context of the “significance of the particular evidence to a factual determination relevant to a finding of a violation of probation.” (*People v. Arreola*, 7 Cal. 4th 1144, 1160, 31 Cal. Rptr. 2d 631, 875 P.2d 736 (1994).) In both *Arreola* and *Winsom*, the hearsay evidence constituted the entire basis for the probation violation.

“Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses” is probably inadmissible at a violation hearing. (*Abrams*, 158 Cal.App.4th at p. 405, citing *In re Miller*, 145 Cal.App.4th 1228, 1238–1240, 52 Cal.Rptr.3d 256 (2006) and *In re Kentron D.*, 101 Cal.App.4th 1381, 1384–1385, 125 Cal.Rptr.2d 260 (2002).)

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Subject to the provisions of § 352, all relevant hearsay evidence is admissible in a small claims hearing and in any trial de novo in superior court. ([Houghtaling v. Superior Court](#), 17 Cal. App. 4th 1128, 1138–1139, 21 Cal. Rptr. 2d 855 (4th Dist. 1993).)

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§ 2:100. Proceedings exempt from hearsay rule—Sentencing hearings; sexually violent predator—Proceedings

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West's Key Number Digest, [Sentencing and Punishment](#) 🔑317, 1900
West's Key Number Digest, [Mental Health](#) 🔑460

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[C.J.S., Criminal Law §§ 2010, 2016 to 2017, 2054, 2056, 2112, 2114 to 2123, 2144 to 2145, 2149 to 2150](#)

A sentencing court may consider a broad range of information in deciding whether to grant probation in a particular case. Due process does not require that a criminal defendant be afforded the same evidentiary protections at sentencing proceedings as exist at trial. A sentencing judge may consider responsible unsworn or out-of-court statements concerning the convicted person's life and characteristics. Fundamental fairness requires, however, that there be a substantial basis for believing the information is reliable. ([People v. Lamb, 76 Cal. App. 4th 664, 683, 90 Cal. Rptr. 2d 565 \(1st Dist. 1999\)](#).) In *Lamb*, the court approved consideration of unsworn statements by other alleged victims of a convicted child molester regarding misconduct alleged to have occurred more than 20 years before. ([People v. Lamb, 76 Cal. App. 4th 664, 682, 90 Cal. Rptr. 2d 565 \(1st Dist. 1999\)](#).)

At disposition hearings in juvenile delinquency cases, reliable hearsay is admissible. ([In re Vincent G., 162 Cal.App.4th 238, 243–244 \(2008\)](#).)

In SVP cases, [Welfare & Institutions Code § 6600\(a\)\(3\)](#) permits the details of predicate offenses to be established by documentary evidence. In *People v. Otto*, the Supreme Court held that this Code section permits the admission of multiple hearsay not covered by any hearsay exception and the reliance on such evidence does not violate the defendant's due process rights. ([People v. Otto, 26 Cal. 4th 200, 109 Cal. Rptr. 2d 327, 26 P.3d 1061 \(2001\)](#).) Central to the court's conclusion was that the defendant has almost always been convicted of the predicate offenses. (at 211) This conviction establishes the necessary reliability of the hearsay.

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§ 2:101. Child dependency hearsay exception**West's Key Number Digest**West's Key Number Digest, [Infants](#)  173**Legal Encyclopedias**[C.J.S., Infants §§ 54 to 55](#)

In *In re Carmen O.*, 28 Cal. App. 4th 908, 919, 33 Cal. Rptr. 2d 848 (4th Dist. 1994), the court created the child dependency hearsay exception. In *In re Cindy L.*, 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (1997), the California Supreme Court approved the judicial creation of this exception and set forth certain requirements for admission of such statements. For the statement to be admissible, “(1) the court must find that the time, content, and circumstances of the statement provide sufficient indicia of reliability; (2) a child must either be available for cross-examination or there must be evidence of child sexual abuse that corroborates the statements made by the child; and (3) other interested parties must have adequate notice of the public agency's intention to use the hearsay statement so as to contest it.” (*In re Cindy L.*, 17 Cal. 4th 15, 29–30, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (1997).)

In *In re Lucero L.*, the California Supreme Court addressed a question left open in *Cindy L.*: the relationship between [Welfare and Institutions Code § 355](#) and the child dependency exception. (*In re Lucero L.*, 22 Cal. 4th 1227, 96 Cal. Rptr. 2d 56, 998 P.2d 1019 (2000).) [Section 355](#) authorizes admission of hearsay statements of a child victim contained in a social study, even if the child is not available for cross-examination, due to incompetence. *Lucero L.* concluded that such statements are admissible, even if they fail the reliability tests set out in *Cindy L.* However, such statements may not be relied on as the sole basis for a jurisdictional finding unless the court finds that “ ‘the time, content and circumstances of the statement provide sufficient indicia of reliability.’ ” (*In re Lucero L.*, 22 Cal. 4th 1227, 1248, 96 Cal. Rptr. 2d 56, 998 P.2d 1019 (2000), citing *In re Cindy L.*, 17 Cal. 4th 15, 29, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (1997).)

The exception applies only to child dependency cases and not to criminal cases. ([In re Carmen O.](#), 28 Cal. App. 4th 908, 922, 33 Cal. Rptr. 2d 848 (4th Dist. 1994).) This exception can be relied on to admit the out-of-court statements of a child who is not competent to testify. ([In re Cindy L.](#), 17 Cal. 4th 15, 31–36, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (1997).)

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§ 2:102. Proving criminal convictions—Judicial notice

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 49, 55 to 60](#)

In 1996, the Legislature enacted the Criminal Convictions Record Act, which materially facilitates the admission of evidence of a person's criminal convictions for different purposes. Sections were added and amended in the Evidence Code and added to the Government Code.

[Evidence Code § 452.5](#) was added and it contains the primary changes. Subsection (a) clarifies that permissive notice of judicial acts and court records pursuant to § 452(c) and (d), includes notice of computer-generated official court records of criminal convictions if two conditions are complied with. First, the Judicial Council must specify the types of official court records relating to criminal convictions covered in the act. Second, the records must be certified by the court clerk pursuant to either [Government Code § 69844.5](#) or [§ 71280.5](#).

[Government Code § 69844.5](#) (which was added by the act) requires each court clerk on or after July 1, 1997, to certify those criminal conviction records specified by the Judicial Council and then submit those records for entry into a computer system operated by the Department of Justice that can be accessed by authorized agents of any district attorney or other state prosecuting agency.

Comment

The act makes no mention of defense access to these records. In those cases where the defense obtains informa-

tion that a prosecution witness has prior criminal convictions that it can use, there would seem to be little doubt that the prosecutor would have to use its access to the computer-generated records to provide them to the defense so it could seek judicial notice of the convictions.

[Evidence Code § 452.5\(a\)](#), clarifies the admissibility of computer-generated records to prove convictions. One court found that a computer-generated document from CLETS was an official court record admissible to prove a conviction as an official record pursuant to the hearsay exception for official records. ([People v. Dunlap](#), 18 Cal. App. 4th 1468, 1476–1481, 23 Cal. Rptr. 2d 204 (5th Dist. 1993).) Another court reached the opposite conclusion because the computer record did not reveal the mode of its preparation or its sources. ([People v. Matthews](#), 229 Cal. App. 3d 930, 939–940, 280 Cal. Rptr. 134 (1st Dist. 1991).) Without directly addressing the precise issue disputed in these two cases, the act simply creates a special category of computer-generated records of criminal convictions that the court may take judicial notice of. It would appear that this notice is limited to notice of the conviction and not the truth of the facts underlying it, that is, the commission of the crime. (See the discussion in § 7:12 of the cases of [Day v. Sharp](#), 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918 (2d Dist. 1975) and [Sosinsky v. Grant](#), 6 Cal. App. 4th 1548, 8 Cal. Rptr. 2d 552 (5th Dist. 1992).)

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§ 2:103. Proving criminal convictions—Expanding the official records hearsay exception

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West's Key Number Digest, [Evidence](#) 🔑332

West's Key Number Digest, [Witnesses](#) 🔑345

West's Key Number Digest, [Criminal Law](#) 🔑429

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[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 863 to 869, 923](#)

[C.J.S., Witnesses §§ 597 to 602](#)

[Evidence Code § 452.5\(b\)](#), seemingly has nothing to do with judicial notice. This subdivision, however, makes a significant change in [Evidence Code § 1280](#), the official records hearsay exception. (This hearsay exception is discussed in §§ [2:66](#) to [2:68](#).) [Section 452.5\(b\)](#), provides that a record of conviction certified pursuant to [Evidence Code § 1530\(a\)](#), is admissible pursuant to [§ 1280](#) to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of prison term, or other act, condition, or event recorded by the record.

The first important change effected by this enactment permits use of the record of conviction to prove the underlying criminal acts. (*People v. Duran*, 97 Cal. App. 4th 1448, 1460, 119 Cal. Rptr. 2d 272 (2d Dist. 2002); accord: *People v. Wesson*, 138 Cal. App. 4th 959, 967–968, 41 Cal. Rptr. 3d 883 (6th Dist. 2006).) In *People v. Wheeler*, the California Supreme Court ruled that prior acts of misconduct amounting to a misdemeanor could be used to impeach a witness if the acts constituted moral turpitude. (*Wheeler* is discussed in [§ 3:58](#).) *Wheeler* also held, however, that these acts could not be proved by simply introducing evidence that the witness had been convicted of the offense: the official record of the conviction proved the conviction, but was hearsay evidence of the

underlying acts. (*People v. Wheeler*, 4 Cal. 4th 284, 297, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (1992); see *People v. Delgado*, 43 Cal.4th 1059, 1071–1072 (2008) [abstract of judgment admissible to prove fact of prior conviction.]) *Evidence Code* § 452.5(b), expands the hearsay exception of § 1280 to permit the conviction to serve as evidence of the underlying misconduct. In most circumstances this change benefits the party impeaching the witness. It is obviously easier to impeach with proof of the conviction than with live witnesses to the misconduct, which may have occurred years before.

Comment

It is not uncommon, however, that an impeaching party would prefer to call a live witness to the impeaching conduct to achieve greater impact with the jury. Should the party be permitted to do this? No. Calling the witness will almost always consume substantially more time than introducing the conviction, with no corresponding increase in probative value. In addition, the extra impact sought by the impeaching party usually constitutes the sort of emotional evidence that causes undue prejudice to the proponent of the impeached witness.

Warning

Note that *Wheeler* has been expanded to permit the impeachment of a witness with prior acts of juvenile misconduct. (See the discussion in § 3:59.) *Evidence Code* § 452.5(b), does not seem to change the prescription against using juvenile findings to prove the underlying conduct, since it only applies to records of criminal convictions, and a juvenile proceeding is civil in nature, not criminal. (*People v. Burton*, 48 Cal. 3d 843, 861, 258 Cal. Rptr. 184, 771 P.2d 1270 (1989).)

The second important change created by § 452.5(b), permits use of the record of conviction to prove that a prior prison term was served. *Penal Code* § 667.5 provides for a penalty enhancement for any criminal defendant convicted of a felony offense who has a prior felony conviction and served a prison term therefor. Prior to the enactment of § 452.5(b), to establish a defendant had, in fact, served a prior prison term, the prosecution was required either to: (a) obtain a “prison packet” pursuant to *Penal Code* § 969b; or (b) introduce an abstract of conviction showing a prison sentence, a record from the Department of Corrections showing the defendant was received and, then, rely on the presumption that official duty was regularly performed. (*Evidence Code* § 664; see *People v. Tenner*, 6 Cal. 4th 559, 24 Cal. Rptr. 2d 840, 862 P.2d 840 (1993).) *Evidence Code* § 452.5(b), will now permit use of the conviction records alone to prove that any prison sentence ordered was served.

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§ 2:104. Proving criminal convictions—Section 1280

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West's Key Number Digest, [Evidence](#) 🔑332

West's Key Number Digest, [Criminal Law](#) 🔑429

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[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 863 to 869, 923](#)

It has already been noted above that the act added [Evidence Code § 452.5\(b\)](#), which in effect expanded the official records hearsay exception contained in § 1280. In addition the act expressly changed § 1280 in two minor ways: by clarifying that the exception applied to both civil and criminal proceedings and that the exception only applies when all three conditions for it are met. Neither of these modifications changed existing law.

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[C.J.S., Criminal Law §§ 1382 to 1394](#)

[C.J.S., Evidence §§ 863 to 869, 923](#)

In addition to one cosmetic change, breaking the statute's provisions into subdivisions, the act made one significant change to former § 1500.5, the predecessor of § 1552. [Evidence Code § 1552\(a\)](#), which is discussed in § 8:23, provides, in pertinent part, that a printed representation of computer information is presumed to be an accurate representation of the computer information. The same subdivision describes how the opposing party overcomes this presumption. The act specified that the presumption does not apply to computer-generated official records certified in accordance with [Evidence Code § 452.5](#) or [§ 1530](#). The net effect of this for the criminal conviction records is that these records are admissible to prove the items set forth in [Evidence Code § 452.5\(a\)](#) and (b), without regard to the presumption in 1552(a). While contrary evidence suggesting that the computer-generated conviction records are inaccurate may also be admissible, such evidence should not lead to the exclusion of the computer-generated conviction record.

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§ 2:106. Proving prior felony conviction constitutes “serious felony”—In general**West's Key Number Digest**West's Key Number Digest, [Sentencing and Punishment](#) 🔑 1379(2)

[Penal Code § 667\(a\)\(1\)](#), provides that a person convicted of a felony is subject to an additional five-year prison term for each prior conviction of a “serious felony.” [Penal Code § 667\(b\) to \(i\)](#), set forth the “three strikes law.” Both provisions rely, in part, on [Penal Code § 1192.7](#), which lists “serious felonies.” Not all the offenses listed in 1192.7 correspond to felonies defined by California law at the time they were committed. The California Supreme Court has held that certain provisions of [Penal Code § 1192.7](#) “refer not to specific criminal offenses, but to the criminal conduct described therein, and applicable whenever the prosecution pleads and proves that conduct.” (*People v. Jackson*, 37 Cal. 3d 826, 832, 210 Cal. Rptr. 623, 694 P.2d 736 (1985).) For example, residential burglary is a “serious felony.” ([Penal Code § 1192.7\(c\)](#).) However, for many years, residential burglary was one form of first degree burglary, and a conviction for first degree burglary would not necessarily disclose the residential character of the offense. Thus, the courts have often been faced with the question of what evidence is admissible to prove that a prior conviction was for conduct listed in Evidence Code § 1192.7.

In *People v. Guerrero*, the court held the trier of fact may consider the entire record of the prior conviction to determine the conduct involved in that offense. This permitted consideration of more than the judgment itself and the elements of the prior charge that were necessarily adjudicated. It also precluded the prosecution from relitigating the circumstances of the prior offense, by limiting evidence to the record of conviction. This case left two questions unanswered: (1) Which items in the record of conviction are admissible? (2) Does the hearsay rule impose additional limitations? (*People v. Guerrero*, 44 Cal. 3d 343, 355, 243 Cal. Rptr. 688, 748 P.2d 1150 (1988).)

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§ 2:107. Proving prior felony conviction constitutes “serious felony”—Admissible items

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In *People v. Reed*, the Supreme Court set forth two possible definitions of “record of conviction.” The broad definition is equivalent to the record on appeal. The narrower definition refers only to “those record documents reliably reflecting the facts of the offense for which the defendant was convicted.” The court determined that the transcript of the preliminary hearing for the prior offense satisfied even the second, narrower test because “the procedural protections afforded the defendant during the preliminary hearing tend to ensure the reliability of such evidence.” (*People v. Reed*, 13 Cal. 4th 217, 223, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (1996).) Courts have declined to decide if excerpts from a probation officer's report are part of the record of conviction. (*People v. Reed*, 13 Cal. 4th 217, 230, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (1996); compare *People v. Garcia*, 216 Cal. App. 3d 233, 237, 264 Cal. Rptr. 662 (4th Dist. 1989), which approved use of a probation report excerpt.) In *People v. Harrell*, the court found the charging document was part of the record of conviction. (*People v. Harrell*, 207 Cal. App. 3d 1439, 255 Cal. Rptr. 750 (1st Dist. 1989).) Courts have found an appellate court opinion upholding the prior conviction was a part of the record of conviction. (*People v. Woodell*, 17 Cal. 4th 448, 17 Cal. 4th 969b, 71 Cal. Rptr. 2d 241, 950 P.2d 85 (1998); *People v. Harbolt*, 61 Cal. App. 4th 123, 127, 71 Cal. Rptr. 2d 459 (5th Dist. 1997).)

Warning

In determining which items in the previous record are admissible, it may be significant whether the defendant pled guilty to the prior offense or was convicted at trial. For example, a preliminary hearing transcript may reliably reflect the facts of a crime the defendant pled guilty to. It is less likely to reflect reliably the facts a jury relied on in reaching its verdict, and no good reason exists to permit that transcript rather than a transcript of the trial to be utilized. (See *People v. Houck*, 66 Cal. App. 4th 350, 77 Cal. Rptr. 2d 837 (4th Dist. 1998).) *Houck* also suggests that the “record of conviction” test (which is broader than the “reliably re-

flect” test) should only be used when the prior conviction was by plea. ([People v. Houck](#), 66 Cal. App. 4th 350, 77 Cal. Rptr. 2d 837 (4th Dist. 1998); see also [People v. Blackburn](#), 72 Cal. App. 4th 1520, 1531, 86 Cal. Rptr. 2d 134 (4th Dist. 1999).) The preliminary hearing transcript of a police officer's testimony pursuant to the hearsay provisions of [Penal Code § 872\(b\)](#), is inadmissible to establish the nature of the prior conviction. ([People v. Best](#), 56 Cal. App. 4th 41, 43–46, 64 Cal. Rptr. 2d 809 (3d Dist. 1997).)

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§ 2:108. Proving prior felony conviction constitutes “serious felony”—Hearsay**West's Key Number Digest**West's Key Number Digest, [Sentencing and Punishment](#) 🔑 1379(2)

In *Reed*, the court apparently rejected the notion that statements contained in the record of conviction were admissible to prove that a prior conviction was for a serious felony, without regard to their hearsay nature. (*People v. Reed*, 13 Cal. 4th 217, 229–230, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (1996).) The court found that statements of a witness at the preliminary hearing were admissible hearsay under § 1291 (which is discussed in §§ 2:72- 2:76), even if the witness was physically available, since *Guerrero* made them legally unavailable. (*Reed*, 13 Cal. 4th at 225–228; *People v. Solis*, 90 Cal. App. 4th 1002, 1018, 91 Cal. App. 4th 341A, 109 Cal. Rptr. 2d 464 (2d Dist. 2001).) This conclusion has survived the United States Supreme Court's re-evaluation of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). (*People v. Gonzales*, 131 Cal. App. 4th 767, 772–777, 32 Cal. Rptr. 3d 172 (4th Dist. 2005).) For a discussion of the impact of the *Crawford* case, see §§ 2:111 to 2:121. If a probation report is part of the record of conviction, then a statement of a defendant in the report is admissible hearsay under [Evidence Code § 1220](#). However, statements by the probation officer describing the offense or summarizing the police report are inadmissible hearsay. (*People v. Reed*, 13 Cal. 4th 217, 230, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (1996).) If the defendant enters a plea of guilty, he or she adopts the allegations of the charging document, making these statements admissible in a later proceeding to prove the nature of the conduct. (*People v. Harrell*, 207 Cal. App. 3d 1439, 1444, 255 Cal. Rptr. 750 (1st Dist. 1989).) Statements made by the defendant during the change of plea hearing are also admissible to prove the nature of the conduct. (*People v. Abarca*, 233 Cal. App. 3d 1347, 1351, 285 Cal. Rptr. 213 (4th Dist. 1991).) In *People v. Sohal*, the court extended *Abarca* in a small, but significant, way: During the change of plea the prosecutor described the assault as one involving a deadly or dangerous weapon. Defense counsel agreed and “immediately thereafter” the defendant pled guilty to assault with a deadly weapon. This was admissible to prove that the prior assault was not simply one involving force likely to produce great bodily injury and was a serious felony. (*People v. Sohal*, 53 Cal. App. 4th 911, 62 Cal. Rptr. 2d 110 (3d Dist. 1997).)

In [People v. Delgado](#), 43 Cal.4th 1059, 1071–1072 (2008), the court held the abstract of judgment, though hearsay, is admissible to prove the fact of the conviction it summarizes. “A court document prepared contemporaneously with the conviction, as part of the record thereof, by a public officer charged with that duty, and describing the nature of the prior conviction for official purposes is relevant and admissible on this issue [T]he trier of fact may draw *reasonable inferences* from the record presented Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction.” ([People v. Miles](#), 43 Cal.4th 1074, 1082–1083 (2008) [*Miles* admitted a federal judgment form signed by the District Court Judge that recited defendant was convicted of “violation of 18 U.S.C. 2113 (a)(d)(e), armed bank robbery and ... kidnapping” to establish defendant had a prior serious felony conviction. *Miles* concluded a finger print card listing defendant's offense as “bank robbery” was inadmissible because there “was no evidence the card had been prepared contemporaneously with the judgment by a court official charged with the duty of recording it accurately.” (at 1093.)

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§ 2:109. Statements by person relating to the infliction or threat of physical injury

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Legal Encyclopedias

[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218, 1291 to 1301](#)

Evidence of a statement that purports to narrate, describe, or explain the infliction or threat of physical injury on the declarant is not inadmissible hearsay if certain conditions are met. ([Evidence Code § 1370\(a\)](#).) The first condition, set forth in [Evidence Code § 1370\(a\)\(2\)](#), requires the declarant must be unavailable, as defined in [Evidence Code § 240](#). ([Evidence Code § 240](#) is discussed in §§ 2:21 to 2:26.) Note that this condition is not satisfied only when the declarant is dead or otherwise physically unable to come to court. In addition a person is unavailable if the person fails to comply with a valid subpoena (see the discussion in § 2:26) or if the person is present in court, refuses to testify, and the court uses all available means to coerce this testimony. (See the discussion in § 2:24.)

To be admissible the statement must have been made at or near the time of the infliction or threat of physical injury. Statements made more than five years before the filing of the current action are inadmissible. ([Evidence Code § 1370\(a\)\(3\)](#).) In [People v. Quitiquit](#), 155 Cal.App.4th 1, the court concluded this provision did not mean that any statement made within five years is admissible. (*Quitiquit*, at p. 9.) Instead, “at or near” denotes a time close to the infliction of the injury, usually within hours or days, and “absent special circumstances, a statement ... made almost two months after its infliction” does not qualify. (*Quitiquit* at p. 9–10.)

Warning

As is true with any other hearsay exception, the predicate facts must be proved independently of the state-

ment. In many situations, the only evidence of when the threat or assault occurred will be in the statement. This will prevent the proponent from proving that the statement is timely. One exception will arise when the statement is made to a law enforcement officer who views the injuries and is able to testify they appeared to result from a recently inflicted assault.

In addition the statement must be written, electronically recorded, or made to a law enforcement officer. ([Evidence Code § 1370\(a\)\(5\)](#).) Thus this provision admits written statements (for example, those in a diary), electronically recorded statements and will also permit a law enforcement officer to testify about statements made to the officer by a witness who is now reluctant to testify at trial, even if the pretrial statements would not qualify as spontaneous declarations. (Spontaneous statements are discussed in [§ 2:46](#).)

Comment

There is no requirement the declarant be the victim in the pending case. For example, if the defendant is charged with committing a physical assault on “A,” evidence of a hearsay statement by “B” that complies with the requirements of [Evidence Code § 1370](#) and is otherwise admissible can be introduced against him or her.

To be admissible the statement must be made under circumstances that indicate its trustworthiness. ([Evidence Code § 1370\(a\)\(4\)](#).) [Evidence Code § 1370\(b\)](#), sets out three circumstances that, among others, may be considered in determining trustworthiness:

- Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
- Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
- Whether the statement is corroborated by evidence other than the statements that are admissible only pursuant to this section.

A statement is admissible pursuant to this section only if the proponent provides the other side with sufficient notice. ([Evidence Code § 1370\(c\)](#).)

In a statement of intent included in the statute enacting [Evidence Code § 1370](#), the Legislature clarified that [§ 1370](#) does not “affect other evidentiary requirements, including, but not limited to, [Evidence Code §§ 351](#) and [352](#), shall not impair a party's right to attack the credibility of the declarant pursuant to Section 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.” In part this reminds us that, though [Evidence Code § 1370](#) may solve a hearsay problem, the evidence is still not admissible unless it is relevant ([Evidence Code § 351](#)), does not violate any special rule of exclusion (for example, those contained in §§ 1101 et seq. relating to predisposition evidence), and does not run afoul of [Evidence Code § 352](#).

In *People v. Hernandez*, the court upheld this hearsay exception against the contention that it denies due process because it provides no reciprocity. This hearsay expression does not expressly benefit only prosecutors

(compare *People v. Brodit*, 61 Cal. App. 4th 1312, 72 Cal. Rptr. 2d 154 (1st Dist. 1998)). *Hernandez* relied on *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1082, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (1991) to determine that due process is not violated even if a hearsay exception can be relied on only by prosecutors. (*People v. Hernandez*, 71 Cal. App. 4th 417, 423, 83 Cal. Rptr. 2d 747 (4th Dist. 1999).)

In 2004, the United States Supreme Court adopted a new Confrontation Clause analysis in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which is discussed beginning in § 2:111. In *People v. Pantoja*, 122 Cal. App. 4th 1, 13, 18 Cal. Rptr. 3d 492 (1st Dist. 2004), the court, in a murder case, rejected admission of a declaration by the victim filed in support of a domestic violence restraining order, finding it unreliable under § 1370, in part because the victim spoke little English and it was unclear if the victim understood the declaration when she signed it. In addition, the declaration was prepared in contemplation of litigation (obtaining the restraining order, as well as custody of the child of the victim and defendant and child support). (See *People v. Quitquit*, 155 Cal.App.4th 1, 11–12 (2007).)

Closely related to this hearsay exception, though analytically distinct, is the admissibility of statements by a victim expressing fear of the defendant, which precede the trial. These statements may or may not constitute hearsay, depending on whether or not they are admitted for the truth of the matter or some other purpose. If hearsay, the statements may be admitted under the exception for statements concerning the declarant's then-existing state of mind contained in *Evidence Code* § 1250(a). Statements of the victim's fear of the defendant are discussed in §§ 2:52 and 2:53.

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§ 2:110. Statements by elder and dependent adults who are victims of abuse**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 🔑 419**Legal Encyclopedias**[C.J.S., Criminal Law §§ 1156 to 1158, 1160 to 1164, 1166 to 1169, 1171 to 1173, 1175 to 1180, 1182 to 1185, 1187 to 1188, 1190 to 1198, 1200, 1203 to 1211, 1213, 1216 to 1218](#)

[Penal Code § 368](#) makes it a crime for a person to cause pain, suffering, or injury to an elder or dependent adult. In a prosecution for a violation of this section, evidence of a statement made by a declarant is not inadmissible hearsay if the declarant is unavailable (see the discussion of [Evidence Code § 240](#) in §§ 2:21 to 2:26) and certain conditions are met. ([Evidence Code § 1380\(a\)](#).) First, the proponent must show “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 determining if this showing has been made, “the court may consider only the circumstances which surround the making of the statement and that render the declarant particularly worthy of belief.” ([Evidence Code § 1380\(a\)\(1\)](#); [People v. Tatum](#), 108 Cal. App. 4th 288, 133 Cal. Rptr. 2d 267 (2d Dist. 2003) (Videotaped statement admissible because the circumstances surrounding the making of it suggest the declarant was unlikely to lie and a review of the videotape establishes declarant's competency and personal knowledge.)) Second, the entire statement must be on a videotape, made by a law enforcement official, prior to the death or disabling of the declarant. ([Evidence Code § 1380\(a\)\(3\)](#).) Third, the declarant must be: (1) the victim of the alleged violation ([Evidence Code § 1380\(a\)\(4\)](#)); (2) 65 years of age or older or a dependent adult when the violation occurred ([Evidence Code § 1380\(a\)\(6\)\(A\)](#)); and (3) at the time of the criminal proceeding, either dead or suffering from certain, listed infirmities of age ([Evidence Code § 1380\(a\)\(6\)\(B\)](#)). Finally, the statement must be supported by corroborative evidence. ([Evidence Code § 1380\(a\)\(5\)](#).) If there is evidence that the unavailability of the declarant was caused, aided, solicited, or procured on behalf of the proponent, the statement is inadmissible. ([Evidence Code §](#)

1380(a)(2).) [Section 1380\(b\)](#), sets forth a notice requirement for the prosecution if it intends to use the statement. Subdivision (c) provides that the court's determination of availability shall be made outside the presence of the jury and provides that if the defendant testifies at the hearing on a motion to introduce such a statement, this testimony shall not be admissible in any other proceeding.

Comment

No exception is provided for the exclusionary rule set forth in the statute to cover the situation where a defendant testifies at trial inconsistently with the testimony provided at the motion. On those occasions when case law has made statements of defendants inadmissible, it is common that such statements are admitted to impeach inconsistent testimony. (See the discussion in [§ 2:42](#).) Since this rule of exclusion is imposed by statute, it seems unlikely that an “impeachment” exception will be implied.

In [People v. Pirwani](#), 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (6th Dist. 2004) the court relied upon a concession from the Attorney General to hold that, under [Crawford v. Washington](#), 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), [§ 1380](#) is unconstitutional on its face. The elimination of this hearsay exception results from a misreading of *Crawford*. As *Pirawani* held, every statement admissible under [§ 1380](#) is “testimonial” under *Crawford*. (See the discussion of testimonial in [§ 2:114](#).) However, that does not mean admitting the statement violates the Confrontation Clause. In fact, if the declarant is legally unavailable at trial and the defendant had an opportunity to cross-examine the declarant on the prior statement, it is admissible. For example, if a declarant provides a statement under [§ 1380](#) and then testifies at the preliminary examination, *Crawford* would not bar admission of the statement at the trial if the declarant was legally unavailable. (See the discussion in [§ 2:111](#).) Unfortunately, if under *Pirawani* the prosecution may no longer rely on [§ 1380](#) as a hearsay exception, the statement will be excluded even if the requirements of the Confrontation Clause are met.

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§ 2:111. The Confrontation Clause

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑662

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[C.J.S., Criminal Law §§ 1514 to 1541](#)

The Confrontation Clause, contained in the 6th Amendment to the United States Constitution, provides, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” A criminal defendant is entitled to rely on this right to argue that an out-of-court statement offered by the prosecution at trial and admissible under a state hearsay exception should be excluded. This right is not available in juvenile dependency cases ([In re April C.](#), 131 Cal. App. 4th 599, 610–611, 31 Cal. Rptr. 3d 804 (2d Dist. 2005)), or civil commitments under the Sexually Violent Predator Act ([People v. Angulo](#), 129 Cal. App. 4th 1349, 1368, 30 Cal. Rptr. 3d 189 (4th Dist. 2005)) or probation violation hearings ([People v. Johnson](#), 121 Cal. App. 4th 1409, 1411, 18 Cal. Rptr. 3d 230 (1st Dist. 2004)). No court has yet ruled on whether the Confrontation Clause applies in juvenile delinquency proceedings. A statement may be challenged under the Confrontation Clause only if it is introduced for its truth. ([People v. Combs](#), 34 Cal. 4th 821, 842, 22 Cal. Rptr. 3d 61, 101 P.3d 1007 (2004), cert. denied, 545 U.S. 1107, 125 S. Ct. 2549, 162 L. Ed. 2d 281 (2005).) A videotaped interview of a victim of financial elder abuse was not testimonial to the extent it was introduced as evidence of the victim's mental state and not for its truth. ([People v. Cooper](#), 148 Cal. App. 4th 731, 744–745, 56 Cal. Rptr. 3d 6 (2d Dist. 2007).) Where the statement of a codefendant is redacted to delete any reference to another person, the statement contains no evidence against the defendant and does not implicate the Confrontation Clause. “The same redaction that ‘prevents Bruton error also serves to prevent *Crawford* error.’ [Citation.]” ([People v. Stevens](#), 41 Cal. 4th 182, 199, 59 Cal. Rptr. 3d 196, 158 P.3d 763 (2007).)

In [Ohio v. Roberts](#), 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), the federal Supreme Court set out a two-part admissibility test: Under the Confrontation Clause, the hearsay statement is admissible if the de-

clarant is legally unavailable and the statement has sufficient indicia of reliability. In [Crawford v. Washington](#), 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the High Court subjected the *Roberts* reliability analysis to withering criticism and fashioned a new standard. Relying on 17th Century English constitutional history, the court concluded that certain out-of-court statements, those resulting from the ex parte examination of witnesses by magistrates, had been a core concern of the drafters of the Confrontation Clause. As modern day examples of this core, the court cited pre-trial ex parte judicial examinations (like the Grand Jury) and police interrogations. *Crawford* referred to statements resulting from these techniques as “testimonial” statements ([Crawford](#), 124 S. Ct. at 1364) and barred them unless the declarant was available at trial and subject to cross-examination, or, if unavailable at trial, had been subject to an earlier cross-examination. ([Giles v. California](#), 128 S.Ct. 2678, 2682 (2008); [People v. Cage](#), 40 Cal. 4th 965, 978, fn. 7, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007) [When the declarant appears at trial and is subject to cross-examination, the Confrontation Clause places no constraints on the use of his prior statements.]])

The court broadly construed “subject to cross-examination.” ([Crawford](#), 124 S. Ct. at 1369, n.9; [People v. Price](#), 120 Cal. App. 4th 224, 238, 15 Cal. Rptr. 3d 229 (1st Dist. 2004).) “[T]he federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. (United States v. Owens, 484 U.S. 555, 559 ...)” ([People v. Carter](#), 36 Cal. 4th 1114, 1172, 32 Cal. Rptr. 3d 759, 117 P.3d 476 (2005), cert. denied, 547 U.S. 1099, 126 S. Ct. 1881, 164 L. Ed. 2d 570 (2006).) “When the requirements of [Evidence Code section 1291](#) [prior testimony] are met, ‘admitting former testimony in evidence does not violate a defendant’s right of confrontation under the federal Constitution ...’” ([People v. Wilson](#), 36 Cal. 4th 309, 340, 30 Cal. Rptr. 3d 513, 114 P.3d 758 (2005), cert. denied, 547 U.S. 1042, 126 S. Ct. 1617, 164 L. Ed. 2d 336 (2006)), even if “subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony” ([Wilson](#), 36 Cal. 4th at 343) and even if the defendant did not fully avail himself of the opportunity to conduct cross-examination at the earlier proceeding. ([Wilson](#), 36 Cal. 4th at 346.) However, when relying on cross-examination that occurred prior to trial, for example at a preliminary hearing, a defendant would seem to have an opportunity to effectively cross-examine a declarant regarding a statement made prior to the hearing only if the defendant became aware of the statement at or before the hearing. In [People v. Guess](#), 158 Cal. App. 4th 283, 292 (2007), the court held that defense counsel had had an adequate opportunity at the preliminary hearing to cross-examine a victim who subsequently failed to appear at trial. At the preliminary hearing the magistrate had denied a defense request to continue the hearing because defense “counsel declared that he had just ... received tapes of police interviews of three victims He would like the time to prepare a transcript, to identify the speakers, to review the police reports, and to interview the victims. [And at] the outset of the preliminary hearing, defense counsel orally announced that he was not ready to proceed.” ([People v. Guess](#), 158 Cal. App. 4th 283, 292 (2007).) In [People v. Angulo](#), 129 Cal. App. 4th 303, 322, 28 Cal. Rptr. 3d 483 (4th Dist. 2005), the court concluded that a statement provided in a prior Arkansas case by a victim of a sexual assault and introduced in the current case does not violate *Crawford* because the defendant had had the opportunity to cross-examine the declarant in the Arkansas prosecution, but had pled guilty and waived that right.

Following *Crawford*, simply because a statement is admissible under a firmly rooted hearsay exception will no longer automatically satisfy the Confrontation Clause. ([Crawford](#), 124 S. Ct. at 1370; see [U.S. v. Cromer](#), 389 F.3d 662, 679 (6th Cir. 2004).) Moreover, *Crawford* rejected any open-ended reliability exception that would admit a testimonial statement even though the defendant had never had an opportunity to cross-examine the declarant. However, dying declarations are an exception to the rule requiring cross-examination of testimonial state-

ments. (*Giles v. California*, 128 S.Ct. at 2682; *People v. Monterroso*, 34 Cal. 4th 743, 764–765, 22 Cal. Rptr. 3d 1, 101 P.3d 956 (2004), cert. denied, 546 U.S. 834, 126 S. Ct. 61, 163 L. Ed. 2d 89 (2005)). In addition, the United States Supreme Court recognized the continuing vitality of the doctrine of forfeiture by wrongdoing that could cost a defendant the right to raise a Confrontation Clause challenge. (*Crawford*, 124 S. Ct. at 1370.)

Note that an objection at trial that the admission of certain evidence violates the hearsay rule does not preserve a Confrontation Clause claim under *Crawford* for appeal. (Section 353; *People v. Chaney*, 148 Cal. App. 4th 772, 777–779, 56 Cal. Rptr. 3d 128 (4th Dist. 2007).)

Crawford left three major questions unresolved, each of which has been subsequently addressed. First, what, if any, Confrontation Clause limits apply to nontestimonial statements admitted under a state court hearsay exception? This question is addressed in § 2:112. Second, what acts by an accused will constitute a forfeiture of the right to confront? This is discussed in § 2:113. Finally, and most significantly, how broadly should we expand the definition of “testimonial statements” beyond the core examples provided? This question is addressed in §§ 2:114 to 2:121.

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§ 2:112. The Confrontation Clause—Constitutional limits on nontestimonial statements**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 662**Legal Encyclopedias**[C.J.S., Criminal Law §§ 1514 to 1541](#)

In [Davis v. Washington](#), 126 S. Ct. 2266, 165 L. Ed. 2d 224 (U.S. 2006), the Supreme Court concluded that the Confrontation Clause is inapplicable to nontestimonial statements. ([Davis](#), 165 L.Ed. 2d at 237; [People v. Cage](#), 40 Cal. 4th 965, 981, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007).) Though it would appear that the Due Process Clause requires that a criminal conviction be reliable ([Dutton v. Evans](#), 400 U.S. 74, 96–100, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (Harlan, J. concurring)), there is no reason to believe that such a requirement would resemble the *Roberts* reliability test. It would seem, in fact, that the reliability imposed by Due Process would rarely exclude evidence otherwise admissible under the Evidence Code.

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§ 2:113. The Confrontation Clause—Forfeiture by wrongdoing

California currently has a very narrow hearsay exception for statements admitted against criminal defendants, who knowingly cause, aid, or solicit the declarant's unavailability. ([Evidence Code § 1350](#), discussed in [§ 2:95](#) of this volume; [People v. Zambrano](#), 41 Cal.4th 1082, 1143–1147, 63 Cal.Rptr.3d 297, 163 P.3d 4 (2007).) [Federal Rules of Evidence](#), Rule 804(b)(6), denominated “Forfeiture by wrongdoing,” provides that a hearsay exception exists for “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” This rule codifies the forfeiture doctrine. ([Davis v. Washington](#), 547 U.S. 813, 833; 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); [Giles v. California](#), 128 S.Ct. 128 S.Ct. 2678, 2687.)

In [People v. Giles](#), 40 Cal.4th 833, 55 Cal.Rptr.3d 133, 152 P.3d 433 (2007), our Supreme Court concluded the wrongdoing need not be intended to procure the declarant's unavailability. In *Giles*, the defendant killed his former girlfriend. After a review of pertinent state and federal authority, *Giles* concluded forfeiture applied if the defendant's wrongful conduct effectively prevented cross-examination of the witness though no intent-to-silence element existed. ([People v. Giles](#), 40 Cal.4th 833, 849–850, 55 Cal.Rptr.3d 133, 152 P.3d 433 (2007).) *Giles* then approved the admission of the victim's statements to police regarding a prior act of domestic violence allegedly committed by the defendant. In [Giles v. California](#), 128 S. Ct. 2678, 2683–2688 (2008) the United States Supreme Court reversed, concluding that unconfrosted testimonial statements would not be admissible under the forfeiture doctrine without establishing the defendant intended to prevent the absent witness from testifying. [Giles v. California](#), 128 S.Ct. at p. 2693, contained the following comment about proving the requisite intent in domestic violence cases: “Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.”

Two questions remain open. First, how broadly should we interpret “acquiesced”? It is probably sufficient if a jailed defendant knows that a witness to his crime will be prevented from testifying and makes no attempt to stop it. But what if the defendant is being prosecuted for her role in a drug conspiracy and one goal of the conspiracy is to eliminate witnesses who cooperate with the government? In [U.S. v. Cherry](#), 217 F.3d 811, 820 (10th Cir. 2000), the court held that though the defendant was in jail and ignorant of the precise effort to eliminate the witness, if the killing was a natural and probable consequence of the conspiracy, the forfeiture doctrine applied.

Second, how broadly should we define “wrongdoing.” Citing federal precedent, the California Supreme Court concluded “the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act.” ([People v. Giles](#), 40 Cal.4th 833, 850, 55 Cal.Rptr.3d 133, 152 P.3d 433 (2007), rev’d on other grounds in [Giles v. California](#), 128 S. Ct. 2678 (2008).) “Wrongdoing” would seem to include threats of violence as well as violence itself. Furthermore, nonthreatening, cajoling conduct by a defendant directed at persuading a witness to refuse to testify in, for example, domestic violence and child abuse cases should constitute sufficient wrongdoing. (See [Penal Code § 136.1](#).) In *Crawford*, the testimonial statement was provided by the defendant’s spouse, who was unavailable at trial because the defendant exercised one of his marital privileges. (See the discussion in §§ 5:37 to 5:44 of this volume.) Though the United States Supreme Court did not address this, ([Crawford v. Washington](#), 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004)). The California Supreme Court’s decision in *Giles* seems to reject the proposition that invoking a statutory privilege constitutes wrongdoing.

The California Supreme Court concluded that the applicable standard of proof for forfeiture is proof by a preponderance of the evidence. ([People v. Giles](#), 40 Cal.4th 833, 852–853, 55 Cal.Rptr.3d 133, 152 P.3d 433 (2007), rev’d on other grounds in [Giles v. California](#), 128 S. Ct. 2678 (2008).)

Finally, the California Supreme Court observed “if a hearing on forfeiture is required, federal courts generally permit the prosecution to rely on the challenged hearsay evidence when proving forfeiture.” ([People v. Giles](#), 40 Cal.4th 833, 853, 55 Cal.Rptr.3d 133, 152 P.3d 433 (2007), rev’d on other grounds in [Giles v. California](#), 128 S. Ct. 2678 (2008).) The court then concluded, “a trial court cannot make a forfeiture finding based solely on the unavailable witness’s unchallenged testimony; there must be independent corroborative evidence that supports the forfeiture finding.” (at 854.) As the concurrence points out, the decision whether and to what extent the victim’s challenged statements may be used in finding wrongdoing was unnecessary given the available evidence independent of the victim’s statements. (at 855.) Furthermore, the majority’s conclusion rests on federal precedent without seeming to recognize one significant difference between the Federal Rules of Evidence and the California Evidence Code. [Federal Rules of Evidence, Rule 104\(a\)](#) (governing what we would call “402 hearings” in California) allows inadmissible evidence, including hearsay, though not privileged information, to be utilized to decide preliminary questions of admissibility. [Rule 104\(a\)](#) is, in fact, quite clear on this. Interestingly enough, the Advisory Committee’s Note to [Rule 104](#) discusses California law and points out that the California Law Revision Commission sought to adopt a similar rule (allowing inadmissible evidence to decide preliminary questions of admissibility) but that proposal was rejected. In California only admissible evidence can be utilized at 402 hearings.

In [People v. Parrish](#), 152 Cal.App.4th 263, 272, 273, 60 Cal.Rptr.3d 868 (2d Dist. 2007), the court relied on

the California Supreme Court's decision in *Giles* to rule that statements introduced by the prosecution under section 356 are generally not inadmissible under *Crawford*. “This is because, like forfeiture by wrongdoing, section 356 is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on Confrontation Clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood.”

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§ 2:114. The Confrontation Clause—Defining testimonial statements

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Crawford expressly refused to provide any definition for “testimonial,” beyond noting that the challenged statement in that case would be covered by any definition. ([Crawford](#), 124 S. Ct. at pp. 1365, n.4 and 1374, n. 10.) In *Crawford*, the defendant was charged with assault with a knife. His wife had been present at the time of the assault and was arrested, *Miranda*'d and interrogated by the police. At trial she was unavailable (because the defendant invoked one of the marital privileges) and the admission of the tape of her interrogation was successfully challenged on appeal.

In *Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (U.S. 2006), the United States Supreme Court has refined *Crawford*'s discussion of testimonial. In *People v. Cage*, 40 Cal. 4th 965, 984, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007), the California Supreme Court derived several basic principles from *Davis*. “First, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken primarily for the purpose ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined ‘objectively,’ considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is

to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.” *Cage* then applied these principles to deem testimonial a statement made by a nontestifying victim to a police officer more than one hour post-assault, at a hospital where the victim was awaiting treatment, where the objective facts showed the primary purpose of the conversation was to investigate a crime and not to facilitate emergency treatment or to “assess the situation.” ([People v. Cage](#), 40 Cal. 4th 965, 984–986, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007).) A post-*Crawford-Davis-Cage* examination of the types of out-of-court statements frequently introduced by prosecutors follows.

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§ 2:115. Responses to police questions—911 calls

Witnesses and victims provide responses to police questions in a variety of factual settings. In 911 calls, after an initial statement by the caller, the operator will commonly ask a series of questions. Those questions may reflect a script or protocol designed to elicit information helpful in alleviating an emergency and in prosecuting criminal acts. (*Davis*, 165 L. Ed. 2d at 234; *People v. Cortes*, 4 Misc. 3d 575, 781 N.Y.S.2d 401 (Sup 2004).) An officer dispatched to the scene may arrive during the 911 call or shortly thereafter. Or an officer might encounter an injured person while on patrol. (*State v. Alvarez*, 210 Ariz. 24, 107 P.3d 350, 355–356 (Ct. App. Div. 2 2005), opinion vacated in part on other grounds, 213 Ariz. 467, 143 P.3d 668 (Ct. App. Div. 2 2006).) These officers will ask their own questions in order to sort out whether a crime has occurred, control the scene, provide aid, and assist in a future prosecution. Or the officers may arrange for a post-crime interview at the police station.

In *Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (U.S. 2006), the United States Supreme Court addressed two common scenarios where prosecutors seek to introduce at trial statements by absent witnesses given in response to police questions: statements in 911 calls made in the midst of or immediately following a crime and statements to police officers who arrive at a crime scene soon after its occurrence. Without attempting to characterize all possible statements to the police, *Davis* held, “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 237 (U.S. 2006).) As to the latter, the court noted, “The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.” (*Davis*, 165 L. Ed. 2d at 240.)

As to 911 calls, the court ruled, “at least the initial interrogation conducted in connection with a 911 call is ordinarily not designed primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance.” (*Davis*, 165 L. Ed. 2d at 240.) In the first segment of the 911 call in *Davis*, the

caller described a current assault, not a past event: “He's here jumpin' on me again He's usin' his fists He's runnin now.” ([Davis v. Washington](#), 126 S. Ct. 2266, 165 L. Ed. 2d 224, 234 (U.S. 2006).) Moreover, unlike Mrs. Crawford, the *Davis* victim “as any reasonable listener would recognize ... was facing an ongoing emergency [Her call was] plainly a call for help against a bona fide physical threat ... [V]iewed objectively ... the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. This is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they were encountering a violent felon” ([Davis](#), 165 L. Ed. 2d at 240.)

Finally, the court pointed to the difference in the level of formality between the *Davis* and *Crawford* interviews. The *Davis* victim provided “frantic answers” over the phone in an unsafe environment. From all of this, the court deduced that in *Davis* the objective circumstances of the interrogation “indicate its primary purpose was to meet an ongoing emergency” not obtain a statement from a witness. ([Davis](#), 165 L. Ed. 2d at 240.) The court then confirmed that an interrogation begun to determine the need for emergency assistance may “evolve into testimonial statements” once the necessary information is obtained and the emergency apparently ends. ([Davis v. Washington](#), 126 S. Ct. 2266, 165 L. Ed. 2d 224, 241 (U.S. 2006).)

In [People v. Brenn](#), 152 Cal. App. 4th 166, 176–177, 60 Cal. Rptr. 3d 830 (4th Dist. 2007), the court found statements made by a victim during a 911 call were made during an ongoing emergency and nontestimonial, though the victim had left the scene of the assault, made the call from next door, and, during the call, stated that he wanted to “press charges.” In [People v. Saracoglu](#), 152 Cal. App. 4th 1584, 1597, 62 Cal. Rptr. 3d 418 (2d Dist. 2007), the court went significantly further and concluded that where the victim of an assault gives a statement to the police at the police station 30 minutes after the assault, the statement is nontestimonial because the victim was injured and upset. The court found the trip to the police station was the equivalent of a 911 call. The court found the statements were made at the police station during an ongoing emergency “because Saracoglu had threatened to kill [the victim] if she went to the police.” ([People v. Saracoglu](#), 152 Cal. App. 4th 1584, 1597, 62 Cal. Rptr. 3d 418 (2d Dist. 2007).) This decision seems to stretch beyond recognition the definition of testimonial provided in *Crawford*, *Davis* and *Cage*.

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In contrast, the United States Supreme Court found the statements in *Hammon* (a separate case also resolved in *Davis*) quite similar to the statements in *Crawford* and, therefore, testimonial. The police interview of Ms. Hammon at the scene of the domestic violence was, the court concluded, part of an investigation into “possibly past criminal activity.” (*Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 242 (U.S. 2006).) There was no emergency in progress, and the interrogation, though less formal than in *Crawford*, occurred in a separate room, away from her husband, “some time after the events described were over.” (*Davis*, 165 L. Ed. 2d at 242.) While rejecting the Indiana Supreme Court’s conclusion that “initial inquiries” at the crime scene are not testimonial, the Supreme Court clarified, “we do not hold the opposite—that no questions at the scene will yield nontestimonial answers ‘[o]fficers called to investigate [domestic violence] need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim’ Such exigencies may often mean that ‘initial inquiries’ produce nontestimonial statements.” (*Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 243 (U.S. 2006); *Com. v. Gonsalves*, 445 Mass. 1, 833 N.E.2d 549 (2005), cert. denied, 126 S. Ct. 2980, 165 L. Ed. 2d 990 (U.S. 2006) and cert. denied, 126 S. Ct. 2982, 165 L. Ed. 2d 989 (U.S. 2006) [Questions designed to secure a violent scene do not constitute an interrogation]; *People v. Johnson*, 150 Cal. App. 4th 1467, 1479, 59 Cal. Rptr. 3d 405 (6th Dist. 2007) [When police interrupt an ongoing emergency and obtain information from victim to assess situation, this information is not testimonial]; *People v. Chaney*, 148 Cal. App. 4th 772, 780, 56 Cal. Rptr. 3d 128 (4th Dist. 2007) [same]; *People v. Pedroza*, 147 Cal. App. 4th 784, 793–794, 54 Cal. Rptr. 3d 636 (2d Dist. 2007) [same]; see the discussion below in “Sorting out the scene.”)

Davis has clarified that in classifying a statement as testimonial “the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which *viewed objectively* are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.” (*People v. Cage*, 40 Cal. 4th 965, 984, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007).)

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§ 2:117. Responses to police questions—Sorting out the scene

It has long been recognized that police officers perform many duties “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” (*Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).) In the course of performing those duties they may ask questions of people who might, then, provide useful information regarding a crime. Should those statements be treated as testimonial? For example, assume an officer on patrol observes a car pulled off the road and a person in the driver seat, slumped over on the steering wheel. Though she lacks probable cause to believe a crime has occurred, the officer is entitled to check out the person's welfare. If the officer makes such an inquiry and the person responds that John Jones threatened him and fled the scene with his wallet, is that statement testimonial? Probably not because the question is not directed at investigating a crime. Even if the declarant reasonably anticipated that his statement would probably be used in the investigation of the robbery and assault, at the time the officer asked the question, a reasonable officer in these circumstances would not reasonably anticipate the response provided. Thus the statement should not be deemed testimonial. The same result should obtain if the officer is summoned to the scene but does not know if a crime has occurred at the time the officer questions a witness or victim. In *People v. Cooper*, 148 Cal. App. 4th 731, 56 Cal. Rptr. 3d 6 (2d Dist. 2007), the police were informed that an individual may have been the victim of elder abuse and went to her home to determine her “ability to provide for her basic needs and the adequacy and propriety of the care defendant was providing” (*People v. Cooper*, 148 Cal. App. 4th 731, 743, 56 Cal. Rptr. 3d 6 (2d Dist. 2007).) The part of the videotaped interview with the victim that sought to assess her mental capacity was deemed nontestimonial. (at 744.) A later stage of the interview that focused on the victim's relationship with the defendant and his involvement in her financial affairs “aimed at implicating him for elder abuse” and was testimonial. (*People v. Cooper*, 148 Cal. App. 4th 731, 744, 56 Cal. Rptr. 3d 6 (2d Dist. 2007).)

When officers arrive at a scene in the midst of an ongoing emergency, they may be entitled to ask questions to assess the nature of that emergency. Thus, in *People v. Johnson*, 150 Cal. App. 4th 1467, 59 Cal. Rptr. 3d 405 (6th Dist. 2007), an officer responded to a report of domestic violence and the defendant opened the door with blood on his hands and shirt. A woman was screaming in the rear of the residence and, upon contacting her, the officer observed she had been beaten. He asked, “What happened?” She responded the defendant had assaulted

her. The court recognized that the facts of the case were close to those in *Hammons*; the victim was in the protective presence of a police officer when she made the challenged statement. But it ruled the statement nontestimonial. At the time the officer asked his question, the officer did not know whether a crime had occurred. “The officer interrupted an ongoing emergency and obtained information from the victim in order to assess the situation.” (*People v. Johnson*, 150 Cal. App. 4th 1467, 1467, 59 Cal. Rptr. 3d 405 (6th Dist. 2007); *People v. Chaney*, 148 Cal. App. 4th 772, 56 Cal. Rptr. 3d 128 (4th Dist. 2007); *People v. Pedroza*, 147 Cal. App. 4th 784, 793–794, 54 Cal. Rptr. 3d 636 (2d Dist. 2007).)

However, courts will need to be vigilant to ensure that the “sorting out” exception does not impinge on the conclusion in *Davis* that the statement made by Ms. Hammon was testimonial. Simply because the officer is not certain of the precise crime committed or has not arrested a suspect does not establish that the statement is nontestimonial. If the questions are asked as part of an investigation into a past crime a reasonable officer believes has occurred, the responses are testimonial.

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In a footnote, *Davis* noted that the two statements in the cases before it were the products of interrogations. “This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.” (*Davis v. Washington*, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 237, (U.S. 2006).) This footnote seems directed at some of the academic commentary on the Confrontation Clause that followed *Crawford*. (Friedman, Adjusting to *Crawford*: High Court Decision Restores Confrontation Clause Protection, *Criminal Justice*, Summer 2004, pp. 5, 9.) To paraphrase, there was a concern that a narrow definition of testimonial requiring interrogation would encourage officers to simply ask one, open-ended question, “What happened?” and permit the crime victim's response to be introduced without any review under the Confrontation Clause. Alternatively, knowledgeable (or coached) alleged victims could appear at the police station and present a detailed statement of the crime to the officer on duty, and that statement would be admissible without this review. The *Davis* footnote discourages such behavior by clarifying that the absence of interrogation does not automatically immunize a statement from the Confrontation Clause.

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§ 2:119. Responses to police questions—Statements of co-conspirators and young children

If a co-conspirator makes statements in furtherance of the conspiracy (admissible under § 1223), they should not be labeled “testimonial,” even though the auditor is a “false friend,” i.e., an undercover officer or police informant. [Crawford](#), 541 U.S. at 58 favorably cites [Bourjaily v. U.S.](#), 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), where a statement to an undercover FBI agent was admitted over a Confrontation Clause challenge. In [U.S. v. Saget](#), 377 F.3d 223 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005), statements of one co-conspirator in furtherance of the conspiracy were tape recorded by a confidential informant and used against another defendant. Such statements were not testimonial.

The same result should occur when a perpetrator makes statements to a “true friend” who subsequently reports the information to the police. ([People v. Cervantes](#), 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (2d Dist. 2004); [People v. Rincon](#), 129 Cal. App. 4th 738, 28 Cal. Rptr. 3d 844 (2d Dist. 2005); [U.S. v. Lee](#), 374 F.3d 637, 643 (8th Cir. 2004), cert. denied, 545 U.S. 1141, 125 S. Ct. 2962, 162 L. Ed. 2d 892 (2005).)

Young children who are abuse victims or who witness a crime may not understand the concept of a criminal prosecution or the role their statements to police might play in one. Alternatively, the police might mask their involvement in taking such a statement. In either case, the child's ignorance resembles the co-conspirator's and suggests that any statement provided is not testimonial because the declarant is not aware he/she is talking to the police. (See [People v. Morgan](#), 125 Cal. App. 4th 935, 946–947, 23 Cal. Rptr. 3d 224 (3d Dist. 2005) [During search of home pursuant to a warrant, officer answers phone and caller asks to buy drugs. Though introduced for its truth, the statement is not testimonial because, among other reasons, it was made “unknowingly” to the police].)

In [People v. Sisavath](#), 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 (5th Dist. 2004), however, the court applied a different analysis. The court considered the videotaped statement of a very young child abuse victim made to a trained interviewer employed by the county's Multi-disciplinary Interview Center, a facility designed to interview suspected child abuse victims. A prosecutor and an investigator from the District Attorney's office attended the interview that was conducted after the filing of the information. In evaluating the reasonable belief

of the declarant, the court looked at it from the perspective of an outside neutral observer: Would an objective observer “reasonably expect the statement to be available for use in a prosecution?” ([People v. Sisavath](#), 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 (5th Dist. 2004).) The *Sisavath* test depends upon a reasonable person with a greater ability to appreciate the significance of the facts regarding the interview evident to the child-declarant. That is, if the circumstances surrounding the taking of the statement would lead a reasonable adult to conclude that the statement would assist in a criminal prosecution, then the statement by the child is testimonial.

Sisavath was decided before *Davis* refined *Crawford*, which had focused on the reasonable expectation of the individual questioned. *Davis* treated the purpose of the police questioning as more important, and, in the factual context of *Sisavath*, that purpose seems clear. However, to the extent the objective circumstances suggest a child does not know he or she is talking to the police, it is submitted that the “ignorant” child’s statements are analogous to the statements made by “ignorant” participants in the crime and should be deemed nontestimonial.

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§ 2:120. Statements to civilians

Should only statements to prosecution authorities be testimonial? The logic of the Confrontation Clause does not seem to limit its reach to statements taken by police officers. Unlike certain rights provided in the Bill of Rights, the forbidden act is not obtaining the evidence (the testimonial statement) but introducing the evidence against a defendant who has not had an opportunity to cross-examine the declarant. However, to the extent that we are trying to discern the declarant's state of mind, the choice to discuss a crime with a police officer rather than a neighbor is not insignificant. A statement by a victim of domestic violence to the police two days after the crime seems more likely to reflect an awareness of the future use of the statement in a criminal proceeding than the same statement given at the same time to the victim's friend. In [People v. Griffin](#), 33 Cal. 4th 536, 579, 15 Cal. Rptr. 3d 743, 93 P.3d 344 (2004), the California Supreme Court considered a statement made by the murder victim to a friend at school shortly before the homicide, in which she expressed concern that the defendant would attempt to molest her later that day, when she returned home. The court held that the statement was not testimonial because the auditor was a friend. (See [Giles v. California](#), 128 S. Ct. 2678, 2692–2693 (2008): “Statements to friends and neighbors about [domestic] abuse and violence” are not testimonial and are barred only, if at all, by state hearsay rules.) But, what if the declarant had also directed her friend to relay the declarant's concerns to the police if anything happened to her? It may well be that the courts should treat a statement to a civilian as testimonial when it is accompanied by a direction to the auditor to deliver the message to the police. On the other hand, to the extent the main inquiry is the purpose behind questioning, questions asked by civilians not working in conjunction with the police are far less likely to be asked for the primary purpose of proving facts for possible use in a criminal trial.

The status of the auditor comes into play in one other common situation, when the crime victim gives a statement to a medical professional soon after commission of the crime. Assume that a medical technician arrives in response to a 911 call and the victim gives a statement, or that the victim goes to the emergency room and gives a statement to the doctor. If we assume that, under the circumstances, the statement would be considered testimonial if given to a police officer, should that designation change if the statement is given to a medical professional? The answer seems to depend upon whether the questions asked by the doctor are related to the treatment to be provided. In [People v. Cage](#), 40 Cal. 4th 965, 986–988, 56 Cal. Rptr. 3d 789, 155 P.3d 205

(2007), the court concluded that a statement by an assault victim to a treating physician more than one hour after the crime was not testimonial. The victim responded to the doctor's question, "What happened?" and the doctor testified his sole object in asking the question was to learn "the exact nature of the wound, and thus the correct mode of treatment." (*People v. Cage*, 40 Cal. 4th 965, 986, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007).) Furthermore, there was no evidence the doctor was acting in conjunction with law enforcement, or that he had any evidence-gathering aim or made an effort to record or memorialize the victim's statement for later legal use. (at page 987.) That the doctor was a mandated reporter (*Penal Code sections 1164, et seq.*, 11657, subd (a)(21)) did not require a finding that the statements to him were testimonial. (*People v. Cage*, 40 Cal. 4th 965, 988, 56 Cal. Rptr. 3d 789, 155 P.3d 205 (2007).)

However, if the medical professional elicits information about the crime unrelated to treatment, that portion of the statement might be considered testimonial. (*In re T.T.*, 351 Ill. App. 3d 976, 287 Ill. Dec. 145, 815 N.E.2d 789, 804 (1st Dist. 2004).)

In *Davis*, the Supreme Court left open the question "whether and when statements to someone other than law enforcement personnel are 'testimonial.'" (*Davis*, 165 L.Ed.2d at 238, fn.2.) In its discussion, it noted, however, "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." (*Davis*, 165 L. Ed. 2d at 238, fn.2.) In *People v. Geier*, 41 Cal. 4th 555, 605, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007), the California Supreme Court limited testimonial statements to those made to a law enforcement officer, including those in an agency relationship with law enforcement and applied this rule to include members of a private company (Cellmark) "paid to do work as part of a government investigation." Even civilians who are not paid by the government may become law enforcement agents if the prosecution authorities have provided training to that individual on questioning victims and witnesses. Another important factor may be whether the "civilian" consciously sets out to obtain statements from victims to provide them to prosecution authorities. Victim advocacy groups, for example, might be encouraged to engage in such practices if it became clear that, so long as the advocates were not trained by the police, the statements provided by the victims could be introduced at trial without regard for the Confrontation Clause.

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2. Hearsay Evidence

B. Hearsay Exceptions

§ 2:121. Statements by the government

Such statements can arise in at least two different contexts. First, in the course of taping statements by unwitting declarants, a confidential informant (or undercover officer) may make statements. The statements by the police agent are not testimonial if they are not introduced for their truth. That is, they may be introduced to provide “context” for the statements of the co-conspirators (*U.S. v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005)) or “to supply meaning to defendant's conduct or silence in the face of the [declarant's] accusatory statements.” (See *People v. Combs*, 34 Cal. 4th 821, 842, 22 Cal. Rptr. 3d 61, 101 P.3d 1007 (2004), cert. denied, 545 U.S. 1107, 125 S. Ct. 2549, 162 L. Ed. 2d 281 (2005).)

A more difficult question arises in regard to statements in reports prepared by government employees or independent organizations hired by the government. Criminalist reports, autopsies and DNA comparisons are common examples. In *Crawford*, the court noted that business records are not “by their nature ... testimonial.” (*Crawford*, 541 U.S. at 56.) As the court in *People v. Mitchell*, 131 Cal. App. 4th 1210, 1221, 32 Cal. Rptr. 3d 613 (2d Dist. 2005) cautioned, the Supreme Court, by its statement that business records are not testimonial, “could not have meant all documentary evidence which could broadly qualify in some context as a business record should automatically be considered non-testimonial.” *Mitchell* then set out a sampling of cases in this area to demonstrate the lack of consensus on how government reports should be treated.

In *People v. Geier*, 41 Cal. 4th 555, 593–607, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007), the Supreme Court permitted a DNA expert to testify that based on her review of the notes prepared by another, nontestifying expert, the DNA extraction was conducted according to protocol. Based on the genetic profiles extracted, the expert testified the DNA extracted from the vaginal swabs of the rape-murder victim matched the defendant's. After reviewing numerous California and out-of-state cases, the Supreme Court concluded that, as to DNA reports, “a statement is testimonial if (1) it is made to a law enforcement officer (including those in an agency relationship to law enforcement) and (2) describes a past fact related to criminal activity for (3) potential use at trial. (*People v. Geier*, 41 Cal. 4th 555, 605, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007).) Because the notes of the nontestifying expert “constitute a contemporaneous recollection of observable events rather than the documentation of past events” they were nontestimonial. (*People v. Geier*, 41 Cal. 4th 555, 605, 61 Cal. Rptr. 3d 580, 161

P.3d 104 (2007).) *Geier* went on to point out that these notes were generated as part of a standardized scientific protocol, recounting the procedures used to analyze the samples and were not made in order to incriminate the defendant. Further, the accusatory opinions that the defendant's DNA matched and the unlikelihood of this result if the defendant was not the donor were “reached and conveyed” by the testifying witness. (*People v. Geier*, 41 Cal. 4th 555, 607, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (2007).) The United States Supreme Court has issued a writ of certiorari to consider whether a forensic analyst's laboratory report is testimonial under *Crawford*. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008).

In applying the ban on police reports in criminal cases contained in *Federal Rule of Evidence, Rule 803(8)*, the federal courts prior to *Crawford* recognized a distinction that is not inconsistent with the *Geier* analysis. Nonevaluative, routine records of simple objective facts not made in highly adversarial conditions are considered to be outside the purpose of the exclusion contained in *Rule 803(8)*. (Compare *U.S. v. Oates*, 560 F.2d 45 (2d Cir. 1977) [excluding the official report and accompanying worksheet of a chemist analyzing the substance seized from the defendant as heroin] with *U.S. v. Grady*, 544 F.2d 598 (2d Cir. 1976) [admitting Irish police reports simply listing serial numbers of semiautomatic weapons seized in Northern Ireland.]) Certain post-*Crawford* decisions have seemed to utilize a similar approach in deciding which records are testimonial. (*U.S. v. Bahena-Cardenas*, 411 F.3d 1067, 1074–1075 (9th Cir. 2005), cert. denied, 547 U.S. 1056, 126 S. Ct. 1652, 164 L. Ed. 2d 398 (2006) [warrant of deportation is “routine, objective cataloguing of unambiguous factual matter” and therefore nontestimonial]; *U.S. v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005), cert. denied, 547 U.S. 1114, 126 S. Ct. 1911, 164 L. Ed. 2d 668 (2006) [certificate of non-existence of record of Attorney General's consent to return to the country following a deportation is nontestimonial]; *People v. Saffold*, 127 Cal. App. 4th 979, 26 Cal. Rptr. 3d 190 (2d Dist. 2005) [proofs of service found nontestimonial]; and *People v. Taulton*, 129 Cal. App. 4th 1218, 29 Cal. Rptr. 3d 203 (4th Dist. 2005) [records of conviction prepared under Penal Code § 969b found nontestimonial].)

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A. Competency Of Witness

§ 3:1. Burden of proving disqualification; statutory grounds

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [35](#), [78](#), [39](#)

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 584](#)

[C.J.S., Witnesses §§ 87 to 88, 90, 92, 108 to 115](#)

Generally, every person, regardless of age, is competent to testify. The party challenging competency bears the burden of proving disqualification. ([People v. Dennis](#), 17 Cal. 4th 468, 525, 71 Cal. Rptr. 2d 680, 950 P.2d 1035 (1998); [People v. Mincey](#), 2 Cal. 4th 408, 444, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (1992).) A witness's competence to testify must be challenged at trial. ([People v. Lewis](#), 26 Cal. 4th 334, 360, 110 Cal. Rptr. 2d 272, 28 P.3d 34 (2001).) A failure to do so waives the right to appeal on this issue. ([People v. Augustin](#), 112 Cal. App. 4th 444, 447, 5 Cal. Rptr. 3d 171 (4th Dist. 2003).) In one case, the prosecution was permitted to call the victim, who had serious physical and mental infirmities resulting from the crime charged. The victim was a quadriplegic, with impaired reasoning functions, who was unable to speak. He could communicate by tapping for a yes or no answer, which limited the type of questions that could be asked on cross-examination. The defendant had objected that the victim was incompetent, that his right to cross-examine was abridged and that the probative value of the evidence was outweighed by the prejudicial impact of the jury seeing the witness on a gurney “with his gross physical abnormalities.” The Court of Appeal found that each of these objections was properly overruled. ([People v. Tran](#), 47 Cal. App. 4th 759, 765–771, 54 Cal. Rptr. 2d 905 (6th Dist. 1996).)

Witness disqualification must be based on a statute; no non-statutory grounds for disqualification can be applied. ([Evidence Code § 700](#).)

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A. Competency Of Witness

§ 3:2. Witness must be able to be understood

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  35, 39

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 584](#)

[C.J.S., Witnesses §§ 87 to 88, 90, 92, 108 to 115](#)

To be competent, a witness must be capable of expressing himself or herself so as to be understood. ([Evidence Code § 701\(a\)\(1\)](#).) The witness's ability to communicate is for the trial court to decide. As an example of the latitude given, one court found a witness competent although he could communicate only by tapping for a “yes” or “no” answer. ([People v. Tran](#), 47 Cal. App. 4th 759, 54 Cal. Rptr. 2d 905 (6th Dist. 1996); see also [Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn.](#), 136 Cal. App. 3d 387, 395, 186 Cal. Rptr. 218 (5th Dist. 1982).)

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A. Competency Of Witness

§ 3:3. Witness must understand duty to tell truth

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  45

Legal Encyclopedias

[C.J.S., Witnesses §§ 102 to 105, 136 to 139](#)

To be competent, a witness must understand the duty to tell the truth. ([Evidence Code § 701\(a\)\(2\)](#).) In determining if a witness understands the duty to testify truthfully, it is unnecessary that the witness entertain a religious belief or have a detailed knowledge of the oath. It is sufficient if the witness understands “that some earthly evil will befall if the truth is not disclosed.” When one witness repeatedly stated that he did not know the difference between the truth and a lie, the court's finding of incompetency was upheld. (*In re Crystal J.*, 218 Cal. App. 3d 596, 601, 267 Cal. Rptr. 105 (2d Dist. 1990).)

Simply because a young witness has fantasies and discusses them on the witness stand does not disqualify the witness from testifying. In one case, a 12-year-old sexual assault victim described her father's assaults in great detail. She also testified that she had been told by her pet that her mother was telling lies about her and that she had seen blood run from the bathtub faucet. An expert testified that such fantasies are not uncommon with sexual assault victims and did not indicate a thought disorder. The trial court's decision to permit the testimony was upheld. (*In re Amy M.*, 232 Cal. App. 3d 849, 857–859, 283 Cal. Rptr. 788 (6th Dist. 1991); see also *People v. Blagg*, 10 Cal. App. 3d 1035, 1039, 89 Cal. Rptr. 446 (2d Dist. 1970).) On the other hand, a witness who suffers from chronic organic brain syndrome and dementia, has difficulty with immediate recall and short-term memory, hallucinates, experiences confusion and confabulates (in which the person makes up a story when memory fails) is incapable of understanding the duty to tell the truth and incompetent to testify under [§ 701](#). (*Stanchfield v. Hamer Toyota, Inc.*, 37 Cal. App. 4th 1495, 1506–1507, 44 Cal. Rptr. 2d 565 (2d Dist. 1995).)

Counsel often view age and credibility as competency factors. In fact, in determining the witness's compet-

ency, age is not a factor. ([Evidence Code § 700](#).) Moreover, that a witness is very young is insufficient to justify requiring corroboration of that witness's testimony. ([People v. Harlan](#), 222 Cal. App. 3d 439, 454, 271 Cal. Rptr. 653 (4th Dist. 1990).) In addition, in determining competency, credibility is not a factor. ([People v. Avila](#), 38 Cal. 4th 491, 589–590, 43 Cal. Rptr. 3d 1, 133 P.3d 1076 (2006).) Indications of emotional instability of a witness and bias against the defendant do not constitute incompetency. They are to be treated as credibility factors to be resolved by the jury. ([People v. Hall](#), 157 Cal. App. 3d 538, 223 Cal. Rptr. 267 (1984).) The fact that a very young witness makes inconsistent or exaggerated statements does not violate the competency standards set forth in [§ 701](#). The witness's competency depends on the [§ 701](#) factors alone; questions of credibility are for the trier of fact. ([Adamson v. Department of Social Services](#), 207 Cal. App. 3d 14, 20, 254 Cal. Rptr. 667 (1st Dist. 1988); see [People v. Zambrano](#), 41 Cal.4th 1082, 1137–1141 (2007).)

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A. Competency Of Witness

§ 3:4. Witness must have personal knowledge

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West's Key Number Digest, [Witnesses](#) 🔑37

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[C.J.S., Witnesses §§ 93 to 101](#)

To testify about a matter, a witness must have personal knowledge of it. ([Evidence Code § 702\(a\)](#).) This places limits on the witness's right to testify on any particular matter; it is not a condition for competency to be a witness. As noted in the California Law Revision Comment to [Evidence Code § 701](#): “[Section 701](#) requires the court to determine only the prospective witness's capacity to communicate and understanding of the duty to tell the truth. The missing qualifications—the capacity to perceive and to recollect—are determined in a different manner. Because a witness, qualified under [§ 701](#), must have personal knowledge of the facts to which he testifies ([Section 702](#)) he must, of course, have the capacity to perceive and recollect those facts. But the court may exclude the testimony of a witness for lack of personal knowledge only if no jury could reasonably find that he has such knowledge. Thus the Evidence Code has made the person's capacity to perceive and to recollect a condition for the admission of his testimony concerning a particular matter instead of a condition for his competency to be a witness. And, under the Evidence Code, if there is evidence a witness has those capacities, the determination whether he in fact perceived and does recollect is left to the trier of fact.” In *People v. Anderson*, a witness to an uncharged homicide, introduced against the defendant in a capital case, testified that her son was present during the crime. In fact, this child was a figment of her imagination. The witness admitted that she “remembered many events through dreams and believed the defendant could communicate with her by telepathy.” Despite this, the court found many factors from which a rational jury could conclude the witness accurately described the circumstances of the uncharged murder and approved the admission of her testimony. (*People v. Anderson*, 25 Cal. 4th 543, 570–575, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (2001).) (See also *People v. Lewis*, 26 Cal. 4th 334, 353–360, 110 Cal. Rptr. 2d 272, 28 P.3d 34 (2001). *People v. Dennis*, 17 Cal. 4th 468,

525–526, 71 Cal. Rptr. 2d 680, 950 P.2d 1035 (1998).)

In a murder trial, a tape was admitted against the defendant, without objection, that included a statement by the interrogating detective that the judge who signed the arrest warrant was convinced that the defendant killed the victim. In addition, the tape contained a statement by the detective that “we knew we had a murderer on our hands.” Each of these statements was inadmissible under [Evidence Code § 702\(a\)](#), because each contained information that was beyond the personal knowledge of the declarant. Counsel’s failure to object was evidence of incompetence and required a reversal. (*In re Cordero*, 46 Cal. 3d 161, 188, 249 Cal. Rptr. 342, 756 P.2d 1370 (1988).)

In addition, if mental illness deprives a witness of the ability to perceive, recollect, or communicate, personal knowledge under [Evidence Code § 702](#) does not exist. (*People v. St. Andrew*, 101 Cal. App. 3d 450, 458, 161 Cal. Rptr. 634 (1st Dist. 1980).)

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§ 3:5. Special rules on competency—Judges' testimony or declarations

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West's Key Number Digest, [Witnesses](#)  68, 71

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[C.J.S., Witnesses §§ 191 to 198](#)

A judge presiding at a trial may not testify at the trial over the objection of any party. ([Evidence Code § 703.](#))

With certain limitations, a judge, arbitrator, or mediator presiding at any proceeding is not competent to testify or present a declaration at a subsequent civil proceeding as to certain acts occurring at the original proceeding. ([Evidence Code § 703.5](#); [Zatkin v. Cesare](#), 199 Cal. App. 3d 756, 759–760, 245 Cal. Rptr. 222 (2d Dist. 1988).) One Court of Appeal reversed a trial judge's decision to relieve appointed counsel under [People v. Marsden](#), 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970). It rejected a declaration filed by the judge in the writ proceeding, finding it violated [Evidence Code § 703.5](#). Even though the underlying case was a criminal prosecution, the writ proceeding was civil in nature, triggering the application of the Evidence Code provision. ([Ng v. Superior Court](#), 52 Cal. App. 4th 1010, 61 Cal. Rptr. 2d 49 (4th Dist. 1997).) A court may consider a declaration from an arbitrator when the arbitrator is challenged for bias. ([Cobler v. Stanley, Barber, Southard, Brown & Associates](#), 217 Cal. App. 3d 518, 265 Cal. Rptr. 868 (4th Dist. 1990).)

Judges may testify about other official acts performed, for example, the decision to sign a search warrant. ([People v. Koch](#), 209 Cal. App. 3d 770, 778, 209 Cal. App. 3d 1345a, 257 Cal. Rptr. 483 (3d Dist. 1989). Compare [People v. Wilson](#), 182 Cal. App. 3d 742, 753, 227 Cal. Rptr. 528 (6th Dist. 1986).)

In addition, in [Rinaker v. Superior Court](#), 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (3d Dist. 1998), the appellate court reviewed a juvenile adjudication for vandalism. The charged youths and the victim had participated

in an earlier mediation to try to resolve a civil case arising from the same incident. The juvenile court judge had relied on [§ 703.5](#) to deny the minors' request that the mediators testify at the hearing to impeach the victim's trial testimony with a statement made by the victim during the mediation admitting he had not seen the rock throwers. The adjudication was reversed based on the youths' right to confront and cross-examine prosecution witnesses. (*Rinaker*, 62 Cal. App. 4th at 161–167.)

A retired judge served on an insurance company's employment termination review panel, constituted pursuant to an employment contract. The review board process was voluntary and the board could not render a final and binding decision. Thus, the process was not an arbitration or a mediation or a quasi-judicial proceeding and the retired judge could not rely on [§ 703.5](#) or [1119](#) to avoid being deposed by a terminated employee. (*Saeta v. Superior Court*, 117 Cal. App. 4th 261, 11 Cal. Rptr. 3d 610 (2d Dist. 2004).)

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A. Competency Of Witness

§ 3:6. Special rules on competency—Losing party to arbitration

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West's Key Number Digest, [Witnesses](#)  74

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[C.J.S., Witnesses §§ 194 to 196, 198](#)

The losing party to an arbitration may not conduct an inquiry into the arbitrator's thought processes in a subsequent civil proceeding. ([Evidence Code § 703.5](#); [Ferguson v. Writers Guild of America](#), 226 Cal. App. 3d 1382, 1391, 277 Cal. Rptr. 450 (2d Dist. 1991).)

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§ 3:7. Special rules on competency—Impaneled juror

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West's Key Number Digest, [Witnesses](#)  68, 73

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[C.J.S., Witnesses §§ 191 to 199](#)

A juror impaneled in a trial may not testify in the same proceeding over the objection of any party. ([Evidence Code § 704.](#))

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§ 3:8. Timing of competency challenge

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  75 to 79

Legal Encyclopedias

[C.J.S., Witnesses §§ 87 to 101, 122 to 135, 140 to 141, 143 to 146, 174 to 175](#)

In a jury trial, an opponent of the evidence should move under [Evidence Code § 403](#) for a ruling that the witness is incompetent. This may be done at the time the witness testifies or prior thereto. In any proceeding conducted without a jury, the court may reserve challenges to the competency of a witness until the end of direct examination. ([Evidence Code § 701\(b\)](#).) In a juvenile dependency hearing conducted without a jury, the trial judge was permitted to reserve its ruling on a minor witness's competency until after cross-examination. ([In re Amy M.](#), 232 Cal. App. 3d 849, 857, 283 Cal. Rptr. 788 (6th Dist. 1991).) If a timely objection is made that a witness lacks personal knowledge, the court may not receive the testimony subject to later proof of personal knowledge. ([Evidence Code § 403\(a\)\(2\)](#); [Evidence Code § 702](#), Comment.)

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A. Competency Of Witness

§ 3:9. Oath required

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑227

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[C.J.S., Witnesses § 394](#)

Before testifying, every witness shall take an oath or make an affirmation or declaration in the form required by law, except a child under the age of 10 or a dependent person with a substantial cognitive impairment, who may be required simply to tell the truth. ([Evidence Code § 710](#).) The requirement of an oath is constitutionally based. ([California v. Green](#), 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).) However, if no objection is lodged, it is deemed waived. ([In re Katrina L.](#), 200 Cal. App. 3d 1288, 1299, 247 Cal. Rptr. 754 (1st Dist. 1988).)

In *People v. Mincey*, the California Supreme Court upheld a competency finding for a five-year-old witness. In determining competency, the judge on voir dire asked the witness if she knew the difference between telling the truth and lying, and whether she would tell the truth in responding to questions. The witness answered yes to both questions and also answered yes when asked whether it would be a lie if the judge said his robe was white. ([People v. Mincey](#), 2 Cal. 4th 408, 443, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (1992).)

At a sentencing hearing, victims are entitled to appear and express views concerning the crime and the defendant without being sworn. ([People v. Birmingham](#), 217 Cal. App. 3d 180, 184, 265 Cal. Rptr. 780 (4th Dist. 1990); see the discussion in [§ 2:100](#).)

Where a mentally retarded sexual assault victim was shown to the jury by the prosecution as “an exhibit, demonstrative evidence” of her inability to consent, no testimony was given, so no oath had to be administered. ([People v. Morgan](#), 191 Cal. App. 3d 29, 236 Cal. Rptr. 186 (5th Dist. 1987).)

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§ 3:10. Confrontation required**West's Key Number Digest**

West's Key Number Digest, [Criminal Law](#) 🔑662

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[C.J.S., Criminal Law §§ 1514 to 1541](#)

“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.” ([Evidence Code § 711](#).) Notwithstanding [Evidence Code § 711](#), at a criminal trial, evidence of the technique used in taking blood samples may be given by affidavit provided the affidavit has been given to the other parties no less than 10 days before trial and no party objects to its use. ([Evidence Code § 712](#).)

The confrontation clause of the United States Constitution guarantees a criminal defendant a face-to-face meeting with witnesses appearing before the trier of fact. ([Coy v. Iowa](#), 487 U.S. 1012, 1016, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).) However, when the trial court makes an individualized finding that the witness will suffer serious emotional distress from this confrontation, it need not occur. ([Maryland v. Craig](#), 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (approving the use of one-way closed-circuit television); [People v. Williams](#), 102 Cal. App. 4th 995, 1006–1009, 125 Cal. Rptr. 2d 884 (2d Dist. 2002), (approving use of videotaped direct and cross-examination of an adult witness).) In limited circumstances, California provides for contemporaneous examination and cross-examination of young sexual assault victims who are outside the courtroom through the use of closed-circuit television. ([Penal Code § 1347](#).) For discussion of the relationship between the hearsay rule and the confrontation clause, see [§ 2:41](#).

The right to confront and cross-examine witnesses is a trial right that is unavailable at the preliminary examination in a felony matter. ([Whitman v. Superior Court](#), 54 Cal. 3d 1063, 1076–1082, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (1991).)

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B. Examination Of Witnesses

§ 3:11. Interpreters in criminal cases—In general

West's Key Number Digest

West's Key Number Digest, [Courts](#) 🔑56

West's Key Number Digest, [Witnesses](#) 🔑230

West's Key Number Digest, [Criminal Law](#) 🔑642

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[C.J.S., Courts § 110](#)

[C.J.S., Criminal Law §§ 1563 to 1564](#)

[C.J.S., Witnesses § 399](#)

A criminal defendant who is unable to understand English has a constitutional right to an interpreter. ([California Const., Art. I, § 14](#).) In proceedings in which evidence is received and there are multiple non—English-speaking defendants, each one is entitled to a separate interpreter. ([People v. Rodriguez](#), 42 Cal. 3d 1005, 232 Cal. Rptr. 132, 728 P.2d 202 (1986).) The defense has the burden of alerting the court to this need. ([People v. Carreon](#), 151 Cal. App. 3d 559, 573, 198 Cal. Rptr. 843 (5th Dist. 1984).) However, the mere statement by the defendant that an interpreter was required is not conclusive. ([In re Raymundo B.](#), 203 Cal. App. 3d 1447, 250 Cal. Rptr. 812 (5th Dist. 1988).) The defendant can waive the right to an interpreter if the record shows an intelligent and voluntary waiver assisted by an interpreter. ([People v. Aguilar](#), 35 Cal. 3d 785, 794, 200 Cal. Rptr. 908, 677 P.2d 1198 (1984).)

When a criminal suspect makes an otherwise admissible statement to police through an interpreter, the hearsay rule does not bar a percipient witness other than the interpreter from testifying to the content of the statement. ([People v. Torres](#), 213 Cal. App. 3d 1248, 262 Cal. Rptr. 323 (3d Dist. 1989).) “Rather, a generally unbiased and adequately skilled translator simply serves as a ‘language conduit,’ so that the translated statement

is considered to be the statement of the original declarant, and not that of the translator.” (*Correa v. Superior Court*, 27 Cal. 4th 444, 448, 117 Cal. Rptr. 2d 27, 40 P.3d 739 (2002).)

Court interpreters in most languages must be certified. (*Government Code § 68562*.) However, use of a competent though noncertified interpreter will not result in reversible error. (*People v. Estrada*, 176 Cal. App. 3d 410, 221 Cal. Rptr. 922 (2d Dist. 1986).)

An interpreter obtained for a defendant or a witness shall take an oath to make a true interpretation to the witness in a language that the witness understands and to 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. (*Evidence Code § 751(a)*.) A typical oath provides as follows:

Do you solemnly swear that you will well and truly interpret from English to [foreign language] and from [foreign language] to English all the testimony, matters, and proceedings given and had in the case now pending before this court, so help you God?

An interpreter regularly employed by the court and properly certified may file an oath as prescribed by *Evidence Code § 751* with the clerk of the court. The filed oath shall serve for all subsequent court proceedings until the appointment is revoked by the court. (*Evidence Code § 751(d)*.)

If an interpreter is required, a bilingual attorney cannot perform this role. (*People v. Chavez*, 124 Cal. App. 3d 215, 226–227, 177 Cal. Rptr. 306 (1st Dist. 1981).)

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SIMCAEVID § 3:11

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§ 3:12. Interpreters in criminal cases—When witness is incapable of understanding English

West's Key Number Digest

West's Key Number Digest, [Courts](#) 🔑56

West's Key Number Digest, [Witnesses](#) 🔑230

West's Key Number Digest, [Criminal Law](#) 🔑642

Legal Encyclopedias

[C.J.S., Courts § 110](#)

[C.J.S., Criminal Law §§ 1563 to 1564](#)

[C.J.S., Witnesses § 399](#)

[Evidence Code § 752](#) provides that when a witness is incapable of understanding English or expressing himself or herself in English so as to be understood directly by counsel, court, and jury, an interpreter shall be provided and compensated as provided in [Evidence Code §§ 730 et seq.](#) In proceedings in which a witness and a defendant are both non-English-speaking, separate interpreters for each must be obtained. ([People v. Menchaca](#), 146 Cal. App. 3d 1019, 194 Cal. Rptr. 691 (2d Dist. 1983).) However, an English-speaking criminal defendant is not entitled to his or her own interpreter to understand better the testimony of a non-English-speaking witness. ([People v. Aranda](#), 186 Cal. App. 3d 230, 230 Cal. Rptr. 498 (2d Dist. 1986).) When an English-speaking witness has a speech handicap that makes it difficult for that witness to be understood, a person familiar with the witness's speech may be sworn as an interpreter to "translate English into English." ([Cramer v. Tyars](#), 23 Cal. 3d 131, 136, 140, 151 Cal. Rptr. 653, 588 P.2d 793 (1979).) The decision whether to appoint an interpreter in this situation is committed to the trial court's discretion. ([People v. Augustin](#), 112 Cal. App. 4th 444, 451, 5 Cal. Rptr. 3d 171 (4th Dist. 2003).)

It is misconduct for a juror to retranslate for other jurors the testimony of a witness as translated by the

court-appointed interpreter. ([People v. Cabrera](#), 230 Cal. App. 3d 300, 303, 281 Cal. Rptr. 238 (2d Dist. 1991).)

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§ 3:13. Interpreters in criminal cases—Deaf or hearing impaired person

West's Key Number Digest

West's Key Number Digest, [Courts](#) 🔑56

West's Key Number Digest, [Witnesses](#) 🔑230

West's Key Number Digest, [Criminal Law](#) 🔑642

Legal Encyclopedias

[C.J.S., Courts § 110](#)

[C.J.S., Criminal Law §§ 1563 to 1564](#)

[C.J.S., Witnesses § 399](#)

A “deaf or hearing impaired person,” as defined in [Evidence Code § 754\(a\)](#), is entitled to an interpreter and, if necessary, an “intermediary interpreter” in any civil or criminal action, juvenile court proceeding, small claims proceeding, or administrative hearing in which the person is present and participating. ([Evidence Code § 754\(b\)](#), (e), and (g).)

No written or oral statement by a person who is deaf or hearing impaired in reply to a question by a peace officer or any other person having a prosecution function in any criminal or quasi-criminal investigation or proceeding may be used against that person unless the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes a special finding that an interpreter was not required and the statement was made knowingly, voluntarily, and intelligently. ([Evidence Code § 754\(k\)](#).)

Whenever an otherwise valid privilege exists between a deaf or hearing-impaired person and another person, that privilege is not waived merely because an interpreter was used to facilitate their conversation. ([Evidence Code § 754.5](#).)

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§ 3:14. Interpreters in criminal cases—Translators

West's Key Number Digest

Wests Key Number Digest, [Courts](#) 🔑56

Wests Key Number Digest, [Witnesses](#) 🔑230

Wests Key Number Digest, [Criminal Law](#) 🔑642

Legal Encyclopedias

[C.J.S., Courts §§ 145 to 147](#)

[C.J.S., Criminal Law §§ 1563 to 1564](#)

[C.J.S., Witnesses § 399](#)

When a writing offered in evidence is 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 language. ([Evidence Code § 753\(a\)](#).)

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§ 3:15. Interpreters in civil cases

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑22

West's Key Number Digest, [Courts](#) 🔑56

West's Key Number Digest, [Witnesses](#) 🔑230

Legal Encyclopedias

[C.J.S., Courts §§ 145 to 147](#)

[C.J.S., Trial § 95](#)

[C.J.S., Witnesses § 399](#)

In 1991, [Evidence Code § 755](#) was enacted providing that “in any civil proceeding, excluding small claims, for which a record is being made, an interpreter shall be provided for a party who is present and who does not proficiently speak or understand English.” ([Evidence Code § 755\(a\)](#).) Subdivision (f) provided that the statute was to expire if it were not extended by the Legislature on or before January 1, 1993. It was not extended.

In any domestic violence proceeding in which a protective order has been granted or is being sought, in which a party does not proficiently understand English, an interpreter shall be present. A court, however, may issue certain ex parte orders without an interpreter. In its discretion, the court can appoint a non-certified interpreter. ([Evidence Code § 755\(a\)](#).) The court shall not commence such proceedings without the presence of the interpreter. However, the court may: (1) issue an order when the necessity for it outweighs the necessity for an interpreter; (2) extend the duration for a previously issued temporary order; and (3) issue a permanent order where a party who requires an interpreter fails to make arrangements for an interpreter after proper notice. ([Evidence Code § 755\(c\)](#).)

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 English, conducted for the purpose of determining damages in a civil action, an interpreter shall be present. ([Evidence Code § 755.5\(a\)](#).) The interpreter's fees are paid by the insurer or defendant requesting the medical examination. ([Evidence Code § 755.5\(b\)](#).) The record of, or testimony concerning, any medical examination conducted in violation of [Evidence Code § 755.5\(a\)](#) shall be inadmissible in the civil action for which it was conducted or any other civil action. ([Evidence Code § 755.5\(c\)](#).)

[Code of Civil Procedure § 116.550](#) provides that a court may permit an individual (other than an attorney) to interpret for a small claims litigant. The court must make reasonable efforts to maintain and make available to such litigants a list of interpreters. Finally, if an interpreter is not available to help a party at the first hearing of the case, the court shall postpone the hearing one time only to allow the party the opportunity to obtain one.

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B. Examination Of Witnesses

§ 3:16. Order of examination

West's Key Number Digest

Wests Key Number Digest, [Trial](#) 🔑59

Wests Key Number Digest, [Witnesses](#) 🔑224

Wests Key Number Digest, [Criminal Law](#) 🔑680

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1657 to 1658](#)

[C.J.S., Federal Civil Procedure § 585](#)

[C.J.S., Trial §§ 188 to 190](#)

[C.J.S., Witnesses §§ 390 to 392](#)

Except as otherwise provided by law, the trial court has discretion to determine the order of proof. ([Evidence Code § 320](#)) This provision vests the court with discretion to order the separate trial of an affirmative defense ([Finley v. Superior Court](#), 80 Cal. App. 4th 1152, 1162, 96 Cal. Rptr. 2d 128 (4th Dist. 2000)), or to permit re-opening of a case after the parties have rested ([People v. Gaines](#), 247 Cal. App. 2d 141, 55 Cal. Rptr. 283 (5th Dist. 1966)), or to postpone cross-examination. ([People v. McDermand](#), 162 Cal. App. 3d 770, 211 Cal. Rptr. 773 (1st Dist. 1984).) In [People v. Tafoya](#), 42 Cal.4th 147, 174–175 (2007), after the defendant was examined by his counsel and cross-examined by the prosecution, he was cross-examined by co-defendant's counsel regarding the defendant's police interview. The trial court's decision to permit further cross-examination by the prosecution on that interview was upheld on the basis that the defendant's answers to co-defendant's counsel's questions regarding the interview raised new credibility issues, which the prosecution was entitled to explore.

The examination of witnesses proceeds in the following order: direct examination, cross-examination, redir-

ect examination, recross-examination, and continuing thereafter by redirect and recross-examination. ([Evidence Code § 772\(a\)](#).) Unless for good cause the court otherwise directs, each phase of a witness's examination must be concluded before the succeeding phase begins. ([Evidence Code § 772\(b\)](#).) A party may, in the discretion of the court, interrupt its cross-examination, redirect examination, or recross-examination of a witness in order to examine the witness on a matter not within the scope of a previous examination of that witness. However, a witness who is the defendant in a criminal action may not, without giving consent, be examined under direct examination by another party. ([Evidence Code § 772\(c\)](#) and (d).) When a party is permitted to go beyond the scope of the initial direct examination, this extended examination is subject to the same rules as direct examination.

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§ 3:17. Direct examination

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  224 to 265

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1313 to 1318](#)

[C.J.S., Federal Civil Procedure §§ 585, 587](#)

[C.J.S., Witnesses §§ 390 to 444, 499, 571](#)

“Direct examination” is the first examination of a witness about a matter that is not within the scope of a previous examination of the witness. ([Evidence Code § 760.](#))

For example, if party A has called a witness and opposing party B examines the witness on a matter not within the scope of the previous examination, B has “taken the witness on direct” and is limited by the rules of direct examination. In its discretion, the court may permit this direct examination by B at the same time as B does its cross-examination or may require B to recall the witness at the end of A's case. ([Evidence Code § 772\(c\).](#)) In making this decision, the court should balance the convenience of the witness and the advantage of presenting all of the witness's testimony to the jury at one time against the interest of A in presenting its case to the jury without interruption.

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§ 3:18. Cross-examination—Scope

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  266 to 284, 372, 330

Legal Encyclopedias

[C.J.S., Federal Civil Procedure §§ 586, 588](#)

[C.J.S., Witnesses §§ 445 to 498, 500 to 507, 579 to 580, 623 to 624, 627 to 629, 631, 664 to 669](#)

Cross-examination is the examination of a witness by a party other than the direct examiner on a matter that is within the scope of the direct examination of the witness. ([Evidence Code § 761](#).) A witness examined by one party may be cross-examined on any matter within the scope of the direct examination by each other party to the action in such order as the court directs. ([Evidence Code § 773\(a\)](#).) The cross-examination of a witness by any party whose interest is not adverse to the party calling that witness is subject to the same rules that are applicable to the direct examination. ([Evidence Code § 773\(b\)](#).)

Courts should normally permit wide latitude in applying the statutory limitation that cross-examination is limited to the scope of direct. The cross-examiner should be permitted to approach a single subject matter from more than one vantage point. Judges should keep in mind that witnesses under cross-examination are not always attempting to cooperate fully. Particularly in such situations, the cross-examiner should be permitted to be somewhat repetitive with the questions. On the other hand, the court must protect the witness from undue harassment or embarrassment. ([Evidence Code § 765\(a\)](#).)

An example of how courts broadly define the scope of direct occurred in *People v. Price*. In the penalty phase of this capital case the defendant denied killing one of the victims. He explained, “I’m not personally capable of doing what whoever did to E. I couldn’t have done that.” In cross-examination, the trial court properly found that prosecution questions about prior acts of violence by the defendant, for example, a robbery, were

within the scope of the direct examination. The court also found that the prosecution could question the defendant about his possession of a stolen gun because, on direct, the defendant had made general claims of rehabilitation after his release from prison. (*People v. Price*, 1 Cal. 4th 324, 477, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991).)

In regulating cross-examination, the following directions from the California Supreme Court should be kept in mind: By cross-examination, an accused “has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief.” (*People v. Green*, 70 Cal. 2d 654, 662, 75 Cal. Rptr. 782, 451 P.2d 422 (1969), judgment vacated, sub nom *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).) 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 cross-examination may be carried rests largely in the discretion of the trial court. (*People v. McClellan*, 71 Cal. 2d 793, 811, 80 Cal. Rptr. 31, 457 P.2d 871 (1969).)

On cross-examination, after one witness has contradicted an earlier witness, counsel may ask the latter if the earlier witness had any reason to lie. (*People v. Guerra*, 37 Cal. 4th 1067, 1126, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006) [Question asked to defendant in capital case].) However, the examiner may not ask the witness if the earlier witness was lying; this calls for an inadmissible lay opinion on veracity. (*People v. Zambrano*, 124 Cal. App. 4th 228, 236–241, 21 Cal. Rptr. 3d 160 (4th Dist. 2004).)

Cross-examination does not extend to matters improperly admitted on direct. “Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony.” (*People v. Williams*, 213 Cal. App. 3d 1186, 1189, 262 Cal. Rptr. 303 (2d Dist. 1989); see also *People v. Smithey*, 20 Cal. 4th 936, 964–967, 86 Cal. Rptr. 2d 243, 978 P.2d 1171 (1999).)

Questions relating to bias, interest, or other motive of the witness are permissible. Credibility challenges are always within the scope of direct. In *People v. Hillhouse*, 27 Cal. 4th 469, 494, 117 Cal. Rptr. 2d 45, 40 P.3d 754 (2002), cert. denied, 537 U.S. 1114, 123 S. Ct. 869, 154 L. Ed. 2d 789 (2003), the Supreme Court held that the trial court improperly sustained a relevancy objection to defense counsel's attempt to question a prosecution witness about his refusal to talk to him. Other examples of bias, interest, or other motive are discussed in § 3:43.

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§ 3:19. Cross-examination—Order of cross-examination

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑 266 to 284

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 445 to 498, 500 to 507](#)

Typically, the court will pick one sequence of cross-examination to be followed throughout the trial. Assume P and D1 are involved in an automobile accident. P sues D1 and also D2 who is D1's employer and the owner of the car D1 was driving. In addition, P sues D3, the city that allegedly failed to maintain properly the roadway where the accident occurred. If P calls a witness, the court must decide in which order D1, D2, D3 will cross-examine. Thus, the court might rule that the parties will cross-examine in the order that they are listed on the complaint, unless the three defendants have agreed to a different sequence. Some courts prefer to allow the party most damaged by the direct to cross-examine first. This highly speculative task may often send a signal to counsel or the jury that is unintended.

Assume the same hypothetical case just discussed, but the witness is called by D1 to describe her observations of plaintiff's driving. Clearly D2's interest in this is not adverse to D1's, and thus D2's examination of the witness is subject to the same rules applicable to direct examination. D3's interest is probably also the same and D3's examination is similarly limited. In this situation, the court may find it wise to permit D1, D2, and D3 to examine the witness on direct before P is given the opportunity to cross-examine. Note that if the witness called by D1 testifies that D1's driving was proper, not that P's was improper, D2's interest is still the same, but D3's interest is adverse and D3, as well as P, should be permitted to cross-examine.

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§ 3:20. Cross-examination—Restrictions—Witness with physical and mental limitations

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑 266 to 284

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 445 to 498, 500 to 507](#)

A witness with severe physical and mental limitations can be permitted to testify, even though the opposing party's right to cross-examine is substantially restricted. In *People v. Tran*, as a result of the crime charged, the victim was a quadriplegic, with impaired reasoning functions, who was unable to speak. He could communicate by tapping for a yes or no answer. Though the court conceded this restricted the types of questions that could be asked, it noted that these restrictions were imposed by the witness's physical condition, not the court, and applied equally to both parties. (*People v. Tran*, 47 Cal. App. 4th 759, 54 Cal. Rptr. 2d 905 (6th Dist. 1996).) *Tran* distinguished *People v. Brock* and upheld the trial judge's decision to permit the testimony. (*People v. Brock*, 38 Cal. 3d 180, 211 Cal. Rptr. 122, 695 P.2d 209 (1985).) In *Brock*, the witness had been examined in a hospital room while under the influence of various prescribed drugs and had been able to answer only three questions on cross-examination before she was unable to continue. The Supreme Court in *Brock* found that the cross-examination had been limited by both the witness's condition *and* the court. It is difficult to determine in what manner the court imposed restrictions in *Brock* that were not required by the witness's physical condition. However, *Brock* certainly seems distinguishable: questioning of the witness was not merely restricted, it was eliminated after the briefest exchange. (*People v. Brock*, 38 Cal. 3d 180, 211 Cal. Rptr. 122, 695 P.2d 209 (1985).)

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§ 3:21. Cross-examination—Restrictions—Statutory protection of certain witnesses

West's Key Number Digest

West's Key Number Digest, [Rape](#) 🔑 40

West's Key Number Digest, [Witnesses](#) 🔑 266 to 284

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Rape §§ 1, 62, 86 to 89](#)

[C.J.S., Witnesses §§ 445 to 498, 500 to 507](#)

When a party wishes to cross-examine a sexual assault victim or a plaintiff in a civil suit alleging sexual misconduct with questions about his or her sexual activities so as to challenge the witness's credibility, the affidavit procedures set forth in [Evidence Code §§ 782 and 783](#) must be followed.

Under [Evidence Code § 1103](#), a sexual assault victim in a criminal case may not be cross-examined about sexual conduct with anyone other than the defendant for any purpose except to attack credibility under [Evidence Code § 782](#). The relationship between [Evidence Code §§ 782 and 1103](#) is also discussed in [§ 6:26](#).

Two different statutes provide for limitations on the examination of witnesses under the age of 14. [Evidence Code § 765\(b\)](#) and [Penal Code § 288\(d\)](#) direct the court to avoid harassment, embarrassment, or psychological harm to the child witness. Further, [Evidence Code § 765\(b\)](#) provides that the court should insure that questions are stated in a form which is appropriate to the age of the witness or the cognitive level of a witness with a substantial cognitive impairment. Usually, but not always, these limits will be applied to the cross-examiner. For an example of relevant evidence being excluded because it would embarrass the witness, see [People v. Phillips](#), 41 Cal. 3d 29, 49, 222 Cal. Rptr. 127, 711 P.2d 423 (1985), where the court excluded evidence that a prosecution

witness was a prostitute.

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§ 3:22. Cross-examination—Restrictions—Cross-examining criminal defendants

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑277, 301

West's Key Number Digest, [Criminal Law](#) 🔑706, 309

Legal Encyclopedias

[C.J.S., Aliens § 124](#)

[C.J.S., Criminal Law §§ 957, 1695](#)

[C.J.S., Witnesses §§ 456, 475, 491 to 492, 496, 529, 532 to 535](#)

The defendant in a criminal case gives up the privilege against self-incrimination only with regard to those subjects testified to on direct. The judge has no discretion to allow the defendant to be cross-examined beyond the scope of those matters. ([People v. Lynn](#), 16 Cal. App. 3d 259, 271, 94 Cal. Rptr. 16 (1st Dist. 1971).) A defendant who makes a general denial of the crime is subject to a wide range of cross-examination. This can include questions about other offenses showing a general scheme or plan. ([People v. Ing](#), 65 Cal. 2d 603, 611, 55 Cal. Rptr. 902, 422 P.2d 590 (1967).) However, if the defendant does not deny the crime, he or she may be cross-examined only about the matters testified to on direct. ([People v. Schader](#), 71 Cal. 2d 761, 769, 80 Cal. Rptr. 1, 457 P.2d 841 (1969).)

Warning

The line between the two situations just described can be easily crossed. For example, assume the prosecution has presented evidence that the defendant confessed to the crime. If the defendant then testifies only that the statement was coerced, cross-examination is limited to the circumstances surrounding the interrogation. If the defendant adds to the description of coercion testimony that the statement is false, then a judge

should find that this is a general denial and the extent of permissible cross-examination is greater.

The California Supreme Court has not yet clarified whether a capital defendant may testify at the penalty phase on some topics but not others. (*People v. Monterroso*, 34 Cal. 4th 743, 769, 22 Cal. Rptr. 3d 1, 101 P.3d 956 (2004), cert. denied, 126 S. Ct. 61 (U.S. 2005).) However, a defendant in the penalty phase of a capital case may not take the stand, profess innocence of the crime, and then discuss his or her background without being subjected to cross-examination on the details of the crime. (*People v. Brown*, 45 Cal. 3d 1247, 1260–1261, 248 Cal. Rptr. 817, 756 P.2d 204 (1988).) In a motion for new trial, the court may not call a defendant to testify and then screen the defendant from cross-examination. (*People v. Stewart*, 202 Cal. App. 3d 759, 764, 248 Cal. Rptr. 907 (4th Dist. 1988).)

Whether examining the defendant or any other witness, the prosecutor cannot ask that witness a question that implies a fact harmful to the defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. (*People v. Hughes*, 27 Cal. 4th 287, 388, 27 Cal. 4th 825a, 116 Cal. Rptr. 2d 401, 39 P.3d 432 (2002); *People v. Lucas*, 12 Cal. 4th 415, 467, 12 Cal. 4th 825a, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (1995); *People v. Warren*, 45 Cal. 3d 471, 480, 247 Cal. Rptr. 172, 754 P.2d 218 (1988).) For example, in examining a character witness called by the defense, the prosecutor may cross-examine regarding the witness' awareness of prior misconduct committed by the defendant to test the witness' familiarity with the defendant. (See the discussion in § 6:24.) The court should ensure that the prosecution has a reasonable basis for believing that this misconduct occurred. (*Michelson v. U.S.*, 335 U.S. 469, 481, 69 S. Ct. 213, 93 L. Ed. 168 (1948).) In addition, a prosecutor who believes a witness may give an inadmissible answer during the examination must warn the witness to refrain from making such a statement. (*People v. Warren*, 45 Cal. 3d 471, 482, 247 Cal. Rptr. 172, 754 P.2d 218 (1988).)

The prosecution may not present evidence it knows is false and should correct any errors in its evidence, even if the false evidence was not submitted intentionally. (*People v. Morrison*, 34 Cal. 4th 698, 716, 21 Cal. Rptr. 3d 682, 101 P.3d 568 (2004), cert. denied, 126 S. Ct. 160 (U.S. 2005).) “[T]his obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution [citation], and applies even if the false or misleading testimony goes only to witness credibility.” (*Morrison*, at 717.) “Ordinarily ‘attorneys may ethically present evidence that they suspect, but do not personally know is false.’” (*People v. Riel*, 22 Cal. 4th 1153, 1217, 96 Cal. Rptr. 2d 1, 998 P.2d 969 (2000).) But the prosecutor is the ‘representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” (*Kyles v. Whitley*, 514 U.S. 419, 439, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).) A prosecutor who, before trial seriously doubts the accuracy of an expert witness' testimony should not present the evidence to a jury, especially in a capital case. But here we have no reason to believe that the prosecutor had any such doubts at the outset of trial.” (*People v. Seaton*, 26 Cal. 4th 598, 649–650, 110 Cal. Rptr. 2d 441, 28 P.3d 175 (2001).) Finally, a prosecutor may not mislead the jury by successfully having evidence excluded and then asking “jurors to draw an inference that they may not have drawn if they had heard the evidence the judge had excluded. He, therefore, unfairly took advantage of the judge's ruling.” (*People v. Daggett*, 225 Cal. App. 3d 751, 757–758, 275 Cal. Rptr. 287 (2d Dist. 1990) (Child molesting case where the judge excluded defense evidence that the victim had been molested by others. The prosecutor's argument to the jury that the child's knowledge of certain sexual activities must have stemmed from the defendant's acts was improper.)) It would seem that the defense should also be precluded from taking unfair advantage

of a trial court's exclusion of prosecution evidence to argue an inappropriate inference from the absence of such evidence.

For a review of the cases discussing whether a prosecutor may properly cross-examine a criminal defendant by asking if the police officer(s) were lying, see [People v. Zambrano](#), 124 Cal. App. 4th 228, 21 Cal. Rptr. 3d 160 (4th Dist. 2004), discussed in § 4:39.

When a witness, including the defendant, refuses to be cross-examined, the court may strike all or part of the direct testimony or give an instruction informing the jury that the refusal may be considered in evaluating credibility. ([People v. Miller](#), 50 Cal. 3d 954, 999, 269 Cal. Rptr. 492, 790 P.2d 1289 (1990) (defendant in a capital case); [Fost v. Superior Court](#), 80 Cal. App. 4th 724, 735–736, 95 Cal. Rptr. 2d 620 (1st Dist. 2000).) When a criminal defendant or defense witness refuses to submit to cross-examination, “the trial court should examine the *motive* of the witness and the *materiality* of the answer The court should also consider if less severe remedies are available before employing the drastic solution of striking the witness's entire testimony These include striking part of the testimony or allowing the trier of fact to consider the witness's failure to answer in evaluating his credibility. [Citations.]” ([People v. Seminoff](#), 159 Cal.App.4th 518, 526 (2008), internal quotation marks omitted.) If the court determines in advance that a witness will frustrate cross-examination by refusing to answer certain questions, the court may decline to admit the direct testimony. In [People v. Price](#), a defense expert on prison gangs testified about a gang outside the presence of the jury and stated that his information was based on interviews with members of that gang whom he would not name on cross-examination. The court properly excluded this testimony. ([People v. Price](#), 1 Cal. 4th 324, 420–421, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991).)

In [People v. Sims](#), the defendant requested an in limine ruling that if he testified, the prosecutor could not cross-examine him regarding certain crimes he committed in another state. The trial judge refused to grant such a ruling in advance, finding that admissibility would necessarily depend on the defendant's testimony on direct. The Supreme Court held that the defendant could not appeal the judge's refusal to rule because he did not testify at the trial. ([People v. Sims](#), 5 Cal. 4th 405, 453–456, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (1993).)

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§ 3:23. Cross-examination—Use of previously suppressed evidence

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  266 to 284, 390, 331.5

Legal Encyclopedias

[C.J.S., Federal Civil Procedure §§ 586, 588](#)

[C.J.S., Witnesses §§ 445 to 498, 500 to 507, 578, 730 to 744](#)

In criminal cases, there are numerous situations in which the prosecution, barred from using certain evidence in its case-in-chief, is permitted to use the same to impeach a defendant who has testified inconsistently. For example, evidence obtained in violation of the Fourth Amendment cannot be introduced by the prosecution in its case, but can be used to impeach contrary testimony of the defendant. ([Walder v. U.S.](#), 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); [People v. Johnson](#), 211 Cal. App. 3d 392, 395, 259 Cal. Rptr. 388 (1st Dist. 1989).) A defense witness may not, however, be impeached with evidence that is the fruit of an illegal search of the defendant. ([James v. Illinois](#), 493 U.S. 307, 110 S. Ct. 648, 107 L. Ed. 2d 676 (1990).) A statement obtained from the defendant in violation of the *Miranda* rule ([Miranda v. Arizona](#), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) can be used to impeach a defendant. ([Harris v. New York](#), 401 U.S. 222, 225, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); [People v. May](#), 44 Cal. 3d 309, 315, 243 Cal. Rptr. 369, 748 P.2d 307 (1988).)

Testimony by a defendant at a probation violation hearing may not be used by the prosecution in its case-in-chief at a subsequent criminal trial, regarding the same defense, but is admissible to impeach a defendant who testifies inconsistently with his testimony at the earlier probation hearing. ([People v. Coleman](#), 13 Cal. 3d 867, 889, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975).) If a defendant testifies in support of a motion to suppress, this testimony is inadmissible at trial except to impeach the defendant's inconsistent testimony. ([People v. Rundle](#), 43 Cal.4th 76, 127 (2008); [People v. Drews](#), 208 Cal. App. 3d 1317, 1325–1326, 256 Cal. Rptr. 846 (4th Dist. 1989).) A minor's statements to a probation officer during an interview conducted prior to a fitness hearing to

determine if the minor should be tried as an adult may be used to impeach inconsistent statements by the minor at trial. (*Macias*, 16 Cal. 4th at 756, 757; See *People v. Humiston*, 20 Cal. App. 4th 460, 476–477, 24 Cal. Rptr. 2d 515 (4th Dist. 1993).) A statement made by a defendant in the course of plea negotiations is inadmissible except to impeach his or her inconsistent testimony at trial. (*People v. Crow*, 28 Cal. App. 4th 440, 449–453, 33 Cal. Rptr. 2d 624 (4th Dist. 1994), which contains an excellent general discussion of this entire area.) However, a testifying defendant may not be impeached with statements made before trial to a mental health professional during a court-ordered examination conducted pursuant to Penal Code section 1369 of the defendant's mental competency to stand trial. (*People v. Pokovich*, 39 Cal. 4th 1240, 48 Cal. Rptr. 3d 158, 141 P.3d 267 (2006).)

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§ 3:24. Redirect and recross

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  285 to 291

Legal Encyclopedias

[C.J.S., Witnesses §§ 487, 508 to 519](#)

“Redirect examination” is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness. ([Evidence Code § 762.](#)) “Recross-examination” is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness. ([Evidence Code § 763.](#)) Once examined, a witness cannot be reexamined on the same matter without leave of the court, but the witness may be reexamined as to any new matter on which the witness has been examined by another party to the action. Leave may be granted or withheld in the court's discretion. ([Evidence Code § 774.](#))

Assume the same hypothetical discussed [§ 3:19](#). The witness called by D1 testifies that P was driving poorly. On cross-examination, P elicits evidence that casts doubt on the witness's ability to have seen P's car just before the collision. While D1 may redirect on the witness's ability to observe, D1 may not re-question the witness about P's driving so as to bring out the same testimony produced on direct.

After a witness has been excused from giving further testimony in the action, the witness cannot be recalled without leave of the court, granted or withheld in the court's discretion. ([Evidence Code § 778.](#)) In *People v. Thomas*, the court upheld the trial judge's decision not to permit recall of a witness. While recall is permissible to rehabilitate the witness's credibility, such was not the case here. ([People v. Thomas](#), 2 Cal. 4th 489, 541–542, 7 Cal. Rptr. 2d 199, 828 P.2d 101 (1992).)

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§ 3:25. Examination by the court

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑246

Legal Encyclopedias

[C.J.S., Witnesses §§ 424 to 428](#)

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. The trial judge is authorized to “ ‘participate in the examination of witnesses whenever he [or she] believes that he [or she] may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his [or her] right of explanation, and in eliciting facts material to a just determination of the cause.’ ” ([People v. Carlucci](#), 23 Cal. 3d 249, 256, 152 Cal. Rptr. 439, 590 P.2d 15 (1979), quoting Gitelson, A Trial Judge's Credo (1966) 7 Santa Clara L. Rev. 13–14. See also [People v. Hawkins](#), 10 Cal. 4th 920, 947–948, 42 Cal. Rptr. 2d 636, 897 P.2d 574 (1995); [In re Conservatorship of Pamela J.](#), 133 Cal. App. 4th 807, 826–828, 35 Cal. Rptr. 3d 228 (4th Dist. 2005).)

The court may cross-examine the defendant after all counsel have questioned him or her, so long as the questioning is conducted impartially and no improper inferences concerning the judge's opinion of the case are conveyed. ([People v. Camacho](#), 19 Cal. App. 4th 1737, 1744, 24 Cal. Rptr. 2d 286 (2d Dist. 1993) (approving court's questions); [People v. Perkins](#), 109 Cal. App. 4th 1562, 1566–1573, 1 Cal. Rptr. 3d 271 (2d Dist. 2003) (disapproving court's questions).) The parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs. ([Evidence Code § 775.](#))

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§ 3:26. Limits on prosecution rebuttal evidence and defense requests to reopen

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 683 to 689

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1662 to 1669](#)

In criminal cases, rebuttal testimony is permitted pursuant to [Penal Code § 1093\(d\)](#), which provides that, after the defendant's evidence, “[t]he parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permits them to offer evidence upon their original case.” In civil cases, rebuttal testimony is subject to the same rule, which is set forth in [Code of Civil Procedure § 607\(6\)](#).

In *People v. Carter*, the court ruled that [Penal Code § 1093\(d\)](#), does not permit the prosecution to introduce in rebuttal all evidence that helps establish guilt ([People v. Carter](#), 48 Cal. 2d 737, 753–754, 312 P.2d 665 (1957)):

The purpose of the restriction in that section is to assure an orderly presentation of evidence ... to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise Thus *proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime*. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which the defendant would clearly have denied from the start. ([People v. Carter](#), 48 Cal. 2d 737, 753–754, 312 P.2d 665 (1957) (emphasis added).)

In *Carter*, after the defendant had denied being present at the murder scene, the prosecution was allowed to rebut with evidence that he had been present. The Supreme Court ruled that this rebuttal was improper because proof of the defendant's presence was an essential part of the prosecution's case-in-chief. (*People v. Carter*, 48 Cal. 2d 737, 753–754, 312 P.2d 665 (1957).) *People v. Daniels* provides good examples of both proper and improper rebuttal. In his defense, the defendant presented expert testimony that the bullet wound he had received to his right hand would have made it impossible for him to shoot a gun. In rebuttal, the prosecution presented the testimony of hospital staff who described the condition and use of the hand up to the date of trial. This was proper under *Carter*, discussed above. However, the trial court erred in allowing rebuttal testimony from one nurse to the effect that the defendant had admitted shooting the two police officers. This was evidence that should have been presented in the case-in-chief. (*People v. Daniels*, 52 Cal. 3d 815, 859–860, 277 Cal. Rptr. 122, 802 P.2d 906 (1991).) In *People v. Young*, 34 Cal. 4th 1149, 1199, 24 Cal. Rptr. 3d 112, 105 P.3d 487 (2005), cert. denied, 126 S. Ct. 57 (U.S. 2005), the Supreme Court allowed the prosecution to call a witness in rebuttal to corroborate testimony presented in its case-in-chief that had been impeached by defense witnesses. “Testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal. [Citations.]”

Defense testimony may permit the prosecution to introduce, in rebuttal, evidence that would otherwise be inadmissible. For example, the defendant, in a sexual assault case involving one of his children, “categorically denied ever using threats.” In rebuttal, the prosecution was able to call the defendant's wife to testify that, in an unrelated incident, he had threatened to kill one of the other children if she did not return home. (*People v. Senior*, 3 Cal. App. 4th 765, 778, 5 Cal. Rptr. 2d 14 (6th Dist. 1992). See, generally, § 1:28 on “opening the door.”)

A prosecutor's request to admit testimony in rebuttal, which apparently could have been introduced in its case in chief, can be approved if sufficient reasons are provided. For example in *People v. DeSantis*, the prosecutor first learned of a jailhouse confession during the presentation of his case in chief. He explained his delay in introducing it by his desire to investigate it and by his surprise at the nature of the defendant's testimony. The trial judge's admission of the evidence was approved on appeal. (*People v. DeSantis*, 2 Cal. 4th 1198, 1232–1233, 9 Cal. Rptr. 2d 628, 831 P.2d 1210 (1992).)

In reviewing a trial court's denial of a defense request to reopen, the appellate court considers: “ ‘(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.’ ” (*People v. Funes*, 23 Cal. App. 4th 1506, 1520, 28 Cal. Rptr. 2d 758 (1st Dist. 1994); *People v. Jones*, 30 Cal. 4th 1084, 1110, 135 Cal. Rptr. 2d 370, 70 P.3d 359 (2003), cert. denied, 541 U.S. 975, 124 S. Ct. 1877, 158 L. Ed. 2d 472 (2004) (Finding an abuse of discretion in the trial court's decision to deny the defendant's request.).)

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§ 3:27. Leading questions

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West's Key Number Digest, [Witnesses](#) 🔑 [239](#), [282](#)

Legal Encyclopedias

[C.J.S., Federal Civil Procedure §§ 586 to 587](#)

[C.J.S., Witnesses §§ 415 to 423, 436, 503 to 504](#)

A “leading question” is a question that suggests to the witness the answer that the examining party desires. ([Evidence Code § 764](#).) It is a common misconception that all questions asking for a “yes” or “no” answer are leading. (See [People v. Bravo](#), 23 Cal. Rptr. 2d 48 (App. 2d Dist. 1993).) In fact only questions that contain a direction to the witness are so. Perhaps the easiest example is a question that begins, “Isn't it true that ...?” Some questions that begin “Did X do [a detailed set of facts]?” may be covered. The California Supreme Court has referred to this explanation of leading questions by McCormick: “A question may be leading because of its form, but often the mere form of a question does not indicate whether it is leading. The question which contains a phrase like ‘did he not?’ is obviously and invariably leading, but almost any other type of question may be leading or not, dependent upon the content and context The whole issue is whether an ordinary man would get the impression that the questioner desired one answer rather than another. The form of a question, or previous questioning, may indicate the desire, but the most important circumstance for consideration is the extent of the particularity of the question itself.” (1 [McCormick on Evidence](#) (4th ed.) § 6, pp. 17–18, cited with approval in [People v. Williams](#), 16 Cal. 4th 635, 672, 66 Cal. Rptr. 2d 573, 941 P.2d 752 (1997).)

Except under special circumstances where the interests of justice otherwise require, leading questions may not be asked of a witness on direct. ([Evidence Code § 767\(a\)\(1\)](#).) An example of such a special circumstance occurs in civil cases when a party or a person identified with a party is called by any adverse party. This witness can be examined as if under cross-examination. ([Evidence Code § 776\(a\)](#); see [Hinson v. Clairemont Community](#)

[Hospital](#), 218 Cal. App. 3d 1110, 1123, 267 Cal. Rptr. 503 (4th Dist. 1990).)

Warning

[Evidence Code § 776](#) applies only to civil cases. No parallel statute exists for adverse witnesses in criminal cases. However, if the court concludes that a witness is, in fact, not cooperating with the direct examiner, leading questions should be permitted. An example of this occurs when the witness testifies in a manner that is materially different from a prior statement provided. The court would then have discretion to permit the questioner to use leading questions to impeach the witness with the prior statements.

Leading questions may be asked on direct examination if there is little danger of improper suggestion and where such questions are necessary to obtain relevant evidence. Examples include preliminary matters, refreshing recollection, examining handicapped witnesses, and expert witnesses. ([Evidence Code § 767](#), Comment.) A witness's physical disability justifies leading questions. ([People v. Augustin](#), 112 Cal. App. 4th 444, 449, 5 Cal. Rptr. 3d 171 (4th Dist. 2003) [Witness had a speech problem resulting from cerebral palsy].)

Except under special circumstances where the interests of justice require otherwise, leading questions are permitted on cross-and recross-examination. ([Evidence Code § 767\(a\)\(2\)](#).) Such a special situation occurs where the witness is friendly to the cross-examiner and, therefore, open to suggestion. Thus, in one case, the prosecution called the defendant's mother. The defendant, on cross-examination, was not permitted to ask leading questions. ([People v. Spain](#), 154 Cal. App. 3d 845, 201 Cal. Rptr. 555 (3d Dist. 1984).) Leading questions may be asked to children under 10 in prosecutions under [Penal Code §§ 273a, 273d](#), and 288. ([Evidence Code § 767\(b\)](#).)
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§ 3:28. Other objections to form of question—In general

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West's Key Number Digest, [Witnesses](#)  236, 279

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 497, 503 to 506](#)

The court is charged with the duty to exercise reasonable control over the examination of witnesses so it is rapid, distinct, and effective for the ascertainment of truth. ([Evidence Code § 765\(a\)](#).) This statutory charge has been the basis for a series of objections to the form of the question upheld by the appellate courts and set forth below. To assist in explaining each objection, examples will be used. These examples are derived from a murder case in which a robber shot a store clerk, and a civil case in which plaintiff contended that a bank wrongfully denied his application for a loan.

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§ 3:29. Other objections to form of question—Asked and answered

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West's Key Number Digest, [Witnesses](#)  [236](#), [282.5](#), [245](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 503, 506](#)

If it appears to the court that the question asked has already been answered and that no different answer is likely to result from the same question, this objection should be sustained. On direct examination, this frequently occurs when counsel re-asks a question to focus the jury's attention. Thus, in the hypothetical murder, if the prosecutor asks an eyewitness who has already identified the defendant, "Once again sir, are you able to identify the person who shot the clerk that day?" the objection should be sustained.

A cross-examiner is given somewhat more latitude in this area, but repetitive questioning should cease when the likelihood of different answers has disappeared.

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§ 3:30. Other objections to form of question—Argumentative

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West's Key Number Digest, [Witnesses](#)  236, 280

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 503](#)

The court must protect the witness from harassment. ([Evidence Code § 765\(b\)](#).) The phrasing of the challenged question is sometimes less important than the tone of voice used by the examiner. An angry tone or one suggesting ridicule will most often be objectionable.

This objection usually arises during cross-examination, particularly when the witness is being questioned on prior inconsistencies. (See, e.g., [People v. Alcala](#), 4 Cal. 4th 742, 793–794, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (1992), where the trial court properly curtailed repeated questioning by the defendant of a prosecution witness who had already testified that she did not remember.) When the question seems rhetorical and is, in fact, unanswerable, it clearly violates this rule. ([People v. Chatman](#), 38 Cal. 4th 344, 384, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (2006)) [“An argumentative question is a speech masquerading as a question. The question is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable.”] In the hypothetical bank loan, assume that plaintiff testified that the denial of the loan caused his thriving business to fail. Bank counsel then confronted plaintiff with a statement in his deposition that he wanted the loan to solve a cash flow problem resulting from the loss of a key customer. Counsel then asks, “Do you really expect the court to believe that your business was thriving?” This question is argumentative.

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§ 3:31. Other objections to form of question—Assumes a fact not in evidence

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [237](#), [281](#)

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 411, 503, 505](#)

This method of questioning is improper because it places before the trier of fact evidence that has not been and perhaps may not be proven. Thus, in the murder case it would be improper for the defense attorney to attempt to discredit an eyewitness by asking, “Is the strength of your testimony reduced by the fact that studies have shown there is a high percentage of errors in cross-racial identifications?” In addition, these questions may confuse the witness, particularly in those situations where the fact assumed is incorrect; for example, if the eyewitness does not wear eyeglasses and then is asked, “Did you have on your glasses during the entire duration of the robbery?”

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§ 3:32. Other objections to form of question—Calls for speculation

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  236(7)

Legal Encyclopedias

[C.J.S., Witnesses §§ 406, 410](#)

A witness may only be asked to testify about acts or events personally observed. If a witness is asked, for example, about the state of mind of another, the answer would be speculative and the question is objectionable. A witness in the hypothetical murder may properly testify as to the defendant's appearance, that he appeared angry, was red in the face, and was shouting. However, the witness may not testify that the defendant intended to fire the weapon.

Asking a witness if it is possible that something occurred is often objectionable as speculation. All things are possible and unless the question closely tests the accuracy of a prior assertion by the witness, the objection should be sustained. If an eyewitness in the hypothetical murder testifies that she was approximately 10 feet away from the gunman during the robbery, it would not be improper for defense counsel to ask if it were possible that the distance was 20 or 25 feet. This simply tests the parameters of what obviously is an estimate. However, asking if it is possible that the distance was 100 yards is objectionable. The answer is yes, but only because all things could be considered to fall within the realm of possibility. The facts testified to by the witness are not rationally related to a distance that great.

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§ 3:33. Other objections to form of question—Compound

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West's Key Number Digest, [Witnesses](#)  236, 279

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 497, 503 to 506](#)

Two separate problems result from compound questions. Consider a situation in which the witness in the murder case is asked, “Did you see the defendant enter the store and point a gun at the victim?” The question is really two: (1) “Did you see the defendant enter the store?” and (2) “Did you see the defendant point a gun at the victim?” If the witness wanted to answer each differently the witness could not do so. The witness might only intend to answer one of the questions, and the trier of fact could mistakenly believe that the negative or affirmative response was to both questions.

A separate problem covered by this objection arises when the examiner asks a question that contains only a limited number of alternatives. If the bank's loan officer in the civil hypothetical is asked, “After receiving the loan application did you deny it or simply pass it on with a negative recommendation?” then the objection should be sustained. The witness might wish to answer that neither was done. The question hinders rather than promotes the ascertainment of truth.

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§ 3:34. Other objections to form of question—Vague or unintelligible

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  236, 279

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 497, 503 to 506](#)

An unintelligible question is one that cannot be understood by the witness or the trier of fact. In many circumstances the judge can resolve the issue simply by asking the witness if he or she understands the question. On other occasions, to avoid juror confusion, the judge should require that the question be rephrased.

Questions are often subject to the objection that they are vague as to time or place. Thus, if the plaintiff in the bank loan case testifies that he submitted three different applications for the loan, the bank's attorney cannot properly ask, "Before you applied, did the loan officer not tell you it would probably be denied?" The question fails to make clear if this occurred prior to the first or to a subsequent application.

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§ 3:35. Other objections to form of question—Calls for a narrative answer

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [236](#), [279](#)

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 497, 503 to 506](#)

Courts normally require questions to be narrow in scope, calling for limited answers. General questions, such as, “What happened after the gunman entered the store?” are disfavored. The primary reason for this preference is that it permits opposing counsel to lodge objections and exclude the inadmissible evidence that might be testified to in the narrative. As with leading questions, the court retains authority to permit such a question if it will promote the fact-finding function. With young witnesses, narrative answers may well serve that purpose.

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§ 3:36. Other objections to form of question—Misstates the evidence

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [236, 279](#)

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 586](#)

[C.J.S., Witnesses §§ 406 to 410, 412 to 414, 497, 503 to 506](#)

It is not uncommon for an examiner to preface a question with a reference to earlier testimony. In the suit against the bank, assume the loan officer testified that he knew the plaintiff socially and that the plaintiff had inquired about obtaining a loan. On cross-examination the witness is asked, “On direct you testified that you had suggested that the plaintiff seek a loan. When approximately did that occur?” Clearly this is objectionable: it puts words in the witness's mouth, is apt to confuse the trier of fact, and obstructs the truth-finding function.

A witness is frequently asked if he or she testified in a certain way: “On direct did you testify that you suggested to the plaintiff that he seek a loan?” Since the examiner is asking whether this testimony occurred rather than assuming it, the question is not objectionable as it does not misstate evidence. Note, however, that such questions should rarely be allowed. Questions about events that transpired are relevant; those about testimony already given are not, with two exceptions: (1) the examiner may be honestly seeking to refresh his or her own recollection of the prior testimony, or (2) the examiner may be trying to contrast current testimony with the witness's past testimony.

Warning

Questions to a witness about the testimony of an earlier witness should not be permitted. Though a common method of interrogation, it is nevertheless improper. For example, in the hypothetical murder, a police of-

ficer testified that when arrested, the defendant stated, “I didn't mean to shoot the guy at the store. The gun just went off.” On direct the defendant testified that he had nothing to do with the robbery-murder. It is objectionable for the prosecutor to ask, “Did you hear Officer R. testify yesterday that you admitted that you shot the clerk? Was he wrong when he testified to that?” These questions are irrelevant; they do not ask the witness about an issue in dispute in the case but only to comment on the testimony of another.

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§ 3:37. Other objections to form of question—Answer is nonresponsive

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  248

Legal Encyclopedias

[C.J.S., Witnesses §§ 430 to 431](#)

Even if the question asked is unobjectionable, the answer may be objected to if it is nonresponsive to the question asked. Assume in the bank loan hypothetical that the plaintiff is asked by the bank's counsel, "Didn't the loan officer tell you before you first applied that you were unlikely to get the loan?" If he responds, "No, I have had a long positive association with that bank and always repaid my loans there," all but the answer "no" should be stricken as nonresponsive. On the other hand, a witness is always entitled to explain an answer even if it calls for a "yes" or "no" response, once that response is given. If we assume the same question again, the following would be a responsive answer: "No, he told me that without his help, I was unlikely to get the loan, but because he was going to help me, there should be no problem."

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B. Examination Of Witnesses

§ 3:38. Using writings in examining witness—Questioning witness about writing

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [271](#), [388](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 491 to 492, 709 to 720, 722 to 726](#)

In examining a witness about a writing it is not necessary to show, read, or disclose to the witness any part of the writing. ([Evidence Code § 768\(a\)](#).)

In examining a witness about any statement, written or oral, that is inconsistent with the witness's testimony at trial, it is not necessary to disclose to the witness any information concerning it. ([Evidence Code § 769](#).) However, a witness cannot be impeached by introducing extrinsic evidence of statements inconsistent with that witness's testimony unless the witness: (1) was given an opportunity to explain or deny the statement; or (2) has not been excused. ([Evidence Code § 770](#).) See the general discussion on impeaching a witness with a prior inconsistent statement in §§ [2:42](#) and [3:45](#).

If a writing is shown to the witness, all parties must be given an opportunity to inspect it before questions concerning it begin. ([Evidence Code § 768\(b\)](#).)

Before the witness can be asked about the contents of the writing, the secondary evidence rule may have to be complied with. (See [Evidence Code § 1521](#), discussed in [§ 8:17](#).)

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§ 3:39. Using writings in examining witness—Refreshing witness's recollection

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑253

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1313 to 1318](#)

[C.J.S., Witnesses §§ 435, 437 to 444, 499, 571](#)

When a witness indicates in any manner that his or her memory as to some matter is impaired, the examiner may use a writing to refresh the witness's recollection. There is no limitation on the writing used. That is, it need not have been prepared by or at the direction of the witness. Moreover, the witness need never have seen it before.

When a witness has used a writing to refresh recollection either at or before the hearing, the writing must be produced at the hearing at the request of any adverse party or the testimony shall be stricken. ([Evidence Code § 771\(a\)](#); [People v. Smith](#), 40 Cal. 4th 483, 509, 54 Cal. Rptr. 3d 245, 150 P.3d 1224 (2007), cert. denied, 2007 WL 2024989 (U.S. 2007) [Trial court may properly order disclosure of defense psychologist's test data to prosecution where psychologist testifies he used tests to refresh his recollection before testifying at the hearing.].) When a witness testifies that to prepare for the testimony “he spent one or two hours reviewing documents and that, after his review, he had a ‘fresher recollection of what had taken place’ [and] that without all of the documents in front of him, he could not recall which ones actually refreshed his recollection and which did not, and that ‘anything [he] looked at probably gave [him] some benefit of refreshing [his] recollection,’ ” all the documents reviewed must be produced. ([International Ins. Co. v. Montrose Chemical Corp.](#), 231 Cal. App. 3d 1367, 1372, 282 Cal. Rptr. 783 (2d Dist. 1991).) If a witness uses a summary of business records as a refresher to recall an earlier examination of the full 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](#), 127 Cal. App. 3d 1039, 179

Cal. Rptr. 190 (1st Dist. 1981).)

The rule in [Evidence Code § 771\(a\)](#), is subject to the following exceptions:

- The writing need not be produced if it is subject to the attorney-client privilege. ([Sullivan v. Superior Court](#), 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972). But see [Kerns Const. Co. v. Superior Court for Orange County](#), 266 Cal. App. 2d 405, 413–414, 72 Cal. Rptr. 74 (4th Dist. 1968).)
- The writing need not be produced if it is not in the control of the witness or the party who proffered the testimony and is not reasonably procurable by such party. ([Evidence Code § 771\(c\)](#).)

If the writing is produced, in addition to examining it or employing it to cross-examine the witness, the adverse party may introduce in evidence any portion pertinent to the testimony, unless introduction of the writing is banned by some other statute. ([Evidence Code § 771\(b\)](#).)

A writing used to refresh a witness's memory has no independent evidentiary value and is not admissible in to evidence at the request of the party calling the witness. Thus, present recollection refreshed differs from past recollection recorded, where the writing has independent evidentiary value. ([In re Berman](#), 48 Cal. 3d 517, 525, 256 Cal. Rptr. 802, 769 P.2d 984 (1989).) For a discussion of the rules regarding past recollection recorded, see [§ 2:44](#).

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§ 3:40. Using writings in examining witness—Introducing writing as evidence

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑39

West's Key Number Digest, [Witnesses](#) 🔑271, 388

West's Key Number Digest, [Criminal Law](#) 🔑663

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1636, 1638 to 1639, 1641 to 1642](#)

[C.J.S., Trial §§ 148 to 153](#)

[C.J.S., Witnesses §§ 491 to 492, 709 to 720, 722 to 726](#)

The writing must be marked for identification by the clerk and then shown to opposing counsel. The witness must authenticate the writing according to the rules set forth in [Evidence Code § 1400](#). The proponent must move the document into evidence. All evidentiary rules, such as relevance, hearsay, and secondary evidence, must be complied with. See the discussion in Chapter 8.

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§ 3:41. When should the court exclude other witnesses?

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑41

West's Key Number Digest, [Criminal Law](#) 🔑665

Legal Encyclopedias

[C.J.S., Contempt § 25](#)

[C.J.S., Criminal Law § 1630](#)

[C.J.S., Trial §§ 155 to 160](#)

Exclusion of witnesses at the preliminary hearing of felony cases is mandatory on motion of either party. All potential and actual witnesses must be excluded with the exception of the investigating officer and the defendant's investigator. If either party challenges the exclusion of any person under this section, the magistrate shall hold a hearing to determine if the person is properly excludable. ([Penal Code § 867](#).)

In all other proceedings, the court has discretion to exclude witnesses so that such witnesses cannot hear the testimony of others. A party to the action, however, cannot be excluded. ([Evidence Code § 777](#).) The purpose of witness exclusion is to discourage and expose fabrication, inaccuracy, and collusion. ([People v. Young](#), 175 Cal. App. 3d 537, 541, 221 Cal. Rptr. 32 (3d Dist. 1985).)

In all proceedings, whether governed by [Evidence Code § 777](#) or [Penal Code § 867](#), the sanctions are the same. The witness can be held in contempt or the witness's testimony may be excluded in whole or in part. ([People v. Young](#), 175 Cal. App. 3d 537, 542, 221 Cal. Rptr. 32 (3d Dist. 1985).) It appears that exclusion of the testimony is proper only when the party calling the witness is "at fault" for violation of the court's order. ([People v. Redondo](#), 203 Cal. App. 3d 647, 250 Cal. Rptr. 46 (6th Dist. 1988); [People v. Valdez](#), 177 Cal. App. 3d 680,

695–696, 223 Cal. Rptr. 149 (5th Dist. 1986).)

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§ 3:42. Attacking or supporting credibility—In general

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  311 to 416

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 588](#)

[C.J.S., Witnesses §§ 559 to 787](#)

Except as otherwise provided by statute, in determining the credibility of a witness, the trier of fact may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the witness's testimony at the hearing. ([Evidence Code § 780.](#))

The credibility of a witness may be attacked or supported by any party, including the party who called the witness. ([Evidence Code § 785](#); [People v. Mayfield](#), 14 Cal. 4th 668, 751, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (1997).)

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B. Examination Of Witnesses

§ 3:43. Attacking or supporting credibility—Bias, interest, or other motive

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [363](#) to [378](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 571, 618 to 673](#)

The trier of fact may consider the existence or nonexistence of a bias, interest, or other motive on the part of the witness. ([Evidence Code § 780\(f\)](#).) For example, the prosecutor may prove that a defense witness helped the defendant hide from authorities or escape punishment in this or another crime. One witness was impeached with the fact that she had assisted the defendant's escape from a state institution several years before the crime charged. ([People v. Johnson](#), 47 Cal. 3d 576, 598, 253 Cal. Rptr. 710, 764 P.2d 1087 (1988).) Evidence that two prosecution witnesses had been confederates in prior criminal activities is relevant to show bias, interest, or other motive. ([People v. Burgener](#), 41 Cal. 3d 505, 525, 224 Cal. Rptr. 112, 714 P.2d 1251 (1986).) Evidence that an alibi witness had committed a felony offense with the defendant years before is admissible to attack the credibility of the witness. ([People v. Freeman](#), 8 Cal. 4th 450, 494, 34 Cal. Rptr. 2d 558, 882 P.2d 249 (1994).) For a discussion of the admissibility of evidence that a defense witness is in the same criminal street gang as the defendant, see § 1:31. Evidence of a family relationship may establish a witness's bias. ([People v. Pierce](#), 269 Cal. App. 2d 193, 75 Cal. Rptr. 257 (3d Dist. 1969).) Evidence that a defense witness in a criminal case was previously arrested by a particular police agency is inadmissible to impeach the witness as showing a bias against that agency or its officers. ([People v. Anderson](#), 20 Cal. 3d 647, 650–651, 143 Cal. Rptr. 883, 574 P.2d 1235 (1978); [People v. Lopez](#), 129 Cal. App. 4th 1508, 1523, 29 Cal. Rptr. 3d 586 (6th Dist. 2005).) However, evidence that the same office prosecuting the defendant (and cross-examining a defense witness) previously prosecuted the witness's husband, leading to his imprisonment at the time of trial, was admissible to show the witness was biased against the prosecution. ([People v. Williams](#), 43 Cal.4th 584, 634 (2008).) Evidence of bias may be limited by the trial court where it does not have significant probative value. ([People v. Whisenhunt](#), 44 Cal.4th 174,

207–208 (2008); *People v. Cunningham*, 25 Cal. 4th 926, 995, 999, 108 Cal. Rptr. 2d 291, 25 P.3d 519 (2001).) [Defense evidence that the chief prosecution witness was a friend of the murder victim, and, therefore biased against the defendant, was properly excluded where such bias was evident from the witness' testimony that the defendant had attempted to kill him.] Though typically such a ruling will be based on [Evidence Code § 352](#), *Cunningham* upheld exclusion of the evidence on relevance grounds.

An accused may question a prosecution witness about promises, expectations, or hopes of leniency from the authorities, however unreasonable. (*People v. Balderas*, 41 Cal. 3d 144, 193, 222 Cal. Rptr. 184, 711 P.2d 480 (1985).) While this questioning may probe the witness's state of mind as to any plea bargain offered, the witness may not be required to answer questions about conversations concerning a plea bargain with his or her lawyer. (*People v. Mincey*, 2 Cal. 4th 408, 463, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (1992).) In *People v. Brown*, 31 Cal. 4th 518, 544, 3 Cal. Rptr. 3d 145, 73 P.3d 1137 (2003), cert. denied, 541 U.S. 1045, 124 S. Ct. 2160, 158 L. Ed. 2d 736 (2004), the court recognized the principle that “a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits from his or her testimony, as such evidence is suggestive of bias.” However, it affirmed the trial court's exclusion of evidence that a juvenile witness to a murder was facing rape charges when the prosecutor, the juvenile and his defense counsel agreed no promises had been made regarding the rape and the juvenile had testified against the defendant at the preliminary hearing, several months before the rape charge had been filed against him. (*Brown*, 31 Cal. 4th at 542–555.) In *People v. Cornwell*, 37 Cal. 4th 50, 93–94, 33 Cal. Rptr. 3d 1, 117 P.3d 622 (2005), cert. denied, 126 S. Ct. 1432, 164 L. Ed. 2d 135 (U.S. 2006), the court held that defense counsel should be able to cross-examine a prosecution witness, who had received immunity for his role in the crime, as to the sentence the witness believed he was facing, even if that belief was inaccurate.

The defense may cross-examine a prosecution witness regarding the witness' parole or probation status and whether the witness is currently facing criminal charges to show that the witness may be seeking leniency through testifying. (*People v. Price*, 1 Cal. 4th 324, 486, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991); *People v. Mickle*, 54 Cal. 3d 140, 168, 284 Cal. Rptr. 511, 814 P.2d 290 (1991); *People v. Claxton*, 129 Cal. App. 3d 638, 662, 181 Cal. Rptr. 281 (5th Dist. 1982) (pending charges).) However, the court retains discretion to exclude evidence of the witness's probation status. (*People v. Chatman*, 38 Cal. 4th 344, 374, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (2006).) Further, a witness may not be cross-examined about alleged illegal activities that are not even being investigated by the police. (*People v. Johnson*, 159 Cal. App. 3d 163, 168–169, 205 Cal. Rptr. 427 (1st Dist. 1984).) A criminal defendant may delve into the details of inducements given to prosecution witnesses. Thus, in *People v. Price*, 1 Cal. 4th 324, 422, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991), the prosecution witness admitted that the prosecution had promised to protect his family if he testified against the defendant. The defendant should, then, have been permitted to ask: (a) which family members were covered; (b) whether they would be relocated; and (c) whether the prosecution had paid to move any family member. Note that there was no contention by the prosecution that the answers to these questions would breach any security measures already in effect. A defendant may question a witness to show the testimony was motivated by a desire to seek revenge. (*People v. Stewart*, 145 Cal. App. 3d 967, 976–977, 193 Cal. Rptr. 799 (2d Dist. 1983).) Extensive cross-examination of a witness is permitted to test if the witness has a bias against the racial group to which the defendant belongs. (*In re Anthony P.*, 167 Cal. App. 3d 502, 511–513, 213 Cal. Rptr. 424 (2d Dist. 1985).)

A plaintiff may show that certain witnesses conspired with the defendant to deprive the plaintiff of satisfaction of his judgment in order to impeach them. (*Boyle v. Hawkins*, 71 Cal. 2d 229, 239, 78 Cal. Rptr. 161, 455

P.2d 97 (1969).)

Any fact or circumstance tending to show that a witness has a financial interest in the proceedings is admissible to impeach. In one case, the attorney subject to State Bar proceedings should have been permitted to elicit evidence that her chief accuser had intentionally failed to pay the attorney's bill in full and had falsely complained to the State Bar as part of a scheme to evade paying the fees due. ([Calvert v. State Bar](#), 54 Cal. 3d 765, 777, 1 Cal. Rptr. 2d 684, 819 P.2d 424 (1991).)

[Penal Code § 128](#) provides that a person who “by willful perjury ... procures the conviction and execution of any innocent person is punishable by death or life imprisonment without possibility of parole.” In [People v. Dickey](#), 35 Cal. 4th 884, 911–912, 28 Cal. Rptr. 3d 647, 111 P.3d 921 (2005), the Supreme Court permitted a prosecution witness in a capital case to testify that he was aware of [§ 128](#), because it bolstered the witness's credibility.

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§ 3:44. Attacking or supporting credibility—Challenging or reinforcing witness's ability to perceive and recollect

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  327 to 330, 77

Legal Encyclopedias

[C.J.S., Federal Civil Procedure § 588](#)

[C.J.S., Witnesses §§ 127 to 131, 144 to 146, 572 to 573, 579 to 583](#)

The trier of fact may consider the extent of the witness's opportunity and capacity to perceive, recollect, and communicate. ([Evidence Code § 780\(c\)](#) and (d).) Evidence as to the witness's location, the duration of observation, and hindrances thereto are relevant.

Expert testimony that certain factors have a tendency to reduce the accuracy of eyewitness identification may be admissible. ([People v. McDonald](#), 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).)

“Evidence of a witness' drug use is inadmissible unless the testimony ‘tends to show that the witness was under the influence thereof either (1) while testifying, or (2) when the facts to which he testified occurred, or (3) that his mental faculties were impaired by the use of such narcotics.’ [Citation.]” ([People v. Panah](#), 35 Cal. 4th 395, 478, 25 Cal. Rptr. 3d 672, 107 P.3d 790 (2005).) Although a witness's intoxication at the hearing may be a basis for impeachment, a party is not entitled on demand to subject the witness to a court-ordered chemical test to determine whether the witness is under the influence of an intoxicating substance. ([People v. Melton](#), 44 Cal. 3d 713, 737, 244 Cal. Rptr. 867, 750 P.2d 741 (1988).) To obtain a blood test of a prosecution witness, the defense must show probable cause to believe that the witness is under the influence. ([People v. Melton](#), 44 Cal. 3d 713, 738, 244 Cal. Rptr. 867, 750 P.2d 741 (1988).)

A witness may be cross-examined about his or her mental condition or emotional stability to the extent it may affect the powers of perception, memory, or communication. While expert psychiatric testimony may be admissible for this purpose, it has generally been rejected. (*People v. Cooks*, 141 Cal. App. 3d 224, 302, 190 Cal. Rptr. 211 (1st Dist. 1983).) An accused may seek to discover a witness's prior psychiatric records in order to use them for cross-examination. In evaluating a defense request for such disclosure, the court should consider the records in camera and only disclose those records essential to the defendant's right of confrontation. (*People v. Reber*, 177 Cal. App. 3d 523, 530–532, 223 Cal. Rptr. 139 (3d Dist. 1986).) In *People v. Hammon*, the Supreme Court substantially limited *Reber*. It held that the defense has no right to obtain pretrial discovery of privileged information, such as psychotherapy records, in the hands of third party psychotherapy providers. *Hammon* did not overrule the conclusion in *Reber* that at trial the defendant could obtain and utilize such records upon making the required showing. *Hammon* did not address the question of obtaining such documents pretrial from the possession of a government agency. (*People v. Hammon*, 15 Cal. 4th 1117, 65 Cal. Rptr. 2d 1, 938 P.2d 986 (1997).) The right to disclosure, discussed in *Reber* and narrowed in *Hammon*, applies to records of prosecution witnesses. A defendant is not able to obtain the psychological records of a codefendant who it was believed would, at some future date, enter into a deal with the prosecution to testify. (*Nielsen v. Superior Court*, 55 Cal. App. 4th 1150, 64 Cal. Rptr. 2d 566 (1st Dist. 1997).)

Comment

Hammon creates one significant, practical problem: continuances in mid-trial in order to: (1) obtain the records for the court; (2) allow review of the records; and (3) if any are disclosed, obtain witnesses. Preparation by the defense can reduce, though it hardly eliminates this problem. Therapists known to the defense could be notified that the information will be sought and their schedules could be considered when setting trial dates. A failure to do this could be a basis for denying a request to continue if, for example, the therapist is unavailable during the trial and a lengthy delay is sought.

The trial court may not order any witness or victim of any sexual assault to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility. (*Penal Code § 1112*.) In *People v. Anderson*, the court rejected the defendant's contention that a trial court has a sua sponte duty to order a delusional witness to undergo a court-ordered psychiatric examination to assist its determination of her competence to testify. (*People v. Anderson*, 25 Cal. 4th 543, 575–577, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (2001).) “No case has even remotely held that the confrontation clause, or any other constitutional guarantee, could compel a witness to undergo a new, court-ordered psychiatric examination, or impose on the trial court a sua sponte duty to order such an examination.” (*Anderson*, 25 Cal. 4th at 577, fn.11)

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§ 3:45. Attacking or supporting credibility—Prior consistent and inconsistent statements

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [379](#) to [397](#), [414\(2\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 674 to 754, 781, 783 to 787](#)

In evaluating credibility, the trier of fact may consider a statement previously made by the witness that is consistent or inconsistent with any part of the witness's testimony at the hearing. ([Evidence Code § 780\(g\)](#) and (h).) When examining a witness about a prior inconsistent statement, it is not necessary to disclose any information concerning the statement or to show the statement to the witness. ([Evidence Code § 769](#).) However, if after the witness has finished testifying, the party plans to introduce extrinsic evidence of the statement, then (a) the witness must be given an opportunity to explain or deny the statement, or (b) the witness must not already have been excused from giving further testimony. ([Evidence Code § 770](#).) If [§ 770](#) is complied with, evidence of an inconsistent statement by the witness is admissible not only as to credibility but for the truth of the matter as well. (See [Evidence Code § 1235](#), discussed in [§ 2:42](#).)

A prior statement that is impliedly inconsistent with testimony may be admitted to impeach. In *People v. Price*, the defendant's sister testified in the penalty phase of defendant's capital case that she had a high opinion of him. The prosecution was permitted to impeach this opinion with a statement she had given to police three years earlier that he was “up to no good,” that she did not trust him, and that he had bragged about killing six people. ([People v. Price](#), 1 Cal. 4th 324, 473–474, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991).)

Comment

Testimony is inconsistent with a previous statement if it contains material facts that were omitted in the prior statement. Conversely, if the testimony omits material facts contained in the earlier statement, an inconsistency

exists.

When an alibi witness testifies for a criminal defendant, can the prosecution impeach that witness with evidence that the witness failed to volunteer this exculpatory information to the police? In *People v. Ratliff*, the appellate court said that the prosecution cannot do so until it establishes that the witness knew that charges were pending and that the information was exculpatory, had reason to make the information available, was familiar with the means of reporting it, and was not asked by the defendant or defense counsel to refrain from disclosing it. (*People v. Ratliff*, 189 Cal. App. 3d 696, 701, 234 Cal. Rptr. 502 (2d Dist. 1987).) In *People v. Price*, the California Supreme Court declined to decide if the *Ratliff* factors are required for admissibility or simply affect the weight to which the impeachment is entitled. (*People v. Price*, 1 Cal. 4th 324, 430, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991).) In *People v. Tauber*, the court seemed to adopt a somewhat more permissive view of the prosecution's right to impeach a defense witness with evidence of prior silence. In *Tauber*, the court found that such evidence is relevant "when the witness was aware before trial of information that he understood tended to exculpate one who had been charged with a crime. If there is substantial evidence such that a trier of fact could so find, then the failure to report the information before trial is relevant and admissible subject to ... § 352." (*People v. Tauber*, 49 Cal. App. 4th 518, 526, 56 Cal. Rptr. 2d 656 (4th Dist. 1996).)

If the witness admits at or before the hearing that he or she has made false statements concerning matters at issue, this admission is admissible. (*Evidence Code § 780(k)*.)

A consistent statement of the witness may be introduced only:

- If it is offered after evidence of an inconsistent statement by the witness is introduced and the consistent statement was made before the inconsistent statement (*Evidence Code § 791(a)*); or
- If it is offered after an express or implied charge that the testimony at the hearing is recently fabricated or influenced by bias or other motive and the consistent statement occurred before the bias or improper motive is alleged to have arisen. (*Evidence Code § 791(b)*; *People v. Frank*, 51 Cal. 3d 718, 733, 274 Cal. Rptr. 372, 798 P.2d 1215 (1990).)

If § 791 is complied with, evidence of a consistent statement by the witness is not made inadmissible by the hearsay rule. Once admitted, the statement may be considered for the truth of the matter it asserts (*California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); see *Evidence Code § 1236*, discussed in § 2:43), as well as for credibility.

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§ 3:46. Attacking or supporting credibility—Proving facts inconsistent with witness's testimony

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  398 to 409

Legal Encyclopedias

[C.J.S., Witnesses §§ 755 to 775](#)

During a witness's testimony, he or she will normally state that certain facts occurred. Proof that even one of them actually did not occur is indicative of a general lack of credibility. (*Kennemur v. State of California*, 133 Cal. App. 3d 907, 923, 184 Cal. Rptr. 393 (5th Dist. 1982); see generally *Evidence Code* § 780(i).) Juries are instructed that a witness who is willfully false in one part of his or her testimony is not to be trusted in others. (*People v. Laverne*, 4 Cal. 3d 735, 742, 94 Cal. Rptr. 405, 484 P.2d 77 (1971).)

Where a defendant denies ever possessing a handgun, a misdemeanor guilty plea for this offense is admissible. (*People v. Cooks*, 141 Cal. App. 3d 224, 324, 190 Cal. Rptr. 211 (1st Dist. 1983).) Where a prosecution witness has testified “that he expected no benefit and was testifying for purely unselfish reasons,” evidence that he had written letters to judges in three separate criminal cases pending against him, offering to inform on others in return for leniency, and stating that he feared injury and death in prison, were admissible for impeachment. (*People v. Mickle*, 54 Cal. 3d 140, 167–168, 284 Cal. Rptr. 511, 814 P.2d 290 (1991).)

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§ 3:47. Attacking or supporting credibility—Threats

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [370](#), [374](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 624, 626, 630 to 644, 649 to 650, 652 to 660, 665 to 666, 669](#)

Evidence of threats made to a witness by or at the instigation of a party are admissible as to the witness's credibility and the party's consciousness of wrongdoing. (*People v. Lybrand*, 115 Cal. App. 3d 1, 12, 171 Cal. Rptr. 157 (1st Dist. 1981).) Evidence that a party has threatened witnesses is highly prejudicial and admissible only if the party's role is adequately substantiated. However, evidence that a witness is afraid to testify is relevant to that witness's credibility and, therefore, admissible without proof of the origin of the threats, subject to § 352. (*People v. Harris*, 43 Cal.4th 1269, 1288–1289 (2008); *People v. Sapp*, 31 Cal. 4th 240, 281, 2 Cal. Rptr. 3d 554, 73 P.3d 433 (2003), cert. denied, 541 U.S. 1011, 124 S. Ct. 2067, 158 L. Ed. 2d 622 (2004); *People v. Warren*, 45 Cal. 3d 471, 481, 247 Cal. Rptr. 172, 754 P.2d 218 (1988).) To properly evaluate the witness's credibility the jury is entitled to know that there have been threats and, subject to § 352, the nature of the threats. (*People v. Guerra*, 37 Cal. 4th 1067, 1141–1142, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006); *People v. Olguin*, 31 Cal. App. 4th 1355, 1368–1369, 37 Cal. Rptr. 2d 596 (4th Dist. 1994).) See the discussion in § 4:9.

Evidence that a witness threatened other witnesses in this or any other case indicates that “he is the type of person who would harm others and subvert the court's truth-finding function for selfish reasons. Both traits are indicative of a morally lax character from which the jury could reasonably infer a readiness to lie.” (*People v. Mickle*, 54 Cal. 3d 140, 168, 284 Cal. Rptr. 511, 814 P.2d 290 (1991).) *Mickle* read Proposition 8 to allow “impeachment with acts not amounting to a felony conviction and with character traits not bearing directly upon honesty or veracity.” (*People v. Mickle*, 54 Cal. 3d 140, 168, 284 Cal. Rptr. 511, 814 P.2d 290 (1991).)

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§ 3:48. Attacking or supporting credibility—Demeanor

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West's Key Number Digest, [Witnesses](#)  315

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[C.J.S., Federal Civil Procedure § 588](#)

[C.J.S., Witnesses § 567](#)

The demeanor of the witness may become evidence bearing on credibility. ([Evidence Code § 780\(a\)](#) and (j).) A jury may be persuaded by the “look or manner of the witnesses, their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration.” ([Meiner v. Ford Motor Co.](#), 17 Cal. App. 3d 127, 140, 94 Cal. Rptr. 702 (4th Dist. 1971).)

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§ 3:49. Attacking or supporting credibility—Character for honesty or dishonesty—In general

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [333](#) to [362](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 566, 585 to 617](#)

The trier of fact may consider the witness's character for honesty or veracity or their opposites. ([Evidence Code § 780\(e\)](#).) In general, character evidence may be proved by (a) evidence of specific instances of conduct, (b) opinion evidence, or (c) reputation evidence.

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§ 3:50. Attacking or supporting credibility—Character for honesty or dishonesty—Civil cases

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  333 to 362

Legal Encyclopedias

[C.J.S., Witnesses §§ 566, 585 to 617](#)

To attack or support witness credibility in civil cases, the only character traits that may be proven are those for honesty, veracity, or their opposites. ([Evidence Code § 786](#).) To attack or support witness credibility in civil cases, the character traits discussed above cannot be proven by evidence of specific instances of the witness's conduct. ([Evidence Code § 787](#).) Note that specific instances of conduct can be introduced if they contradict facts testified to by the witness. (See the discussion in [§ 3:46](#).) In civil cases, evidence of a witness's good character for honesty or veracity cannot be introduced to support credibility unless bad character evidence has been admitted to attack it. ([Evidence Code § 790](#).) In civil cases, the limitations of [§§ 786, 787, and 790](#), still apply, even after the passage of Proposition 8. ([Mendez v. Superior Court](#), 206 Cal. App. 3d 557, 577, 253 Cal. Rptr. 731 (5th Dist. 1988); [Andrews v. City and County of San Francisco](#), 205 Cal. App. 3d 938, 946, 252 Cal. Rptr. 716 (1st Dist. 1988).)

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§ 3:51. Attacking or supporting credibility—Character for honesty or dishonesty—Criminal cases

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  333 to 362

Legal Encyclopedias

[C.J.S., Witnesses §§ 566, 585 to 617](#)

[Evidence Code §§ 786, 787, and 790](#), which purport to limit the admissibility of evidence of a witness's character to attack or support the credibility of the witness, are no longer applicable in criminal cases since [article I, § 28\(d\) of the California Constitution](#) was added in 1982 by Proposition 8. Exclusion of the evidence may, however, be ordered pursuant to [Evidence Code § 352](#). (*People v. Harris*, 47 Cal. 3d 1047, 1080–1082, 255 Cal. Rptr. 352, 767 P.2d 619 (1989).) Thus, an officer may bolster the credibility of a witness by testimony that the witness has been reliable as an informant in past cases. (*People v. Harris*, 47 Cal. 3d 1047, 1080, 255 Cal. Rptr. 352, 767 P.2d 619 (1989).) In addition, a defendant in a rape case may introduce evidence that the victim has falsely accused others of rape. (*People v. Adams*, 198 Cal. App. 3d 10, 243 Cal. Rptr. 580 (1st Dist. 1988); see also *People v. Burrell–Hart*, 192 Cal. App. 3d 593, 237 Cal. Rptr. 654 (2d Dist. 1987).) A defendant may introduce evidence that a molest victim has made a prior false accusation of sexual molestation, without complying with the affidavit requirements of [Evidence Code § 782](#). (*People v. Franklin*, 25 Cal. App. 4th 328, 334–335, 30 Cal. Rptr. 2d 376 (6th Dist. 1994); *People v. Tidwell*, 163 Cal.App.4th 1447, 1454–1456 (2008).) This right is strictly limited by the rule against admitting evidence that will cause undue consumption of time. (See the discussion in [Note 6:26](#).) Finally a witness may be impeached with proof of a specific act of misconduct involving moral turpitude, which did not result in a felony conviction. (See the discussion in §§ [3:58](#) and [3:59](#).)

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§ 3:52. Attacking or supporting credibility—Religious beliefs

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West's Key Number Digest, [Witnesses](#)  [340\(2\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 596, 604](#)

Evidence of a witness's religious beliefs is inadmissible to support or attack credibility. ([Evidence Code § 789](#).) In *Drake v. Dean*, the court ruled that while [§ 789](#) precludes evidence that a witness possesses or lacks religious beliefs on the issue of credibility, it does not prevent inquiry into whether a witness belongs to a particular sect or has a particular tenet of faith where that might tend to show bias. In *Drake*, the plaintiff sued for injuries caused by the defendant's dog. The defendant was permitted to cross-examine a witness with regard to whether her status as a fellow Jehovah's Witness or some tenet of her faith biased her in favor of the plaintiff. (*Drake v. Dean*, 15 Cal. App. 4th 915, 933, 19 Cal. Rptr. 2d 325 (3d Dist. 1993).) In *People v. Bautista*, 163 Cal.App.4th 762, 784 (2008), the defendant, a lay minister, preached a strict doctrine regarding the sexual behavior of young churchgoers. Given that he was charged with molesting teenage members of the church, the court properly overruled the defense objections under the First Amendment and [section 789](#) to evidence concerning the background of the church and certain tenets of its members.

Warning

No case has yet ruled on whether, in criminal cases, [§ 789](#) survives the passage of Proposition 8. In *People v. Harris*, the court held that the Initiative invalidated [Evidence Code §§ 786, 787, and 790](#) in criminal cases. (*People v. Harris*, 47 Cal. 3d 1047, 255 Cal. Rptr. 352, 767 P.2d 619 (1989); see the discussion in §§ [3:49](#) to [3:51](#).) There seems little room to doubt that the same result will be reached when the appellate courts consider [§ 789](#). However, it is still unlikely that a party will be able to impeach with evidence of a witness's religious beliefs. [Evidence Code § 352](#), which excludes evidence that may confuse the jury or

evidence that is unduly prejudicial, will operate to exclude virtually the same evidence that § 789 previously did.

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§ 3:53. Attacking or supporting credibility—Credibility of civil or criminal sexual assault victims

West's Key Number Digest

West's Key Number Digest, [Rape](#) 🔑40

West's Key Number Digest, [Witnesses](#) 🔑344

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[C.J.S., Rape](#) §§ 1, 62, 86 to 89

[C.J.S., Witnesses](#) §§ 596, 603, 605

Concerned that sexual assault victims were reluctant to prosecute or sue because of the way they would be treated in court, the Legislature enacted §§ 782 and 783. See a discussion of this legislative policy in [In re Venus B.](#), 222 Cal. App. 3d 931, 936, 272 Cal. Rptr. 115 (2d Dist. 1990).

In certain specified sexual assault criminal prosecutions, [Evidence Code § 782](#) provides that prior sexual conduct of the victim may not be proved to attack the victim's credibility unless a written motion is filed by the defense setting forth an offer of proof in an affidavit that establishes the relevance of the evidence. If the court is satisfied by the offer of proof, a hearing is held outside the jury's presence and the witness is examined. If the court determines that the evidence would be relevant, it may be proved to the jury unless the court rejects it under [Evidence Code § 352](#). (See [People v. Casas](#), 181 Cal. App. 3d 889, 226 Cal. Rptr. 285 (6th Dist. 1986), which rejected evidence that the victim had solicited an act of prostitution; [People v. Rios](#), 161 Cal. App. 3d 905, 916–919, 207 Cal. Rptr. 903 (5th Dist. 1984), which rejected evidence that the victim was a convicted prostitute; and the discussion in [§ 3:51](#).) (For a discussion of the relationship between [Evidence Code §§ 782](#) and [1103](#), see [§ 6:26](#).) Where the defense seeks to introduce evidence of prior sexual conduct by a child to show that the child had sexual knowledge independent of that allegedly obtained from the crime, [§ 782](#) applies. ([People v. Daggett](#), 225 Cal. App. 3d 751, 757, 275 Cal. Rptr. 287 (2d Dist. 1990).) In [People v. Bautista](#), 163 Cal.App.4th 762, 781–783 (2008), the defendant was permitted to cross-examine a teenage molesting victim regarding the

role the defendant played in requiring her to end her relationship with a boy, in order to establish a motive for her to fabricate. The defendant was not permitted to elicit information regarding the sexual aspects of the relationship between the victim and the boy. This ruling did not violate the Confrontation Clause. (at 783.)

Effective January 1, 2007, the affidavit procedure set out in [§ 782](#) has been expanded to include not only the complaining witness in the current crime, but any other alleged victim who testifies pursuant to [Evidence Code §§ 1101](#) and 1008.

In any civil action alleging sexual harassment, sexual assault, or sexual battery, the same limitations on evidence of sexual conduct apply. ([Evidence Code § 783](#).)

Juvenile dependency cases are covered by the rules of [Evidence Code §§ 782](#) and [783](#), though not specifically mentioned in either statutory provision. (*In re Venus B.*, 222 Cal. App. 3d 931, 272 Cal. Rptr. 115 (2d Dist. 1990).)

In *People v. Espinoza*, a child molesting case, the defense sought to introduce evidence that the victim's foster mother believed the victim was “not honest” and “told a lot of lies.” (*People v. Espinoza*, 95 Cal. App. 4th 1287, 1313, 116 Cal. Rptr. 2d 700 (6th Dist. 2002).) The trial court relied on [Welfare & Institutions Code § 827](#) to exclude the evidence. [Section 827](#) restricts those who examine “a juvenile case file.” Subdivision (e) defines that term. The Court of Appeal held that this ruling was erroneous, because [§ 827](#) did not apply to the observations of a foster mother. (*Espinoza*, 95 Cal. App. 4th at 1316.)

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§ 3:54. Impeaching witness with prior felony conviction—Limitations

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West's Key Number Digest, [Witnesses](#)  [345](#), [337\(5\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

[Evidence Code § 788](#) by its own terms permits a witness to be impeached by all felony convictions, unless subsequent to the conviction the witness received one of the listed types of certificates of pardon or rehabilitation. Despite this language in [§ 788](#), in 1972 the California Supreme Court ruled that trial courts have discretion under [§ 352](#) to bar proof of the felony conviction if its probative value is outweighed by its prejudicial impact. (*People v. Beagle*, 6 Cal. 3d 441, 99 Cal. Rptr. 313, 492 P.2d 1 (1972).) In a series of decisions over the next 10 years, the Supreme Court fleshed out the factors that the trial court could consider as part of its weighing process.

In 1982, Proposition 8 was enacted, which added [article I, § 28\(f\) to the California Constitution](#). This provision sets out in the strongest possible terms that “[a]ny prior felony conviction ... shall subsequently be used without limitation for purposes of impeachment.” In 1985, the California Supreme Court held that this provision was limited by both the federal due process clause and [Evidence Code § 352](#): in order for a prior felony conviction to be used to impeach, the court must first find that it is one involving moral turpitude and then must exercise its discretion under [§ 352](#). (*People v. Castro*, 38 Cal. 3d 301, 316, 211 Cal. Rptr. 719, 696 P.2d 111 (1985); *People v. Coad*, 181 Cal. App. 3d 1094, 1109, 226 Cal. Rptr. 386 (1st Dist. 1986).) Some of the limitations on admissibility imposed by the *Beagle* line of cases are now imposed under *Castro* and are discussed in §§ [3:62](#) to [3:67](#). Note that at least one appellate case has questioned the validity of the “moral turpitude” limitation. (*People v. Ballard*, 13 Cal. App. 4th 687, 691–695, 16 Cal. Rptr. 2d 624 (1st Dist. 1993).)

In a civil case, when there is an attempt to impeach a witness with a prior felony conviction, neither Propo-

ition 8, nor any of the subsequent appellate decisions on criminal cases directly governs. “The trial court in a civil case may, however, utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under [section 352](#).” (*Robbins v. Wong*, 27 Cal. App. 4th 261, 32 Cal. Rptr. 2d 337 (6th Dist. 1994).)

Comment

Though commonly one talks of impeachment by a “prior” felony conviction, a witness may be impeached by a conviction obtained after the charged offense occurred. (*People v. Hinton*, 37 Cal. 4th 839, 886–887, 38 Cal. 4th 71a, 38 Cal. Rptr. 3d 149, 126 P.3d 981 (2006); *People v. Halsey*, 21 Cal. App. 4th 325, 328, 26 Cal. Rptr. 2d 701 (4th Dist. 1993).) In addition, if a defendant is convicted of one felony offense and tried on a second before being sentenced on the first, the defendant may be impeached by the first conviction, even if the judge who presided at the first trial has the discretion under [Penal Code § 17](#) to reduce the conviction to a misdemeanor at the time of sentence. (*People v. Martinez*, 62 Cal. App. 4th 1454, 73 Cal. Rptr. 2d 358 (5th Dist. 1998).)

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§ 3:55. Impeaching witness with prior felony conviction—General categories of impeachable felonies

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345](#), [337\(5\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

Prior convictions that involve dishonesty are crimes of moral turpitude. ([People v. Jackson](#), 174 Cal. App. 3d 260, 266, 220 Cal. Rptr. 39 (5th Dist. 1985); [People v. Parrish](#), 170 Cal. App. 3d 336, 349, 217 Cal. Rptr. 700 (5th Dist. 1985).) Other prior convictions that show “a general readiness to do evil” are crimes of moral turpitude. ([People v. Jackson](#), 174 Cal. App. 3d 260, 266, 220 Cal. Rptr. 39 (5th Dist. 1985) (assault with deadly weapon); [People v. Williams](#), 169 Cal. App. 3d 951, 957, 215 Cal. Rptr. 612 (1st Dist. 1985) (battery by jail inmate on non-inmate).)

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§ 3:56. Impeaching witness with prior felony conviction—Does felony involve moral turpitude?

West's Key Number Digest

Wests Key Number Digest, [Witnesses](#)  [345](#), [337\(11\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

The following table lists common felonies and appellate court decisions determining whether or not a conviction for the felony involves moral turpitude and is admissible to impeach a witness.

Felony	Admissible	Citation
Arson	Yes	<i>People v. Miles</i> , 172 Cal. App. 3d 474, 482, 218 Cal. Rptr. 378 (1985)
Assault, simple	No	<i>People v. Cavazos</i> , 172 Cal. App. 3d 589, 594, 218 Cal. Rptr. 269 (1985)
Assault, deadly weapon	Yes	<i>People v. Means</i> , 177 Cal. App. 3d 138, 139, 222 Cal. Rptr. 735 (1986)
Assault, intent to murder	Yes	<i>People v. Sandoval</i> , 4 Cal. 4th 155, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992)
Assault, intent to rape	Yes	<i>People v. Bonilla</i> , 168 Cal. App. 3d 201, 205, 214 Cal. Rptr. 191 (1985)
Auto theft	Yes	<i>People v. Lang</i> , 49 Cal.3d 991, 1011, 264 Cal. Rptr. 386, 782 P.2d 627 (1989)
Battery, simple	No	<i>People v. Lindsay</i> , 209 Cal. App. 3d 849, 856, 257 Cal. Rptr. 529 (1989)
Battery, serious bodily injury	No	<i>People v. Lindsay</i> , 209 Cal. App. 3d 849, 856, 257

Battery, jail inmate on non-inmate	Yes	Cal. Rptr. 529 (1989) <i>People v. Williams</i> , 169 Cal. App. 3d 951, 957, 215 Cal. Rptr. 612 (1985)
	No	<i>People v. Mansfield</i> , 200 Cal. App. 3d 82, 89, 245 Cal. Rptr. 800 (1988)
Battery on police officer	Yes	<i>People v. Lindsay</i> , 209 Cal. App. 3d 849, 257 Cal. Rptr. 529 (1989)
Burglary, intent to commit theft or Another felony	Yes	<i>People v. Bothuel</i> , 205 Cal. App. 3d 581, 595, 252 Cal. Rptr. 596 (1988)
Child endangerment	No	<i>People v. Sanders</i> , 10 Cal. App. 4th 1268, 1273, 13 Cal. Rptr. 2d 205 (1992)
Child molestation	Yes	<i>People v. Massey</i> , 192 Cal. App. 3d 819, 823, 237 Cal. Rptr. 734 (1987)
Conspiracy to commit crime of moral turpitude	Yes	<i>People v. Garrett</i> , 195 Cal. App. 3d 795, 799, 241 Cal. Rptr. 10 (1987)
Corporal injury to child	Yes	<i>People v. Brooks</i> , 3 Cal. App. 4th 669, 4 Cal. Rptr. 2d 570 (1992)
Driving under the influence of alcohol	Yes	<i>People v. Forster</i> , 29 Cal. App. 4th 1746, 1756, 35 Cal. Rptr. 2d 705 (1994)
Escape without violence	Yes	<i>People v. Lang</i> , 49 Cal. 3d 991, 1010, 264 Cal. Rptr. 386, 782 P.2d 627 (1989)
Escape, failure to return to custody	Yes	<i>People v. Lee</i> , 229 Cal. App. 3d 1504, 281 Cal. Rptr. 9 (1991)
Failure to appear on felony bond	Yes	<i>People v. Maestas</i> , 132 Cal. App. 4th 1552, 1556–1558, 34 Cal. Rptr. 3d 503 (2005)
False imprisonment	Yes	<i>People v. Cornelio</i> , 207 Cal. App. 3d 1580, 1583, 255 Cal. Rptr. 775 (1989)
Flight from peace officer	Yes	<i>People v. Dewey</i> , 42 Cal. App. 4th 216, 49 Cal. Rptr. 2d 537 (1996)
Forgery	Yes	<i>People v. Almarez</i> , 168 Cal. App. 3d 262, 267, 214 Cal. Rptr. 105 (1985)
Hit and run with injury	Yes	<i>People v. Bautista</i> , 217 Cal. App. 3d 1, 265 Cal. Rptr. 661 (1990)
Indecent exposure	Yes	<i>People v. Ballard</i> , 13 Cal. App. 4th 687, 691, 16 Cal. Rptr. 2d 624 (1993)
Involuntary manslaughter	No	<i>People v. Solis</i> , 172 Cal. App. 3d 877, 883, 218 Cal. Rptr. 469 (1985)
Kidnapping	Yes	<i>People v. Zataray</i> , 173 Cal. App. 3d 390, 400, 219 Cal. Rptr. 33 (1985)

Maintaining place where drugs distributed	Yes	<i>People v. Vera</i> , 69 Cal. App. 4th 1100, 82 Cal. Rptr. 2d 128 (1999)
Malicious mischief	Yes	<i>People v. Campbell</i> , 23 Cal. App. 4th 1488, 28 Cal. Rptr. 2d 716 (1994)
Negligent discharge of firearm	Yes	<i>People v. Feaster</i> , 102 Cal. App. 4th 1084, 1093 (2002)
Pimping and pandering	Yes	<i>People v. Jaimez</i> , 184 Cal. App. 3d 146, 150, 228 Cal. Rptr. 852 (1986)
Possession deadly weapon with intent to assault (misdemeanor)	Yes	<i>People v. Rivera</i> , 107 Cal. App. 4th 1374, 1378–1982, 1933 Cal. Rptr. 2d 176 (2003)
Possession of drugs, simple	No	<i>People v. Castro</i> , 38 Cal.3d 301, 317, 211 Cal. Rptr. 719, 696 P.2d 111 (1985)
Possession, firearm by felon	Yes	<i>People v. Littrel</i> , 185 Cal. App. 3d 699, 230 Cal. Rptr. 83 (1986)
Possession, illegal firearm	Yes	<i>People v. Robinson</i> , 37 Cal. 4th 592, 625–626, 36 Cal. Rptr. 3d 760, 124 P.3d 363 (2005); <i>People v. Garrett</i> , 195 Cal. App. 3d 795, 241 Cal. Rptr. 10 (1987)
Possession, marijuana for sale	Yes	<i>People v. Standard</i> , 181 Cal. App. 3d 431, 435, 226 Cal. Rptr. 62 (1986)
Possession, narcotics for sale	Yes	<i>People v. Castro</i> , 38 Cal.3d 301, 317, 211 Cal. Rptr. 719, 696 P.2d 111 (1985)
Rape	Yes	<i>People v. Muldrow</i> , 202 Cal. App. 3d 636, 248 Cal. Rptr. 891 (1988)
Receiving stolen property	Yes	<i>People v. Rodriguez</i> , 177 Cal. App. 3d 174, 179, 222 Cal. Rptr. 809 (1986)
Resisting or deterring executive officer	Yes	<i>People v. Williams</i> , 72 Cal. App. 4th 1460, 86 Cal. Rptr. 2d 62 (1999)
Robbery	Yes	<i>People v. Burns</i> , 189 Cal. App. 3d 734, 739, 234 Cal. Rptr. 547 (1987)
Sale of drugs	Yes	<i>People v. Navarez</i> , 169 Cal. App. 3d 936, 215 Cal. Rptr. 519 (1985)
Sexual Battery (Misdemeanor)	Yes	<i>People v. Chavez</i> , 84 Cal. App. 4th 25, 100 Cal. Rptr. 2d 680 (2000)
Shooting at inhabited dwelling/vehicle	Yes	<i>People v. White</i> , 4 Cal. App. 4th 1299, 6 Cal. Rptr. 2d 259 (1992)
Spousal battery	Yes	<i>People v. Rodriguez</i> , 5 Cal. App. 4th 1398, 7 Cal. Rptr. 2d 495 (1992)
Statutory rape	Yes	<i>People v. Fulcher</i> , 194 Cal. App. 3d 749, 754, 236

Statutory rape	No	Cal. Rptr. 845 (1987) <i>People v. Flanagan</i> , 185 Cal. App. 3d 764, 773, 230 Cal. Rptr. 64 (1986)
Terrorist threats	Yes	<i>People v. Thornton</i> , 3 Cal. App. 4th 419, 4 Cal. Rptr. 2d 519 (1992)
Vandalism (felony)	Yes	<i>People v. Campbell</i> , 23 Cal. App. 4th 1488, 1493, 28 Cal. Rptr. 2d 716 (1994)
Voluntary manslaughter	Yes	<i>People v. Foster</i> , 201 Cal. App. 3d 20, 25, 246 Cal. Rptr. 855 (1988)

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B. Examination Of Witnesses

§ 3:57. Impeaching witness with prior felony conviction—Out-of-state felony convictions

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345, 337\(5\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

A foreign felony conviction may be used to impeach a witness in a California trial if it meets the *Castro* tests, is a felony under the laws of the state in which it occurred, and would also have been a felony in California. ([Truman v. Thomas](#), 27 Cal. 3d 285, 296, 165 Cal. Rptr. 308, 611 P.2d 902 (1980).)

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§ 3:58. Impeaching witness with prior felony conviction—Impeaching witness with misdemeanor misconduct**West's Key Number Digest**Wests Key Number Digest, [Witnesses](#)  [345](#), [337\(9\)](#)**Legal Encyclopedias**[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

The truth-in-evidence provisions of Proposition 8 have repealed the limitations on credibility evidence contained in [Evidence Code § 787](#). Thus, a trial court has broad discretion to admit specific acts of dishonesty or moral turpitude to impeach a witness's credibility. Past criminal conduct amounting to a misdemeanor, which has a logical bearing on the veracity of a witness, is admissible under this standard. ([People v. Wheeler](#), 4 Cal. 4th 284, 295, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (1992); [People v. Robinson](#), 37 Cal. 4th 592, 625–626, 36 Cal. Rptr. 3d 760, 124 P.3d 363 (2005), cert. denied, 2006 WL 1557901 (U.S. 2006).)

How may this past criminal conduct be proved? Assume a situation where a witness has a previous conviction for misdemeanor grand theft. *Wheeler* held that the misdemeanor conduct could not be proved through use of the prior conviction because the conviction is hearsay evidence of the misconduct. ([People v. Wheeler](#), 4 Cal. 4th 284, 297, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (1992).) *Wheeler* noted that, unlike prior felony convictions, which are admissible to impeach under [Evidence Code § 788](#) without regard to their hearsay nature, no hearsay exception for misdemeanor convictions existed. ([People v. Wheeler](#), 4 Cal. 4th 284, 298, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (1992).) Thus, under *Wheeler*, it was necessary to call live witnesses to prove the misdemeanor misconduct. The enactment of the Criminal Convictions Record Act has changed this. This act added [§ 452.5\(b\) to the Evidence Code](#). This subsection provides, among other things, that “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.” (See the discussion in [§ 2:103](#).) Following enactment of [§ 452.5\(b\)](#), a misdemeanor conviction is admissible to prove the conduct underlying. [People v.](#)

[Duran](#), 97 Cal. App. 4th 1448, 1460, 119 Cal. Rptr. 2d 272 (2d Dist. 2002). If that conduct constitutes moral turpitude, the conviction can be introduced to impeach the witness, subject to [Evidence Code § 352](#).

If the misconduct did not result in a conviction, the court need not label it as a particular offense in order to determine if it constitutes an act of moral turpitude. In *People v. Lepolo*, a defendant prosecuted for murder was impeached with evidence that on an earlier occasion he had raised a machete at a police officer and subsequently stated that “I wanted to whack his head off.” The appellate court found that the conduct showed more than one possible crime. “Whether the trial court admits evidence of past misconduct should be determined solely on the basis that that conduct evinces moral turpitude. The label is not important—the conduct is.” ([People v. Lepolo](#), 55 Cal. App. 4th 85, 89–90, 63 Cal. Rptr. 2d 735 (4th Dist. 1997).)

Comment

When there is no conviction and the misconduct must be proved by the testimony of witnesses, courts must be concerned with the consumption of time that could occur. Except in those cases where the witness being impeached has admitted the impeaching conduct, a mini-trial may well result that rivals the length of the main trial. In such a situation the party opposing the impeachment should argue that proving the conduct will consume an undue amount of time and, under [Evidence Code § 352](#), should be excluded.

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§ 3:59. Impeaching witness with prior felony conviction—“Convictions” in juvenile court

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345\(9\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 597 to 601](#)

A juvenile proceeding is “civil” in nature, not “criminal” as required by Proposition 8. It is error to admit a juvenile adjudication for impeachment. ([People v. Burton](#), 48 Cal. 3d 843, 861, 258 Cal. Rptr. 184, 771 P.2d 1270 (1989).) Pursuant to *Wheeler*, a party may impeach a witness with evidence of prior conduct amounting to moral turpitude even if such conduct was the subject of a prior juvenile adjudication. ([People v. Rivera](#), 107 Cal. App. 4th 1374, 133 Cal. Rptr. 2d 176 (6th Dist. 2003) (defendant impeached with prior juvenile misdemeanor adjudication for possession of deadly weapon with the intent to assault); [People v. Lee](#), 28 Cal. App. 4th 1724, 1738–1740, 34 Cal. Rptr. 2d 723 (4th Dist. 1994).) *Lee* appears to permit the prior conduct to be proved by introducing evidence of an admission to the prior petition ([People v. Lee](#), 28 Cal. App. 4th 1724, 1740, 34 Cal. Rptr. 2d 723 (4th Dist. 1994)); evidence of the prior adjudication is still inadmissible, however.

Comment

Though [Evidence Code § 452.5\(b\)](#), changed the result in *Wheeler* to permit proof of the conviction to impeach, it does not change *Lee*: a juvenile adjudication is not a “conviction.”

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§ 3:60. Impeaching witness with prior felony conviction—Adult defendant sent to California Youth Authority

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345\(9\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 597 to 601](#)

If the felony could have been charged as a misdemeanor and, after conviction, an adult defendant is committed to the Youth Authority, the felony is reduced to a misdemeanor on discharge from that institution. ([Penal Code § 17\(c\)](#).) Discharge does not occur until the defendant's parole is successfully completed. ([People v. Seaton](#), 146 Cal. App. 3d 67, 77–78, 194 Cal. Rptr. 33 (3d Dist. 1983).)

Comment

Though discharge from the Youth Authority will preclude use of the felony conviction, it should not preclude use of the underlying conduct to impeach, if the conduct involves moral turpitude. Though no case has so held, this seems an inevitable conclusion from *Wheeler* (discussed in [§ 3:58](#)). In addition, [Evidence Code § 452.5\(b\)](#), will permit use of the original conviction to prove the underlying conduct.

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§ 3:61. Impeaching witness with prior felony conviction—Procedure for limiting impeachment

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345, 337\(5\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

The party whose witness has the conviction should move to exclude evidence of it before the trial begins because the court's ruling may affect not only trial strategy (for example, will the witness testify) but the content of voir dire as well.

If a party seeks a ruling on the admissibility of prior convictions, the court should give it before the witness's testimony, but it is not error to delay the decision until after the direct examination. ([People v. Washington](#), 211 Cal. App. 3d 207, 212–214, 259 Cal. Rptr. 307 (1st Dist. 1989).)

In evaluating the prejudicial effect of allowing impeachment, the court may wish to know what the witness's testimony will be. To facilitate a ruling prior to the testimony, the party should make an offer of proof by having the witness testify outside the jury's presence and, if the witness is a criminal defendant, in camera. ([People v. Washington](#), 211 Cal. App. 3d 207, 213, 259 Cal. Rptr. 307 (1st Dist. 1989); [People v. Delgado](#), 32 Cal. App. 3d 242, 252, 108 Cal. Rptr. 399 (4th Dist. 1973).)

The court then engages in a two-step determination: (1) is the conviction one involving moral turpitude? and (2) if so, will the prejudicial effect substantially outweigh the probative value? The factors involved in this judicial balancing test are discussed in [§ 3:62](#).

If the court rules in favor of admitting the conviction, the party may challenge the constitutionality of the conviction. A constitutionally invalid prior conviction may not be used to impeach. ([People v. Coffey](#), 67 Cal.

2d 204, 218, 60 Cal. Rptr. 457, 430 P.2d 15 (1967).) However, there is “no authority for the proposition that a witness can avoid impeachment with a prior conviction by ... attacking the constitutionality of the statute which he had been convicted of violating.” (*People v. Thornton*, 3 Cal. App. 4th 419, 424, 4 Cal. Rptr. 2d 519 (4th Dist. 1992).)

Warning

If the court again rules that the prior conviction can be used, the party must decide whether to call the witness. A failure to call the witness, even a criminal defendant, will preclude appeal of the ruling approving impeachment. If the witness does not testify, appeal of this issue is lost; a mere offer of proof is insufficient. (*People v. Collins*, 42 Cal. 3d 378, 384–388, 228 Cal. Rptr. 899, 722 P.2d 173 (1986); *People v. Moten*, 210 Cal. App. 3d 765, 770, 258 Cal. Rptr. 390 (1st Dist. 1989).) If the witness testifies, the party should consider having the witness disclose the conviction on direct. Disclosing the conviction on direct will not prevent an appeal of the ruling. (*People v. Turner*, 50 Cal. 3d 668, 704–705, 268 Cal. Rptr. 706, 789 P.2d 887 (1990).) Note that the federal rule is contrary: a defendant who admits prior convictions on direct examination, after the court has overruled an objection to their admissibility, cannot challenge the ruling on appeal. (*Ohler v. U.S.*, 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000).)

The defendant may testify that he or she has been rehabilitated and has received relief under [Penal Code § 1203.4](#). (*People v. Marsh*, 175 Cal. App. 3d 987, 995–996, 221 Cal. Rptr. 311 (4th Dist. 1985).) For all witnesses except criminal defendants, a dismissal of the accusatory pleading under [Penal Code § 1203.4](#) bars use of the felony to impeach. ([Evidence Code § 788\(c\)](#).) This expungement provision has survived the passage of Proposition 8. (*People v. Field*, 31 Cal. App. 4th 1778, 1789–1780, 37 Cal. Rptr. 2d 803 (4th Dist. 1995).)

If the adverse party wishes to question the witness about the prior conviction, the questioning is limited to the name or nature of the crime and the date and place of conviction. (*People v. Allen*, 42 Cal. 3d 1222, 1268, 232 Cal. Rptr. 849, 729 P.2d 115 (1986); *People v. Hall*, 5 Cal. App. 3d 116, 126, 85 Cal. Rptr. 188 (2d Dist. 1970).) If the witness admits the felony conviction on direct, the adverse party is still limited to questions about its name, nature, date, and place unless the witness tries to mislead the jury by minimizing the facts. That is, the cross-examiner can only go into the details of the crime if the witness opens the door. (*People v. Heckathorne*, 202 Cal. App. 3d 458, 461–463, 248 Cal. Rptr. 399 (4th Dist. 1988).)

In *Heckathorne*, the prosecutor asked the defendant if he had been convicted of assault with a deadly weapon. The following colloquy ensued:

A: Yes. An automobile.

Q: Did you try to assault somebody with this automobile?

A: It was a car accident.

The court held that the prosecutor should not have been permitted to pursue further details of the automobile assault. The court concluded that the defendant's reference to an automobile did not minimize or mislead. The defendant's reference to the incident as an “accident” was in response to the prosecutor's improper invitation to

discuss the facts of the old offense. Significantly, the court noted that had the defendant's statement about the "car accident" been made on direct examination, the prosecutor would have been permitted to inquire into the crime's details.

In order to establish prima facie evidence that a witness has a previous conviction, a party may introduce a properly certified record of the conviction, or a computer-generated record under [Evidence Code § 452.5\(a\)](#). In addition, records or copies of records of any state or federal prison or other custodial facility may be introduced into evidence when such records or copies thereof have been certified by the official custodian of such records. ([Penal Code § 969\(b\)](#).) If a party introduces a judgment of conviction that has the same first and last name as the witness, the trier of fact may presume it is the same person, even if the middle name is different. ([People v. Mendoza](#), 183 Cal. App. 3d 390, 401, 228 Cal. Rptr. 308 (1st Dist. 1986).)

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§ 3:62. Impeaching witness with prior felony conviction—Judicial balancing—In general

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West's Key Number Digest, [Witnesses](#)  [345, 337\(5\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

When a party objects under [Evidence Code § 352](#) to the use of prior misconduct or a prior conviction to impeach on the basis that the probative value of the evidence is substantially outweighed by the undue prejudice, the record must demonstrate affirmatively that the trial judge weighed prejudice against probative value. ([People v. Green](#), 27 Cal. 3d 1, 25, 164 Cal. Rptr. 1, 609 P.2d 468 (1980).) “Nonetheless ‘the trial judge need not expressly weigh prejudice against probative value—or even expressly state that he has done so.’ ” ([People v. Crittenden](#), 9 Cal. 4th 83, 135, 9 Cal. 4th 579b, 36 Cal. Rptr. 2d 474, 885 P.2d 887 (1994) (emphasis in original). See also [People v. Mickey](#), 54 Cal. 3d 612, 656, 286 Cal. Rptr. 801, 818 P.2d 84 (1991) and [People v. Garrett](#), 195 Cal. App. 3d 795, 801, 241 Cal. Rptr. 10 (2d Dist. 1987), which held that the court need not recite “magic words.”)

The decision in [People v. Beagle](#), 6 Cal. 3d 441, 99 Cal. Rptr. 313, 492 P.2d 1 (1972) set forth certain factors, in addition to the nature of the prior conviction, which the court should weigh. Since Proposition 8, the Supreme Court has held that the same factors apply “as guiding rather than restraining the discretion of the trial courts in applying § 352 to prior convictions offered for impeachment.” ([People v. Collins](#), 42 Cal. 3d 378, 392, 228 Cal. Rptr. 899, 722 P.2d 173 (1986).) These factors are discussed below.

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§ 3:63. Impeaching witness with prior felony conviction—Judicial balancing—Remoteness of crime

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345, 337\(28\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

A court may properly consider the remoteness of the crime. The court may look to: (1) the length of time elapsed since the conviction; (2) the length of sentence served; (3) the age of the witness at the time of conviction; and (4) the witness's conduct subsequent to the conviction. ([People v. Burns](#), 189 Cal. App. 3d 734, 738–739, 234 Cal. Rptr. 547 (2d Dist. 1987).) In *People v. Morris*, felony convictions that were seven and nine years old were found not to be too remote. ([People v. Morris](#), 53 Cal. 3d 152, 195, 279 Cal. Rptr. 720, 807 P.2d 949 (1991).) In *People v. DeCosse*, a 12-year-old prior conviction was held admissible. ([People v. DeCosse](#), 183 Cal. App. 3d 404, 411–412, 228 Cal. Rptr. 114 (1st Dist. 1986).) In *People v. Turner*, a 13-year-old prior conviction was admitted. ([People v. Turner](#), 8 Cal. 4th 137, 200, 32 Cal. Rptr. 2d 762, 878 P.2d 521 (1994).) In *People v. Carpenter*, the court approved admission of 17-year-old prior convictions because the defendant had been incarcerated for all but two of the years between the convictions and the trial. ([People v. Carpenter](#), 21 Cal. 4th 1016, 1055–1056, 90 Cal. Rptr. 2d 607, 988 P.2d 531 (1999).)

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§ 3:64. Impeaching witness with prior felony conviction—Judicial balancing—Identical crime

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West's Key Number Digest, [Witnesses](#)  [345](#), [337\(27\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

If the prior conviction is for a crime identical to the one charged, the court may, but is no longer compelled to, exclude it, particularly if it is the witness's only impeachable conviction. (*People v. Tamborrino*, 215 Cal. App. 3d 575, 590, 263 Cal. Rptr. 731 (2d Dist. 1989); *People v. Gutierrez*, 28 Cal. 4th 1083, 1139, 124 Cal. Rptr. 2d 373, 52 P.3d 572 (2002), cert. denied, 538 U.S. 1001, 123 S. Ct. 1899, 155 L. Ed. 2d 829 (2003).) See *People v. Muldrow*, where the court admitted six prior felonies, three of which were for identical charges. (*People v. Muldrow*, 202 Cal. App. 3d 636, 647, 248 Cal. Rptr. 891 (1st Dist. 1988).) As an alternative to excluding an identical prior conviction, the court can sanitize it and thereby reduce the prejudice to the defendant. For example, in *People v. Foreman*, a defendant charged with burglary had an identical prior conviction. The judge permitted the impeachment but the jury was informed only that it was a conviction involving theft. (*People v. Foreman*, 174 Cal. App. 3d 175, 182, 219 Cal. Rptr. 759 (5th Dist. 1985); see *People v. Carpenter*, 21 Cal. 4th 1016, 1055–1056, 90 Cal. Rptr. 2d 607, 988 P.2d 531 (1999); *People v. Forster*, 29 Cal. App. 4th 1746, 1755, 35 Cal. Rptr. 2d 705 (4th Dist. 1994) (driving under the influence); *People v. Massey*, 192 Cal. App. 3d 819, 825, 237 Cal. Rptr. 734 (2d Dist. 1987) (child molestation); *People v. Ballard*, 13 Cal. App. 4th 687, 698, 16 Cal. Rptr. 2d 624 (1st Dist. 1993) (indecent exposure).)

Comment

Sanitizing may provide a useful method of balancing the defendant's right to a fair trial and the prosecution's right to inform the jury of an impeachable felony. Three different questions concerning sanitizing should be addressed:

- Does the defendant, in fact, wish to have the conviction sanitized? It is possible that the jury will conclude that the conviction is for a more serious crime than the one actually committed if only a general reference to it is made. The prosecutor should ensure that the record is clear that the sanitizing is being done at the defendant's request to preclude an appeal on this ground.
- If the decision is made to sanitize, how should the felony be referred to? If it is a theft crime, it could be referred to as a "felony involving theft." If some other type of impeachable felony, it could be referred to as a "felony involving moral turpitude." This may result in a problem if the jury inquires about the meaning of "moral turpitude," a not unlikely occurrence. If this inquiry is made, the court could define "moral turpitude" in the language of *Jackson*, discussed in § 3:55. The court might also decide to respond to the question by indicating that the phrase "moral turpitude" simply denotes that it is the type of felony the jury may consider for impeachment purposes.
- Can a court sanitize a felony when it is not identical to the one charged? Assume the defendant is charged with auto theft and has a prior child molesting conviction. If he testifies, may counsel move to sanitize? No case has ever so ruled. However, under general principles of § 352, it would seem that the court could exclude the prior conviction entirely if it concluded that the undue prejudice sufficiently outweighed its probative value. If exclusion is permissible, it is difficult to see why the court should be denied the option to take the lesser step of sanitizing.

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§ 3:65. Impeaching witness with prior felony conviction—Judicial balancing—Refusal to testify

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [337\(26\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 599](#)

If the witness is a criminal defendant, the court must be concerned if the fear of impeachment leads to a refusal to testify. Though this should not be understood to give the defendant a veto power over the court, the court may decide that it is more important that the jury hear the defendant's version of events. ([People v. Beagle](#), [6 Cal. 3d 441, 453, 99 Cal. Rptr. 313, 492 P.2d 1 \(1972\).](#))

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§ 3:66. Impeaching witness with prior felony conviction—Judicial balancing—Multiple impeachable convictions

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [345](#), [337\(30\)](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 587, 589 to 590, 597 to 602](#)

If the witness has more than one prior felony conviction for crimes of moral turpitude, the court must consider the following:

- Will evidence of more rather than fewer priors tip the balance and unduly prejudice the party whose witness is impeached?
- If some of the priors are convictions and others are not, will admission of the evidence of unadjudicated misconduct consume an undue amount of time relative to the additional probative value? (See [§ 3:58](#) for a discussion of the admissibility of unadjudicated misconduct constituting moral turpitude.)
- If the court denies admission of some of the priors, will this create a false image of the witness for the jury?

See [People v. Hinton](#), 37 Cal. 4th 839, 888, 38 Cal. Rptr. 3d 149, 126 P.3d 981 (2006); [People v. Holt](#), 37 Cal. 3d 436, 452–453, 208 Cal. Rptr. 547, 690 P.2d 1207 (1984).

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§ 3:67. Impeaching witness with prior felony conviction—Judicial balancing—Impeaching witness other than defendant

West's Key Number Digest

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[C.J.S., Witnesses §§ 597 to 602](#)

If the witness is not a criminal defendant, the factors are to be weighed differently. Nondefendant witnesses do not have the option to refuse to testify. The court should be more hesitant to exercise its discretion to exclude a remote felony conviction of a nondefendant witness. ([People v. Stevenson](#), 79 Cal. App. 3d 976, 989, 145 Cal. Rptr. 301 (2d Dist. 1978).) As to nondefendant witnesses generally, see [People v. Woodard](#), 23 Cal. 3d 329, 152 Cal. Rptr. 536, 590 P.2d 391 (1979) and [People v. Smith](#), 151 Cal. App. 3d 89, 198 Cal. Rptr. 623 (1st Dist. 1984). In [People v. Clair](#), the court held that when a party seeks to impeach a nondefendant witness with a prior felony conviction for a crime of moral turpitude, the two most important factors for the court to consider under [Evidence Code § 352](#) are “whether the conviction (1) reflects on honesty and (2) is near in time.” The trial court's decision to exclude proof of a 1965 voluntary manslaughter conviction was upheld. ([People v. Clair](#), 2 Cal. 4th 629, 7 Cal. Rptr. 2d 564, 828 P.2d 705 (1992).)

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3. Witnesses

B. Examination Of Witnesses

§ 3:68. Limits on examining witness who has been hypnotized**West's Key Number Digest**Wests Key Number Digest, [Witnesses](#) 🔑257.10Wests Key Number Digest, [Criminal Law](#) 🔑418.10**Legal Encyclopedias**[C.J.S., Criminal Law §§ 1313 to 1318](#)[C.J.S., Witnesses §§ 437, 571](#)

In *People v. Shirley*, the Supreme Court ruled that the testimony of a witness who has undergone hypnosis to restore memory of the events is inadmissible. ([People v. Shirley](#), 31 Cal. 3d 18, 66-67, 181 Cal. Rptr. 243, 723 P.2d 1354 (1982).) Proposition 8 (enacted in 1982) overruled *Shirley* and presumably allowed such witnesses to testify without limitation. [Evidence Code § 795](#) was enacted following Proposition 8 and struck a middle ground between the flat prohibition of such testimony by *Shirley* and the complete acceptance of it by the Initiative. [Section 795](#) permits such a witness to testify if strict guidelines are followed that ensure a record adequate to determine the change in memory resulting from hypnosis. In addition, the statute limits the type of person who can perform the hypnosis and who can be present when the procedure occurs. ([Evidence Code § 795\(a\)\(3\)\(D\)](#).) If someone other than those listed, such as a police officer, conducts the hypnosis, the witness may not testify as to events covered at the session. ([People v. Burroughs](#), 188 Cal. App. 3d 1162, 1167, 233 Cal. Rptr. 872 (5th Dist. 1987); see *People v. Shirley*, 31 Cal. 3d 18, 66-67, 181 Cal. Rptr. 243, 723 P.2d 1354 (1982).)

The testimony is limited to those matters that the witness recalled and related prior to the hypnosis. ([Evidence Code § 795\(a\)\(1\)](#).) In addition, the substance of the pre-hypnotic memory must be preserved in written, audiotape, or videotape form prior to the hypnosis. The hypnosis session, including the pre-and post-hypnosis interviews must be videotape recorded for subsequent review. ([Evidence Code § 795\(a\)\(2\)](#) and (a)(3)(C).)

Prior to the admission of the testimony, the court must hold an [Evidence Code § 402](#) hearing 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's pre-hypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness's pre-hypnosis recollection. At the hearing each side has the right to present expert testimony and cross-examine the witnesses. ([Evidence Code § 795\(a\)\(4\)](#).)

[Section 795](#) does not limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or limit other legal grounds to admit or exclude the testimony of that witness. ([Evidence Code § 795\(b\)](#).)

This statute should not be applied to limit the testimony of a criminal defendant who has been hypnotized. ([People v. Aguilar](#), 218 Cal. App. 3d 1556, 1563–1564, 267 Cal. Rptr. 879 (2d Dist. 1990).)

[Evidence Code § 795](#) does not apply to civil cases. ([Schall v. Lockheed Missiles & Space Co.](#), 37 Cal. App. 4th 1485, 1492, 44 Cal. Rptr. 2d 191 (6th Dist. 1995).) In *Schall*, plaintiff sued for sexual harassment and relied on memories she had recovered during hypnosis. *People v. Shirley*, discussed above, precludes such testimony in civil cases except for testimony concerning events recalled and related to others prior to hypnosis. ([Schall v. Lockheed Missiles & Space Co.](#), 37 Cal. App. 4th 1485, 1492, 44 Cal. Rptr. 2d 191 (6th Dist. 1995).) To determine the limits imposed on a witness in a civil case who has arguably undergone hypnosis, the trial court should determine “(1) whether the witness underwent hypnosis, (2) for the purpose of restoring memory about the subject of the hypnotic session, and (3) if applicable, whether any proposed testimony is about events recalled and related to others prior to the hypnotic session.” In determining if the second factor exists, the court is unconcerned with the therapist's subjective intent. “The purpose element therefore refers to precluding testimony about the witness's restored memory as to ‘the subject of the hypnotic session.’ ” ([Schall v. Lockheed Missiles & Space Co.](#), 37 Cal. App. 4th 1485, 1492–1493, 44 Cal. Rptr. 2d 191 (6th Dist. 1995), citing *People v. Shirley*, 31 Cal. 3d 18, 67, 181 Cal. Rptr. 243, 723 P.2d 1354 (1982) and *People v. Hayes*, 49 Cal. 3d 1260, 1269, 265 Cal. Rptr. 132, 783 P.2d 719 (1989).)

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Chapter
4. Expert And Other Opinion Testimony

§ 4:1. Qualifying an expert witness—General rules

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑477

West's Key Number Digest, [Evidence](#) 🔑535 to 546

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1437 to 1438, 1453](#)

[C.J.S., Evidence §§ 521, 523 to 527, 599 to 600, 612 to 625, 628 to 630, 632, 634 to 637, 643 to 653, 656 to 660, 666 to 667, 670 to 671, 673 to 678, 680 to 682, 685 to 686, 688](#)

The common practice in most trial courts is for the proponent of the expert witness to begin the examination by setting forth the witness's qualifications and then asking the court to find the witness an “expert,” subject to opposing counsel's voir dire. However, the law does not require that the qualifications be set forth before the expert provides an opinion unless an opposing party objects. ([Evidence Code § 720\(a\)](#).) Even if no objection is raised, or the adverse party offers to stipulate that the witness is an expert, the proponent will often decide it is appropriate to present evidence of the expert's qualifications to the trier of fact. These qualifications are not only a predicate to offering an opinion, they also help the trier of fact weigh and evaluate the opinion.

If an objection is lodged, the proponent must prove that the witness has special knowledge, skill, experience, training, or education on the subject to which the testimony relates. ([Evidence Code § 720](#).) The court is given considerable latitude in determining if the qualifications set forth are sufficient. ([People v. Bolin](#), 18 Cal. 4th 297, 321–322, 75 Cal. Rptr. 2d 412, 956 P.2d 374 (1998); [Brown v. Colm](#), 11 Cal. 3d 639, 646–647, 114 Cal. Rptr. 128, 522 P.2d 688 (1974).) The proponent of the expert may develop the following subject areas in qualifying the witness: First, the witness's educational background should be probed. Second, any specialized training received by the witness should be emphasized. Third, experience in the laboratory or in the field relevant to the issue should be explored. Fourth, the witness should be asked about any relevant projects in which the witness is engaged. Normally this fourth area will involve formal studies in a laboratory in which a strict scientific method is employed, but courts have allowed an expert to be qualified based, in part, on an informal

study conducted by the expert in the field. (See, e.g., *People v. Ojeda*, 225 Cal. App. 3d 404, 406, 275 Cal. Rptr. 472 (1st Dist. 1990).) Fifth, the proponent should ask the expert about any reading done in the subject area. Finally, the witness should inform the court as to the number of occasions the witness has qualified as an expert in this area.

Prior judicial determinations that a witness is an expert will often be decisive to the trial judge. However, courts should not automatically rule against those who have not been previously qualified. (*McCleery v. City of Bakersfield*, 170 Cal. App. 3d 1059, 1066, 216 Cal. Rptr. 852 (5th Dist. 1985).)

The proponent must state the precise area of expertise and then take care to demonstrate that the expert's qualifications relate to that particular subject. (*Jackson v. Deft, Inc.*, 223 Cal. App. 3d 1305, 1319, 273 Cal. Rptr. 214 (1st Dist. 1990).) In *Miller v. Los Angeles County Flood Control Dist.*, a mechanical engineer was called to testify as to whether reasonable construction practices would have required erection of a retaining wall for a hillside residence. Despite the witness's consideration of the construction of hundreds of hillside homes, his unfamiliarity with specific construction practices in flood-hazard areas led to a finding that he was unqualified. (*Miller v. Los Angeles County Flood Control Dist.*, 8 Cal. 3d 689, 106 Cal. Rptr. 1, 505 P.2d 193 (1973); see also *People v. Hogan*, 31 Cal. 3d 815, 183 Cal. Rptr. 817, 647 P.2d 93 (1982).) A person may be qualified as an expert on one subject and yet be unqualified to give an opinion on matters beyond that subject. Thus, in *People v. Williams*, the court found that a police officer was qualified as an expert to administer the nystagmus test and observe signs of nystagmus in a driver stopped for being under the influence; however, the officer was not qualified to attribute the observed eye movements to a particular cause. (*People v. Williams*, 3 Cal. App. 4th 1326, 1333–1334, 5 Cal. Rptr. 2d 130 (5th Dist. 1992).) In *People v. Davenport*, the court found that a proposed expert on the cause of death “may be an excellent homicide investigator. He may be an excellent crime scene investigator.” But this did not establish that he was an expert on cause of death. Since he had no medical, serology or pathology training, had only viewed eight corpses, none of which had a similar injury and had only a limited understanding of the manner in which cause of death is determined, he could not testify as an expert on this subject. (*People v. Davenport*, 11 Cal. 4th 1171, 1206–1207, 12 Cal. 4th 825g, 47 Cal. Rptr. 2d 800, 906 P.2d 1068 (1995).)

The factors that make one an expert vary from case to case, depend entirely on the subject matter, and do not always require either formal education or certification. Thus, an officer's experience in giving a horizontal gaze nystagmus test may be sufficient to qualify the officer as an expert in evaluating the test. (*People v. Ojeda*, 225 Cal. App. 3d 404, 408, 275 Cal. Rptr. 472 (1st Dist. 1990).) As to whether admissibility of this evidence is subject to the *Kelly* requirements, see the discussion in § 4:27.

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4. Expert And Other Opinion Testimony

§ 4:2. Qualifying an expert witness—Medical and legal experts

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 477

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1437 to 1438, 1453](#)

To qualify as an expert in a medical malpractice case, the witness must have sufficient knowledge, learning and skill with the pertinent subject matter and must be familiar with the standard of care governing the defendant's performance. ([Avivi v. Centro Medico Urgente Medical Center](#), 159 Cal.App.4th 463, 467 (2008).) The standard of care for doctors is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by doctors under similar circumstances. ([Mann v. Cracchiolo](#), 38 Cal.3d 18, 36 (1985).) “[F]amiliarity with the standard of care in the particular community where the alleged malpractice occurred, while relevant, is generally not a requisite... . ([Avivi](#), 159 Cal.App.4th at p. 465.

A medical expert may be qualified to testify even though the expert has not performed the same procedure that is the subject of the testimony. The witness's expertise may be acquired from sources other than practice, including private study of the subject through readings and attendance at lectures. “The unmistakable trend in recent years has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.” ([Brown v. Colm](#), 11 Cal. 3d 639, 644–646, 114 Cal. Rptr. 128, 522 P.2d 688 (1974) (and cases cited therein); see also [Mann v. Cracchiolo](#), 38 Cal. 3d 18, 37–39, 210 Cal. Rptr. 762, 694 P.2d 1134 (1985) (diplomate of surgery and neurosurgery may testify as to the standard of care in reading X-rays, in submitting X-ray reports, and in diagnosing); [People v. Williams](#), 77 Cal. App. 4th 436, 443–444, 92 Cal. Rptr. 2d 1 (6th Dist. 1999) (licensed clinical social worker and CONREP program director testified in a proceeding under the Mentally Disordered Prisoners Act that a defendant's sexual disorders were not in remission); [People v. Catlin](#), 26 Cal. 4th 81, 131–132, 26 Cal. 4th 1060c, 109 Cal. Rptr. 2d 31, 26 P.3d 357 (2001) (a chemical toxicologist with a Ph.D. in physiology and pharmacology could testify regarding the victim's cause of death from paraquat poisoning and the time of ingestion).)

The same broad standards apply to qualifying an expert in the legal malpractice area. Legal specialists can be as reluctant as medical specialists to testify against each other. Moreover, as with the field of medicine, there are many unusual legal situations in which few have direct experience. “Liberalizing the qualifications standards of lawyer experts is similarly appropriate.” ([Jeffer, Mangels & Butler v. Glickman](#), 234 Cal. App. 3d 1432, 1440, 286 Cal. Rptr. 243 (2d Dist. 1991).)

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§ 4:3. Qualifying an expert witness—*Kelly* expert

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West's Key Number Digest, [Criminal Law](#) 🔑 477

West's Key Number Digest, [Evidence](#) 🔑 535

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1437 to 1438, 1453](#)

[C.J.S., Evidence §§ 521, 524, 637](#)

The qualifications of the expert who establishes that a specific testing procedure has general scientific acceptance requires that the expert be “impartial.” However, a certain amount of financial or professional interest in promoting a new technique “must be tolerated if scientists familiar with the theory and practice of a new technique are to testify at all.” (*People v. Axell*, 235 Cal. App. 3d 836, 859, 1 Cal. Rptr. 2d 411 (2d Dist. 1991).) Moreover, once the technique has qualified, a less impartial expert, such as a police department criminalist, may testify about the use of the procedure in a particular case. (*People v. Smith*, 215 Cal. App. 3d 19, 27, 263 Cal. Rptr. 678 (1st Dist. 1989).) In *Smith*, the testimony related to the electrophoretic analysis of dried bloodstains. The *Kelly* test for new scientific techniques is discussed in [§ 4:28](#).

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§ 4:4. Disclosing an expert witness—Exchange of expert witness lists

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Wests Key Number Digest, [Pretrial Procedure](#) 🔑 39, 40, 44

Wests Key Number Digest, [Criminal Law](#) 🔑 627.5, 629

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[C.J.S., Criminal Law](#) §§ 434, 587 to 599, 601 to 602, 604, 624, 627 to 628, 663 to 667, 669 to 676, 678 to 679, 681 to 694, 697 to 699, 700 to 705, 707 to 715, 720 to 733, 735 to 736, 1636, 1638 to 1639

[C.J.S., Discovery](#) §§ 22, 25 to 26, 31

In civil cases, a party can require the other parties to disclose their expert witnesses before trial by complying with [Code of Civil Procedure § 2034](#). That section permits any party to demand a mutual and simultaneous exchange of the names and addresses of all persons whose expert opinion any party expects to offer into evidence at trial. ([Code of Civil Procedure § 2034\(a\)\(1\)](#).) A party may also demand the mutual and simultaneous production of all discoverable reports and writings made by such expert. ([Code of Civil Procedure § 2034\(a\)\(3\)](#).) Subdivision (f) sets forth the contents of the information that must be exchanged. This includes “A brief narrative statement of the general substance of the testimony that the expert is expected to give.” ([Code of Civil Procedure § 2034\(f\)\(2\)\(B\)](#).) Under subdivision (i), the party must make his or her expert available for a deposition. When a party has failed to comply with the provisions of [§ 2034](#) as to any expert, the court shall exclude the testimony of that witness. ([Code of Civil Procedure § 2034\(j\)](#).) If the narrative statement filed under subdivision (f)(2)(B) incorrectly discloses some, but not all of the areas of testimony the expert will provide, exclusion of opinions in the undisclosed areas is required. (*Bonds v. Roy*, 20 Cal. 4th 140, 144, 83 Cal. Rptr. 2d 289, 973 P.2d 66 (1999).)

Treating physicians who will provide expert opinions must be disclosed under [§ 2034\(f\)\(1\)\(A\)](#). However, no declaration under subdivision (f)(2) need be provided. In *Schreiber v. Estate of Kiser*, the Supreme Court noted that the declaration requirements of subdivision (f)(2) apply only to “‘certain’ experts witnesses, i.e. those who are parties, employees of parties or are ‘retained by a party for the purpose of forming and expressing an opinion

in anticipation of the litigation or in preparation for the trial.’ ” Since treating physicians do not fall into any of these categories, § 2034(f)(2), does not require submission of an expert witness declaration for a treating physician. (*Schreiber v. Estate of Kiser*, 22 Cal. 4th 31, 34–35, 91 Cal. Rptr. 2d 293, 989 P.2d 720 (1999).)

One significant exception to the exclusion required by subdivision (j) is that a party may call an undesignated expert at trial as a witness to impeach the testimony of any expert called by any other party. (*Code of Civil Procedure* § 2034(m)(2).) The impeachment is limited and may involve testimony as to facts that contradict the factual basis for the other experts' opinions, but it may not include testimony that contradicts the opinions themselves. (*Mizel v. City of Santa Monica*, 93 Cal. App. 4th 1059, 1068, 113 Cal. Rptr. 2d 649 (2d Dist. 2001); *Fish v. Guevara*, 12 Cal. App. 4th 142, 145–146, 15 Cal. Rptr. 2d 329 (6th Dist. 1993).) *Fish* recognized that the line between a foundational fact and an opinion is somewhat arbitrary. It held that the term “foundational fact” should be narrowly construed to prevent a party from presenting a contrary opinion disguised as “impeachment.” *Fish* upheld the trial court's exclusion of the testimony of the undesignated expert. See also *Kennemur v. State of California*, which also adopted a narrow view of the impeachment exception and rejected a party's contention that any evidence offered by an expert in rebuttal that substantively contradicts the testimony of another party's expert is admissible. (*Kennemur v. State of California*, 133 Cal. App. 3d 907, 921–925, 184 Cal. Rptr. 393 (5th Dist. 1982).)

In civil cases, where an expert witness is properly disclosed and during his/her deposition testified to specific opinions and states those are the only opinions that will be offered at trial, additional opinions offered by the expert at trial may be barred even if the witness's declaration under *Code of Civil Procedure* section 2034 (f)(2) is broad enough to encompass the trial testimony. (*Jones v. Moore*, 80 Cal. App. 4th 557, 565, 95 Cal. Rptr. 2d 216 (2d Dist. 2000).) But where the expert's trial testimony “constituted merely an expanded description and interpretation of the conclusions stated in his deposition testimony” it is properly admitted. (*DePalma v. Rodriguez*, 151 Cal. App. 4th 159, 165, 59 Cal. Rptr. 3d 479 (2d Dist. 2007).)

In criminal cases, by complying with *Penal Code* § 1054.5, either party may require the other to disclose the names and addresses of persons he or she intends to call as witnesses at trial, together with any reports or statements of experts made in connection with the case and including the results of physical or mental examinations, scientific tests, experiments, or comparisons that the party intends to offer as evidence at trial. (*Penal Code* §§ 1054.1 and 1054.3.) *Penal Code* § 1054.5 provides that if a party fails to comply with § 1054.1 or 1054.3, a court may make any necessary order “including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.” These reciprocal discovery provisions are constitutional. (*Izazaga v. Superior Court*, 54 Cal. 3d 356, 285 Cal. Rptr. 231, 815 P.2d 304 (1991).) The court's power to exclude the testimony of an undisclosed (nonexpert) witness was upheld in *People v. Jackson*, 15 Cal. App. 4th 1197, 19, 19 Cal. Rptr. 2d 80 (4th Dist. 1993). However, such exclusion should not occur whenever less severe sanctions can be effective. (*People v. Edwards*, 17 Cal. App. 4th 1248, 1265, 22 Cal. Rptr. 2d 3 (2d Dist. 1993).) In *People v. Gonzales*, the court concluded that “absent a showing of significant prejudice and willful conduct, exclusion of testimony is not appropriate as punishment” for failure to disclose. (*People v. Gonzales*, 22 Cal. App. 4th 1744, 1758, 28 Cal. Rptr. 2d 325 (5th Dist. 1994).) The criminal discovery provisions contain no express exception for undisclosed experts called for impeachment purposes only. At least in those cases where the need for such impeachment evidence could not have been reasonably anticipated before trial, such an exception should be inferred from the language of §§ 1054.1 and 1054.3. In any event, as § 1054.5(c), and *Jackson* make clear, “The court may pro-

hibit the testimony of a witness ... only if all other sanctions have been exhausted.”

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§ 4:5. Disclosing an expert witness—Effect on privileges

West's Key Number Digest

West's Key Number Digest, [Pretrial Procedure](#) 🔑 35, 39, 40

West's Key Number Digest, [Witnesses](#) 🔑 219(3)

West's Key Number Digest, [Criminal Law](#) 🔑 629, 627.5

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[C.J.S., Criminal Law §§ 434, 587 to 599, 601 to 602, 604, 624, 627 to 628, 663 to 667, 669 to 676, 678 to 679, 681 to 694, 697 to 699, 700 to 705, 707 to 715, 720 to 733, 735 to 736, 1636, 1638 to 1639](#)

[C.J.S., Discovery §§ 22, 25 to 26, 29](#)

[C.J.S., Witnesses §§ 378 to 389](#)

In a civil case, disclosure of the expert's name pursuant to § 2034 waives any attorney-client or work product privilege protecting the expert's communications. (*Kizer v. Sulnick*, 202 Cal. App. 3d 431, 441, 248 Cal. Rptr. 712 (2d Dist. 1988); *Sanders v. Superior Court*, 34 Cal. App. 3d 270, 277, 109 Cal. Rptr. 770 (2d Dist. 1973).) Any adverse party may depose the expert and could call the expert at trial. (*Code of Civil Procedure* § 2034(i).)

In a criminal case, the discovery provisions were not intended to waive any privileges. Sections 1054.1 and 1054.3 require disclosure of the expert's name and any written report. However, § 1054.6 provides that neither privileged information nor work product need be disclosed. Virtually any reports prepared by an expert in preparation for trial would seem to fall under the attorney-client privilege and perhaps other privileges as well. In *Rodriguez v. Superior Court*, the court relied on § 1054.6 to find that the compelled disclosure of the defendant's expert's name and report did not require the defense to turn over a section of the report that it deleted in reliance on the attorney-client privilege. (*Rodriguez v. Superior Court*, 14 Cal. App. 4th 1260, 18, 18 Cal. Rptr. 2d 120 (5th Dist. 1993).) *Rodriguez* did not address whether § 1054.6 might be relied on to block disclosure of all expert reports as privileged. See also *Andrade v. Superior Court*, 46 Cal. App. 4th 1609, 54, 54 Cal. Rptr. 2d 504

(2d Dist. 1996), which like *Rodriguez*, permitted the defense to delete statements made to a defense psychologist by the defendant before disclosing the psychologist's report to the prosecution. A dissent in *Andrade* relied on the reasoning of *Woods v. Superior Court*, 25 Cal. App. 4th 178, 30, 30 Cal. Rptr. 2d 182 (4th Dist. 1994), discussed in § 4:6.

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§ 4:6. Disclosing an expert witness—When disclosure is not required

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Wests Key Number Digest, [Pretrial Procedure](#) 🔑 39, 40, 44

Wests Key Number Digest, [Witnesses](#) 🔑 219

Wests Key Number Digest, [Criminal Law](#) 🔑 627.5, 629

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[C.J.S., Criminal Law §§ 434, 587 to 599, 601 to 602, 604, 624, 627 to 628, 663 to 667, 669 to 676, 678 to 679, 681 to 694, 697 to 699, 700 to 705, 707 to 715, 720 to 733, 735 to 736, 1636, 1638 to 1639](#)

[C.J.S., Discovery §§ 22, 25 to 26, 31](#)

[C.J.S., Witnesses §§ 378 to 389](#)

In *Sandeffer v. Superior Court*, the court held that the defense need not disclose the identity or produce reports and notes by an expert the attorney had not yet decided to call at trial. (*Sandeffer v. Superior Court*, 18 Cal. App. 4th 672, 679, 22 Cal. Rptr. 2d 261 (4th Dist. 1993).) In *Hines v. Superior Court*, the court held that the discovery statute did not require disclosure of random notes in the expert's file, notes of an interview with the defendant, preliminary drafts of the expert's report, the expert's notes to himself, and interim conclusions or subsidiary reports on which the expert may rely. (*Hines v. Superior Court*, 20 Cal. App. 4th 1818, 1823, 25 Cal. Rptr. 2d 712 (4th Dist. 1993).) *Hines* did order disclosure of "original documentation of the examinations, tests, etc. conducted." In addition, where a psychologist has been identified as an expert witness, the psychologist's opinion has been disclosed, and the psychologist relied on certain standardized test results in reaching that opinion, those results must be disclosed. (*Woods v. Superior Court*, 25 Cal. App. 4th 178, 30, 30 Cal. Rptr. 2d 182 (4th Dist. 1994).) *Woods* held that disclosure of the expert and his or her report waived the attorney-client privilege that might otherwise protect these test results.

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4. Expert And Other Opinion Testimony

§ 4:7. Appropriate areas for expert testimony—Matters beyond common experience

West's Key Number Digest

Wests Key Number Digest, [Criminal Law](#) 🔑468

Wests Key Number Digest, [Evidence](#) 🔑505 to 534

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1435 to 1436, 1439 to 1452](#)

[C.J.S., Evidence §§ 510, 513, 597, 599 to 600, 609 to 629, 631 to 632, 634 to 637, 643 to 652, 654 to 659, 666 to 667, 670, 673, 677, 679 to 680, 682 to 684, 687 to 688, 729](#)

An expert's opinion must relate to a subject matter that is sufficiently beyond common experience that it assists the trier of fact. ([Evidence Code § 801\(a\)](#).) The “beyond common experience” test does not require that the jury be completely ignorant of the subject matter, otherwise expert testimony would rarely be heard. Even if the jury has some knowledge of the subject matter, the opinion is admissible if it would “assist” the jury. Only if the opinion would add nothing, when the subject is of such common knowledge that ordinary people could reach an opinion as well as the witness, is the testimony excluded. ([Weller v. American Broadcasting Companies, Inc.](#), 232 Cal. App. 3d 991, 1007–1008, 283 Cal. Rptr. 644 (1st Dist. 1991).) In *Weller*, the court permitted plaintiff in a defamation suit to call a linguist as an expert to explain the disparity between the words expressly broadcast on television and the implicit meaning conveyed, which was allegedly defamatory. In [People v. Farnam](#), 28 Cal. 4th 107, 162, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (2002), cert. denied, 537 U.S. 1124, 123 S. Ct. 861, 154 L. Ed. 2d 806 (2003), the court held that an expert opinion on crime scene reconstruction is admissible. In [People v. Prince](#), 40 Cal. 4th 1179, 1223, 57 Cal. Rptr. 3d 543, 156 P.3d 1015 (2007), the court held a properly qualified expert could testify that “certain features that appear in all the charged crimes are comparatively rare, and therefore suggest in the expert's opinion that the crimes were committed by the same person.” In [People v. Robinson](#), 37 Cal. 4th 592, 631, 36 Cal. Rptr. 3d 760, 124 P.3d 363 (2005), cert. denied, 2006 WL 1557901 (U.S. 2006) the court upheld the admission of a medical examiner's opinion that the victim was kneeling next to the shooter at the time he was killed.

In *Loth v. Truck-A-Way Corp.*, the court found that an expert may not testify in a personal injury case on a method of computation of hedonic damages. “A plaintiff's loss of enjoyment of life is not ‘a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ ” A plaintiff may not provide, through expert testimony or otherwise, a formula for computing damages for pain and suffering. (*Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 767–768, 70 Cal. Rptr. 2d 571 (2d Dist. 1998).)

See the discussion in § 6:9 regarding the admission of profiling evidence by an expert in a criminal case.
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SIMCAEVID § 4:7

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§ 4:8. Appropriate areas for expert testimony—Specific psychological factors

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Wests Key Number Digest, [Criminal Law](#) 🔑 474 to 474.4

Wests Key Number Digest, [Evidence](#) 🔑 510

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1435, 1439, 1414 to 1450](#)

[C.J.S., Evidence §§ 649 to 652](#)

An expert on eyewitness identification may testify about specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known or understood by the jury. This testimony is limited to those cases where that identification is both a key element of the prosecution case and is not substantially corroborated by evidence giving it independent reliability. (*People v. McDonald*, 37 Cal. 3d 351, 377, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).) In *People v. Plasencia*, the court upheld exclusion of such testimony where the prosecution's case was not premised solely on eyewitness testimony. (*People v. Plasencia*, 168 Cal. App. 3d 546, 555, 223 Cal. Rptr. 786 (2d Dist. 1985).) An expert on eyewitness identification may not testify about the accuracy of identification lineups shown to the witnesses. (*People v. Sandoval*, 30 Cal. App. 4th 1288, 1296–1298, 36 Cal. Rptr. 2d 646 (4th Dist. 1994).)

The defense in a homicide case may call an expert to testify about the general psychological factors that might lead a defendant to provide the police with a false confession. The expert may not testify that certain of those factors were present in this case or that the confession given was not reliable. (*People v. Page*, 2 Cal. App. 4th 161, 188–189, 2 Cal. Rptr. 2d 898 (1st Dist. 1991); but see *People v. Ramos*, 121 Cal. App. 4th 1194, 1206–1207, 18 Cal. Rptr. 3d 167 (2d Dist. 2004) [Court properly excluded defendant's expert on false confessions because interrogation technique was not as complex as in *Page* or as lengthy and jury could understand and evaluate all the evidence presented by the defendant without the expert's assistance.]

In defending a murder charge, a defendant contended that he acted out of an honest and reasonable fear of

the victim. He was entitled to call an expert to testify that stress and expectations caused him to honestly perceive a threat where none was apparent to others at the scene. (*People v. Vu*, 227 Cal. App. 3d 810, 814, 278 Cal. Rptr. 153 (4th Dist. 1991).)

Under [Evidence Code § 801](#), and without regard to [Evidence Code § 1107](#), expert evidence explaining why a victim of domestic violence will often recant her initial complaint and, in fact, testify at trial in support of the defendant, is admissible. (*People v. Brown*, 33 Cal. 4th 892, 906–907, 16 Cal. Rptr. 3d 447, 94 P.3d 574 (2004).) It will assist the trier of fact “by giving the jurors information they need to objectively evaluate [the victim's] credibility.” (*Brown*, 33 Cal. 4th at 906.) There must, however, be foundational evidence of domestic violence independent of the expert's testimony. (*Brown*, 33 Cal. 4th at 908.)

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§ 4:9. Appropriate areas for expert testimony—Gang-related testimony

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[C.J.S., Criminal Law §§ 1435 to 1436, 1439 to 1452](#)

Expert police officer testimony on street gang sociology and psychology is admissible. ([People v. Gardeley](#), 14 Cal. 4th 605, 617, 59 Cal. Rptr. 2d 356, 927 P.2d 713 (1996); [People v. Gamez](#), 235 Cal. App. 3d 957, 286 Cal. Rptr. 894 (4th Dist. 1991).) Gang evidence is admissible to prove the defendant's motive and intent. ([People v. Williams](#), 16 Cal. 4th 153, 193, 66 Cal. Rptr. 2d 123, 940 P.2d 710 (1997); accord: [People v. Hernandez](#), 33 Cal. 4th 1040, 1049, 16 Cal. Rptr. 3d 880, 94 P.3d 1080 (2004).) Thus, an officer can testify that factions of one gang would unite to avenge a member injured by an outside gang. ([In re Darrell T.](#), 90 Cal. App. 3d 325, 328–329, 153 Cal. Rptr. 261 (2d Dist. 1979).) In [People v. Sengpadychith](#), 26 Cal. 4th 316, 324, 26 Cal. 4th 1154a, 109 Cal. Rptr. 2d 851, 27 P.3d 739 (2001), the Superior Court held that opinion evidence like that in *Gardeley* could be sufficient to establish a street gang's primary activities under [Penal Code § 186.22](#). However, gang experts may not state any and all opinions they have concerning gangs and individual members. In [People v. Killebrew](#), 103 Cal. App. 4th 644, 658, 126 Cal. Rptr. 2d 876 (5th Dist. 2002), the court listed numerous topics covered by the expert that were admissible: (1) that a gang could expect retaliation as a result of a particular shooting; (2) that members would, therefore, travel in large groups; (3) that in certain circumstances, if a confrontation arose, gang members would share a firearm; and (4) that often gang members traveling together would know if one of their group was armed. However, the expert may not testify that a specific individual had specific knowledge or possessed a specific intent. Thus, the court should not have admitted the expert's testimony that each individual in the three cars knew that there was a firearm in two of the cars and jointly possessed it for mutual protection. (But, see, [People v. Ward](#), 36 Cal. 4th 186, 210, 30 Cal. Rptr. 3d 464, 114 P.3d 717 (2005) and [People v. Gonzalez](#), 126 Cal. App. 4th 1529, 1551 (2005).) In *Gamez*, the officer was permitted to testify that: (1) the defendant was a member of a specific gang; (2) a shooting was in retaliation for a prior crime committed by one gang against another; and (3) various crimes were committed by a particular gang, making

them a criminal street gang pursuant to [Penal Code § 186.22](#). ([People v. Gamez](#), 235 Cal. App. 3d 957, 964, 286 Cal. Rptr. 894 (4th Dist. 1991).) In *People v. Zepeda*, a gang expert was permitted to give an opinion on why “somebody would go to Pacific [Avenue] and ask a person where they were from and then shoot them.” ([People v. Zepeda](#), 87 Cal. App. 4th 1183, 1207, 105 Cal. Rptr. 2d 187 (6th Dist. 2001).) In *People v. Gonzalez*, 38 Cal. 4th 932, 945–947, 44 Cal. Rptr. 3d 237, 135 P.3d 649 (2006) the court upheld the admission of expert testimony on “[w]hether members of a street gang would intimidate persons who testify against the gang or a rival gang.”

“[A]ny material that forms the basis of an expert's opinion testimony must be reliable [T]he expert's opinion is no better than the facts on which it is based.” ([People v. Gardeley](#), 14 Cal. 4th 605, 618, 59 Cal. Rptr. 2d 356, 927 P.2d 713 (1996).) In *In re Alexander L.*, 149 Cal. App. 4th 605, 612–614, 57 Cal. Rptr. 3d 226 (4th Dist. 2007), the court held that the gang expert's opinions were improperly introduced because no evidence was admitted regarding the reliability of the information forming the basis of these opinions.

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§ 4:10. Appropriate areas for expert testimony—Drug transactions

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[C.J.S., Criminal Law §§ 1435 to 1436, 1439 to 1452](#)

In a drug prosecution, an officer was permitted to provide expert testimony “regarding the nature of various transactions that he and other officers observed, as well as the various roles and levels of culpability manifested by each defendant.” (*People v. Harvey*, 233 Cal. App. 3d 1206, 1226, 285 Cal. Rptr. 158 (4th Dist. 1991).) The court stated that “even though facts may be within the knowledge or understanding of the trier of fact, the conclusions to be drawn therefrom may require expert testimony.” In drug prosecutions, an officer-expert may testify that a drug was possessed for sale. In *People v. Douglas*, the officer-expert was given a long hypothetical question in which he was asked to assume as facts the prosecution evidence and then asked, “Do you have an opinion, officer, as to whether or not the marijuana ... was possessed for personal use or was possessed for sale?” The subsequent opinion was properly admitted. (*People v. Douglas*, 193 Cal. App. 3d 1691, 1694, 239 Cal. Rptr. 252 (1st Dist. 1987).) However, an officer may not give an opinion that a drug which can and has been lawfully obtained is unlawfully possessed for sale without testimony that the officer observed facts inconsistent with lawful possession. (*People v. Hunt*, 4 Cal.3d 231, 238, 93 Cal.Rptr. 197, 481 P.2d 205 (1971); *People v. Chakos*, 158 Cal.App.4th 357, 365 (2007).) Quantity, street value and normal use are not such factors. (*Hunt*, 4 Cal.3d at p. 238.) In such a case, the expert must demonstrate “expertise in distinguishing lawful patterns of possession from unlawful patterns of holding for sale.” (*Chakos*, 158 Cal. App.4th at p. 367.) In *Chakos*, the court reversed the conviction for possession for sale of marijuana of an individual who had a formal certificate from his doctor for lawful marijuana consumption under the Compassionate Use Act. (*Health & Safety Code section 11362.5*.)

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§ 4:11. Appropriate areas for expert testimony—Proving lost business profits as damages

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[C.J.S., Criminal Law §§ 614, 643, 659, 666 to 667, 670, 673](#)

Where an established business' operation is prevented or interrupted, damages for the resulting loss of prospective profits are recoverable so long as their occurrence and extent may be ascertained with reasonable certainty by considering business volume and data relevant to probable future sales. ([Kids' Universe v. In2Labs](#), 95 Cal. App. 4th 870, 884, 116 Cal. Rptr. 2d 158 (2d Dist. 2002).) Lost anticipated profits by an unestablished business whose operation is interrupted are generally not recoverable because their occurrence is speculative. They may be recovered, however, where the evidence makes reasonably certain their occurrence and extent. ([Kids' Universe v. In2Labs](#), 95 Cal. App. 4th 870, 883, 116 Cal. Rptr. 2d 158 (2d Dist. 2002).)

Certainty as to the amount of lost profits for an unestablished business whose operation is interrupted is not required. ([Kids' Universe v. In2Labs](#), 95 Cal. App. 4th 870, 883–884, 116 Cal. Rptr. 2d 158 (2d Dist. 2002).) For an unestablished business, lost anticipated profits may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like. ([Kids' Universe v. In2Labs](#), 95 Cal. App. 4th 870, 884, 116 Cal. Rptr. 2d 158 (2d Dist. 2002).) Expert testimony alone may suffice for a new business, if the expert 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](#), 95 Cal. App. 4th 870, 886, 116 Cal. Rptr. 2d 158 (2d Dist. 2002).) Before evidence of similar businesses may be used to prove prospective profits, there must be substantial similarity between the facts forming the basis of the profit projections and the business opportunity destroyed. ([Kids' Universe v. In2Labs](#), 95 Cal. App. 4th 870, 886, 116 Cal. Rptr. 2d 158 (2d Dist. 2002).)

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§ 4:12. Appropriate areas for expert testimony—Testimony on expert testimony

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[C.J.S., Evidence §§ 599 to 600, 609 to 610, 624 to 625, 627, 634, 636, 652, 677, 680, 682 to 684, 687 to 688, 729](#)

An expert can testify that the information relied on by a prior expert witness, or the methods used by the witness to evaluate the information, were inadequate to base a valid professional opinion. ([People v. Prince](#), 203 Cal. App. 3d 848, 856–857, 250 Cal. Rptr. 154 (6th Dist. 1988).) Expert testimony is permitted on the “unreliability of psychiatric testimony.” ([People v. Smithey](#), 20 Cal. 4th 936, 964–967, 86 Cal. Rptr. 2d 243, 978 P.2d 1171 (1999); [People v. Clark](#), 5 Cal. 4th 950, 1019, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (1993).)

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§ 4:13. Appropriate areas for expert testimony—Sexual abuse testimony

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A psychiatrist may testify that a child has been sexually abused based on the psychiatrist's observations of the child during play therapy. (*In re Cheryl H.*, 153 Cal. App. 3d 1098, 1116, 200 Cal. Rptr. 789 (2d Dist. 1984).) In addition, a doctor can provide a medical opinion that a child has been abused based on the doctor's observations of patterns of scarring, deformities, and other non-normal changes in the hymen. (*People v. Mendibles*, 199 Cal. App. 3d 1277, 1292, 245 Cal. Rptr. 553 (2d Dist. 1988).)

A police officer-expert on child molestation investigations can testify that a parent might not report a known child molestation and why. The officer can also testify that there is no profile of a "typical" child molester. (*People v. McAlpin*, 53 Cal. 3d 1289, 1298–1299, 283 Cal. Rptr. 382, 812 P.2d 563 (1991).)

An expert may testify about the extent of the mental disabilities of a sexual assault victim so that the jury can properly evaluate the victim's testimony. (*People v. Stark*, 213 Cal. App. 3d 107, 112–113, 261 Cal. Rptr. 479 (4th Dist. 1989).)

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§ 4:14. Appropriate areas for expert testimony—Ultimate issues

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[C.J.S., Criminal Law § 1441](#)

[C.J.S., Evidence §§ 513, 634](#)

An expert may provide an opinion on the ultimate issue to be decided by the trier of fact, if the opinion is otherwise admissible. ([Evidence Code § 805](#).) But the “opinion is inadmissible 'if it invades the province of the jury to decide the case.'” ([Piscitella v. Friedenberg](#), 87 Cal. App. 4th 953, 972, 105 Cal. Rptr. 2d 88, (2001).)” ([People v. Frederick](#), 142 Cal. App. 4th 400, 412, 48 Cal. Rptr. 3d 585 (2d Dist. 2006).) In *Frederick*, defendants were prosecuted for conducting an endless chain scheme. Their expert was properly permitted to testify “regarding the indicia or aspects of an endless chain scheme but not whether [defendant's organization] was, in fact, an endless chain scheme.” ([People v. Frederick](#), 142 Cal. App. 4th 400, 412, 48 Cal. Rptr. 3d 585 (2d Dist. 2006).)

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§ 4:15. Appropriate areas for expert testimony—Syndromes—Battered child syndrome

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[C.J.S., Criminal Law §§ 1447 to 1450](#)

Evidence of the battered child syndrome may be introduced to establish that the victim is a battered child. Moreover, in a murder case, the prosecution was permitted to introduce proof of the syndrome and of prior serious, repeated injuries suffered by the child-victim to help establish an intent to kill. The evidence negated accident as the cause of death and was admissible even though the defendant never claimed the death resulted from an accident. ([Estelle v. McGuire](#), 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), which originated as a California prosecution.)

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§ 4:16. Appropriate areas for expert testimony—Syndromes—Child sexual abuse accommodation syndrome and rape trauma syndrome

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[C.J.S., Criminal Law §§ 1447 to 1450](#)

With the child sexual abuse accommodation syndrome (CSAAS) or the rape trauma syndrome (RTS), the expert's testimony on the syndrome cannot be introduced to prove that the crime charged occurred. The evidence is admissible only to dispel common misconceptions that jurors may hold as to how victims react to abuse. Thus, in *People v. Sanchez*, the court held that expert evidence regarding CSAAS was inadmissible to prove that a child had been abused but was admissible to dispel common misconceptions as to how such children react to abuse. (*People v. Sanchez*, 208 Cal. App. 3d 721, 256 Cal. Rptr. 446 (4th Dist. 1989).) In *People v. Housley*, psychological testimony on CSAAS was properly admitted to explain the victim's delay in reporting the abuse and her last-minute denial of the accusations she had made. (*People v. Housley*, 6 Cal. App. 4th 947, 955, 8 Cal. Rptr. 2d 431 (1st Dist. 1992).) There are two requirements of admissibility. First, the prosecution must identify the misconception that the evidence is designed to correct, and second, the testimony must be limited to explaining why the victim's behavior is not inconsistent with abuse. (*People v. Sanchez*, 208 Cal. App. 3d 721, 735, 256 Cal. Rptr. 446 (4th Dist. 1989).) CSAAS may be introduced as part of the prosecution's case-in-chief so long as an issue has been raised as to the victim's credibility. (*People v. Patino*, 26 Cal. App. 4th 1737, 1745, 32 Cal. Rptr. 2d 345 (5th Dist. 1994); see also *People v. Bledsoe*, 36 Cal. 3d 236, 247–248, 203 Cal. Rptr. 450, 681 P.2d 291 (1984).)

In *People v. Wells*, 118 Cal. App. 4th 179, 12, 12 Cal. Rptr. 3d 762 (1st Dist. 2004), the defense was not permitted to introduce expert testimony about the usual demeanor of trauma victims as a basis for concluding that, in videotapes made after the alleged sexual assaults, the victim's calm demeanor was inconsistent with the usual behavior. Such evidence was relevant only to show that the assaults did not occur; the evidence did not

correct any common misconception. ([Wells, 118 Cal. App. 4th at 189.](#))

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§ 4:17. Appropriate areas for expert testimony—Syndromes—Intimate partner battering

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[C.J.S., Criminal Law §§ 1447 to 1450](#)

[Evidence Code § 1107](#) permits either the prosecution or the defense to present expert testimony in a criminal matter regarding intimate partner battering (IPB) 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” ([Evidence Code § 1107\(a\)](#).) Such evidence is not admissible against a criminal defendant to prove the occurrence of the abuse charged. ([Evidence Code § 1107\(a\)](#).) To introduce such evidence the proponent need only establish its relevancy and the proper qualifications of the expert. The statute specifically provides that IPB is not “a new scientific technique whose reliability is unproven” ([Evidence Code § 1107\(b\)](#)), thereby eliminating any need to establish a *Kelly* foundation.

In *People v. Humphrey*, the California Supreme Court found that this evidence is relevant not only to whether a defendant actually believed she needed to kill in self-defense, but also whether such belief was reasonable. “[T]he jury, in determining objective reasonableness, must view the situation from the *defendant's perspective*.” ([People v. Humphrey](#), 13 Cal. 4th 1073, 1086, 56 Cal. Rptr. 2d 142, 921 P.2d 1 (1996).) To the extent that this testimony helps show how a person can become more sensitized to the abuser's behavior, it can help persuade the jury that the defendant's resort to violence was reasonable. The court found such evidence was also relevant to defendant's credibility. It assists “the jury in objectively analyzing [defendant's] claim of self-defense by dispelling many of the commonly held misconceptions about battered women.” ([People v. Humphrey](#), 13 Cal. 4th 1073, 1087, 56 Cal. Rptr. 2d 142, 921 P.2d 1 (1996) citing [People v. Day](#), 2 Cal. App. 4th 405, 416, 2 Cal. Rptr. 2d 916 (5th Dist. 1992).) In *Day*, the court held that a defendant may introduce this evidence to rehabilitate her credibility if the prosecutor contends that she acted inconsistently with a claim of self-defense by remaining with her mate after the alleged abuse.

A key prosecution witness, who had been the intimate partner of a defendant accused of murder, testified she remained with him though he had battered her and she did not attempt to prevent the murder or abandon the defendant after he committed the crime. The prosecution may introduce evidence of IPB to allay juror doubts regarding the witness's credibility, particularly because the defendant claimed the witness committed the killing. (*People v. Riggs*, 44 Cal.4th 248, 292–294 (2008).)

Evidence of IPB may be used by the defendant to show the effect of domestic violence on the mental state of victims as a class. Even after the passage of [Evidence Code § 1107](#), this evidence cannot be used by an expert to give an opinion concerning the defendant's actual state of mind at the time of the crime. In *People v. Erickson*, the court held that [§ 1107](#) did not overrule [Penal Code § 29](#) and permit such testimony. (*People v. Erickson*, 57 Cal. App. 4th 1391, 67, 67 Cal. Rptr. 2d 740 (5th Dist. 1997).)

Evidence concerning IPB may also be used by the prosecution in a criminal case to disabuse the jury about widely held misconceptions concerning batterers and battered intimate partners. It may be used to explain why a victim would recant an earlier description of the facts, delay reporting the assault or remain with the defendant after the crime was committed. (*People v. Williams*, 78 Cal. App. 4th 1118, 1126–1128, 93 Cal. Rptr. 2d 356 (2d Dist. 2000); *People v. Morgan*, 58 Cal. App. 4th 1210, 1215, 68 Cal. Rptr. 2d 772 (1st Dist. 1997).) There is a dispute in the cases as to whether the admissibility of prosecution evidence of this type is dependent on proof of prior domestic violence by the defendant against the victim. In *People v. Gomez* the court ruled that this evidence was irrelevant because there was no showing of prior domestic violence between the parties. (*People v. Gomez*, 72 Cal. App. 4th 405, 415–416, 85 Cal. Rptr. 2d 101 (2d Dist. 1999).) *People v. Williams* disagreed: “There is nothing in [Evidence Code § 1107](#) to suggest that the legislature had intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator.” (*People v. Williams*, 78 Cal. App. 4th 1118, 1129, 93 Cal. Rptr. 2d 356 (2d Dist. 2000).) The *Williams* court distinguished the situation where a defendant in a criminal case wishes to introduce evidence under [§ 1107](#) to establish a defense. “It is reasonable to require that the alleged victim/defendant establish a history of abuse.” (*People v. Williams*, 78 Cal. App. 4th 1118, 1130, 93 Cal. Rptr. 2d 356 (2d Dist. 2000).) (Cf. *People v. Humphrey*, 13 Cal. 4th 1073, 1077, 56 Cal. Rptr. 2d 142, 921 P.2d 1 (1996).)

In *People v. Brown*, 33 Cal. 4th 892, 16, 16 Cal. Rptr. 3d 447, 94 P.3d 574 (2004), the California Supreme Court upheld the admissibility under [Evidence Code § 801](#) of expert evidence designed to disabuse jurors of common misconceptions regarding the credibility of a victim of domestic violence who recants. *Brown* declined to resolve the conflicting interpretations of [§ 1107](#) by *Gomez* and *Williams*. (*Brown*, 33 Cal. 4th at 904–5.)

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§ 4:18. Inadmissible opinions—Matters within common experience

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[C.J.S., Criminal Law § 1436](#)

[C.J.S., Evidence §§ 599 to 600, 610, 636](#)

An officer's opinion in a drug case that the defendant's head shake from side to side meant that he had been asked whether he had any more narcotics and was responding that he did not was properly excluded. This interpretation of the defendant's conduct was considered within common experience and the officer's expertise added no probative value to the evidence, which the jury was capable of analyzing for itself. ([People v. Hernandez](#), 70 Cal. App. 3d 271, 274–275, 138 Cal. Rptr. 675 (2d Dist. 1977).)

In a homicide case, the appellate court approved the trial court's refusal to permit a defense expert to testify that “the ‘ordinarily reasonable person would have been provoked to an unreasoning passion by the events which occurred The adequacy of provocation is not a subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” ([People v. Czahara](#), 203 Cal. App. 3d 1468, 1477–1478, 250 Cal. Rptr. 836 (1st Dist. 1988).) In *Czahara*, the court prevented expert testimony about the effect of certain factors on the state of mind of the reasonable person. In *People v. McCowan*, the court noted that [Penal Code § 29](#) is, in effect, the Legislature's conclusion that the trier of fact is “capable of deciding if a defendant's mental illness resulted in an inability to form the mental state required by the charge.” Thus, such testimony is not sufficiently beyond common experience to be admissible as an expert opinion. ([People v. McCowan](#), 182 Cal. App. 3d 1, 14, 227 Cal. Rptr. 23 (3d Dist. 1986); see also [People v. Whitler](#), 171 Cal. App. 3d 337, 341, 214 Cal. Rptr. 610 (3d Dist. 1985).)

In *Fielder v. City of Glendale*, the court held that there is no need for expert testimony on the issue of what

type of defect in a sidewalk is dangerous. This is a matter within the common knowledge of lay judges and jurors. (*Fielder v. City of Glendale*, 71 Cal. App. 3d 719, 732, 139 Cal. Rptr. 876 (2d Dist. 1977); accord: *Caloroso v. Hathaway*, 122 Cal. App. 4th 922, 928, 19 Cal. Rptr. 3d 254 (2d Dist. 2004).)

In *Kotla v. Regents of University of California*, 115 Cal. App. 4th 283, 8, 8 Cal. Rptr. 3d 898 (1st Dist. 2004), the court reversed the plaintiff's verdict in a wrongful termination case because the plaintiff's human resources management expert was permitted to opine that certain facts were “indicators” that plaintiff had been discharged for retaliatory reasons. The court found that this opinion was not sufficiently beyond common experience. (*Kotla*, 115 Cal. App. 4th at 291–294.)

Although statistical evidence will often require an expert's opinion in order to be properly understood, a “simple comparison of percentages does not exceed the ‘common experience’ of the trier of fact, and, hence, does not mandate use of an expert.” (*Everett v. Superior Court*, 104 Cal. App. 4th 388, 394, 128 Cal. Rptr. 2d 418 (2d Dist. 2002).) In *Everett*, the court reversed a grant of summary judgment, finding that plaintiff's comparison of the percentage of a particular racial group who were guests at a particular amusement park with the percentage of that group who were disciplined by security at the park created a triable issue of racial discrimination, though the percentage comparison was not buttressed by expert testimony.

Evidence that people act differently under the influence of alcohol, or that alcohol affects criminal intent concerns matters of common knowledge and a trial court acts within its discretion in excluding it. (*People v. Seaton*, 26 Cal. 4th 598, 654–655, 110 Cal. Rptr. 2d 441, 28 P.3d 175 (2001).

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§ 4:19. Inadmissible opinions—Veracity of witnesses

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[C.J.S., Criminal Law §§ 1441 to 1443, 1439](#)

[C.J.S., Evidence §§ 513, 634](#)

The veracity of witnesses is not a matter sufficiently beyond common experience to permit the testimony of an expert. (*People v. Coffman*, 34 Cal. 4th 1, 82, 17 Cal. Rptr. 3d 710, 96 P.3d 30 (2004), cert. denied, 125 S. Ct. 2517, 161 L. Ed. 2d 1114 (U.S. 2005); *People v. Chatman*, 38 Cal. 4th 344, 374–377, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (2006) [Judicial policy disfavors impeaching a witness by means of psychiatric testimony.]) Thus, a police officer may not provide an expert opinion that the child victim of a sexual assault was being truthful. (*People v. Sergill*, 138 Cal. App. 3d 34, 39, 187 Cal. Rptr. 497 (1st Dist. 1982); but, see *People v. Padilla*, 11 Cal. 4th 891, 946–947, 12 Cal. 4th 825h, 47 Cal. Rptr. 2d 426, 906 P.2d 388 (1995), suggesting that article 1, section 28, subdivision (d) of the California Constitution, the Truth in Evidence provision, repealed the rule against expert and lay opinion testimony on veracity for crimes committed after its enactment. See, also, *People v. Chatman*, 38 Cal. 4th 344, 376, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (2006).) In *People v. Russel*, 69 Cal. 2d 187, 193, 70 Cal. Rptr. 210, 443 P.2d 794 (1968), the California Supreme Court held that expert psychiatric testimony of the complaining witness's mental or emotional state is permitted in sexual assault cases “in order to inform the jury of the effect of a certain medical condition upon the ability of the witness to tell the truth” *Russel*, however, is no longer good law. (*People v. Anderson*, 25 Cal. 4th 543, 575, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (2001); *People v. Espinoza*, 95 Cal. App. 4th 1287, 1312, 116 Cal. Rptr. 2d 700 (6th Dist. 2002).) In *People v. Foss*, 155 Cal.App. 4th 113, 128–130 (2007), the court concluded that the modern approach, which undermined the rationale of *Russel*, also undermined *People v. Scholl*, 225 Cal.App.2d 558, 562–564 (1964). *Scholl* had held the defendant in a child molesting case was entitled to ask the victim's mother whether she “had

complained of advances made to her by various men” because the court believed the mother may have planted in the victim a belief she had been molested. (*Scholl*, at pp. 562–563.)

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§ 4:20. Inadmissible opinions—Likelihood of future violent acts

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[C.J.S., Criminal Law §§ 1997, 2010 to 2011, 2019 to 2031, 2054, 2056, 2112, 2114 to 2121, 2123](#)

With limited exceptions, expert testimony during the penalty phase of a capital case on the likelihood of future violent acts by the defendant is inadmissible. ([People v. Murtishaw](#), 29 Cal. 3d 733, 774, 175 Cal. Rptr. 738, 631 P.2d 446 (1981).)

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§ 4:21. Inadmissible opinions—Legal conclusions

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[C.J.S., Evidence §§ 513, 634](#)

Courts will not ordinarily consider an expert's opinion to the extent it is a conclusion of law. ([Kahn v. East Side Union High School Dist.](#), 31 Cal. 4th 990, 1017, 4 Cal. Rptr. 3d 103, 75 P.3d 30 (2003).) Thus, the prosecution may not introduce evidence to establish that the defendant has the characteristics of a battering parent. ([People v. Walkey](#), 177 Cal. App. 3d 268, 279, 223 Cal. Rptr. 132 (4th Dist. 1986).) A psychiatrist may not testify that a particular individual committed child abuse based solely on interviews and tests of the victim. ([In re Cheryl H.](#), 153 Cal. App. 3d 1098, 1116, 1118–1119, 200 Cal. Rptr. 789 (2d Dist. 1984).) However, an expert may testify on the meaning of terms used in the International Chamber of Commerce Uniform Customs and Practices for Documentary Credits (UCP 500) because the UCP 500 does not rise to the status of a law. ([DBJJ, Inc. v. National City Bank](#), 123 Cal. App. 4th 530, 541, 19 Cal. Rptr. 3d 904 (2d Dist. 2004).)

An expert may not provide an opinion that a defendant is guilty of a crime; this opinion does not assist the trier of fact. ([People v. Coffman](#), 34 Cal. 4th 1, 77–78, 17 Cal. Rptr. 3d 710, 96 P.3d 30 (2004), cert. denied, 125 S. Ct. 2517, 161 L. Ed. 2d 1114 (U.S. 2005); [People v. Torres](#), 33 Cal. App. 4th 37, 43–45, 39 Cal. Rptr. 2d 103 (2d Dist. 1995).)

In [Summers v. A.L. Gilbert](#), the court held that an attorney could not testify as an expert witness on the defendant's liability under different legal theories. ([Summers v. A.L. Gilbert Co.](#), 69 Cal. App. 4th 1155, 82, 82 Cal. Rptr. 2d 162 (5th Dist. 1999).) “ ‘[T]he calling of lawyers as ‘expert witnesses’ to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as ap-

plicable to the facts” ([Amtower v. Photon Dynamics, Inc.](#), 158 Cal.App.4th 1582, 1598–1599 (2008).)

An officer's opinion that a driver was “most responsible” for an accident is a legal conclusion and not a proper subject for expert opinion. ([Carlton v. Department of Motor Vehicles](#), 203 Cal. App. 3d 1428, 1432, 250 Cal. Rptr. 809 (2d Dist. 1988).) Finally, in *Adams v. City of Fremont*, the court found that expert testimony was not relevant to the court's determination of whether a duty of care existed between police officers on the scene and a person threatening suicide with a loaded firearm. ([Adams v. City of Fremont](#), 68 Cal. App. 4th 243, 265–266, 80 Cal. Rptr. 2d 196 (1st Dist. 1998).)

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§ 4:22. Basis of expert opinion

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The expert opinion must be based on matter (including special knowledge, skill, experience, training, and education) perceived by or personally known to the expert, or made known to the expert at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied on by an expert, unless the expert is precluded by law from relying on such matter. ([Evidence Code § 801\(b\)](#).)

The Comment to [Evidence Code § 801\(b\)](#), explains the three different tests contained in the rule:

- The expert witness must be acquainted with the facts of the particular case either by personal perception or by means of assuming facts.
- Regardless of how the expert learned of the matter on which the opinion is based, the matter must be of a type that reasonably may be relied on by experts in forming an opinion. (See the discussion in [§ 4:23](#) and the discussion of the *Kelly* rule in [§ 4:27](#).)
- An expert may not base an opinion on any matter that is declared by the constitutional, statutory, or decisional law to be an improper basis for an opinion. However, simply because a piece of evidence is inadmissible does not mean that it cannot be relied on by an expert.

“ ‘Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts or upon factors which are speculative, remote or con-

jectural, then his conclusion has no evidentiary value.’ [Citation.]” (*In re Lockheed Litigation Cases*, 115 Cal. App. 4th 558, 563, 10 Cal. Rptr. 3d 34 (2d Dist. 2004); *Geffcken v. D'Andrea*, 137 Cal. App. 4th 1298, 1310–1312, 41 Cal. Rptr. 3d 80 (2d Dist. 2006).) “[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reason and facts on which it is based.” (*Bushling v. Fremont Medical Center*, 117 Cal. App. 4th 493, 510, 11 Cal. Rptr. 3d 653 (3d Dist. 2004).)

In a medical malpractice case, the defense submitted an expert declaration that simply set forth the events leading to the injury and the expert's opinion that the defendant acted within the standard of care. Relying on this declaration, the trial court granted summary judgment. The Court of Appeal reversed on the basis that the declaration was inadmissible under [Evidence Code § 801](#) because it failed to “disclose the matter relied on in forming the opinion expressed.” Thus the court could not conclude that the expert had relied on proper matters in forming the opinion. (*Kelley v. Trunk*, 66 Cal. App. 4th 519, 78, 78 Cal. Rptr. 2d 122 (2d Dist. 1998).)

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§ 4:23. Examples of matters properly relied on by experts—In general

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An expert can base an opinion on gang psychology and sociology on the hearsay statements of gang members. ([People v. Gardeley](#), 14 Cal. 4th 605, 619, 59 Cal. Rptr. 2d 356, 927 P.2d 713 (1996); [People v. Gamez](#), 235 Cal. App. 3d 957, 967–968, 286 Cal. Rptr. 894 (4th Dist. 1991).) *Gamez* relied on the following Comment to § 801: “The variation in the permissible bases of expert opinion is unavoidable in light of the wide variety of subjects upon which such opinion can be offered. In regard to some matters of expert opinion, an expert must ... rely on reports, statements, and other information that might not be admissible evidence.”

In [Crawford v. Washington](#), 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) and [Davis v. Washington](#), 126 S. Ct. 2266, 165 L. Ed. 2d 224 (U.S. 2006), the United States Supreme Court re-interpreted the Confrontation Clause in the 6th Amendment to the United States Constitution. (See the discussion in [§§ 2:111 et seq.](#)) There has been speculation that *Crawford/Davis* will lead to a re-evaluation of the widespread use of inadmissible hearsay as a basis for a prosecution expert's opinion testimony in criminal cases, where the evidence is admitted on the theory that it does not come in for the truth of the matter. The logic behind this theory of admissibility is often illusory, since the hearsay relied upon may be valueless unless it is true. For example, in [People v. Thomas](#), 130 Cal. App. 4th 1202, 1208, 30 Cal. Rptr. 3d 582 (4th Dist. 2005), the court upheld the admission of testimony by a gang expert that he based his conclusion that the defendant was a gang member on statements made to the expert by other gang members, in which they identified the defendant as a gang member. The court concluded *Crawford* did not preclude this testimony because it was not admitted for its truth. ([People v. Thomas](#), 130 Cal. App. 4th 1202, 1210, 30 Cal. Rptr. 3d 582 (4th Dist. 2005); [People v. Cooper](#), 148 Cal.

[App. 4th 731, 747, 56 Cal. Rptr. 3d 6 \(2d Dist. 2007\).](#)) But the gang members' statements, quoted by the expert, would seem to be valueless unless true. In [People v. Geier, 41 Cal. 4th 555, 593–608, 61 Cal. Rptr. 3d 580, 161 P.3d 104 \(2007\)](#), the California Supreme Court examined the admissibility of a DNA expert's opinion that relied upon hearsay documents prepared by other, nontestifying experts working in the same laboratory. It is noteworthy that *Geier* did not simply state that this hearsay was not admitted for its truth, thereby avoiding the *Crawford/Davis* issue. Instead, *Geier* treated the hearsay as if it were admitted for its truth and concluded it was not testimonial. (See the discussion in [§ 2:121](#).) This may signal a recognition that *Crawford/Davis* may limit the use of hearsay as a basis for a prosecution expert's opinions in criminal cases.

Warning

While an expert can rely on hearsay statements, a police officer testifying as a nonexpert may not rely on hearsay statements of gang members to give an opinion. ([In re Wing Y., 67 Cal. App. 3d 69, 74–75, 77–78, 136 Cal. Rptr. 390 \(2d Dist. 1977\).](#))

In the penalty phase of a capital case, a prosecution expert was permitted to base an opinion about the effect of defendant's drug abuse on his conduct, in part, on a telephonic interview with defendant's ex-wife. ([People v. Mickey, 54 Cal. 3d 612, 686–688, 286 Cal. Rptr. 801, 818 P.2d 84 \(1991\).](#))

A defense psychiatrist may base an opinion on the defendant's mental state on interviews with the defendant. ([People v. Ainsworth, 45 Cal. 3d 984, 1011–1012, 248 Cal. Rptr. 568, 755 P.2d 1017 \(1988\).](#))

When an expert is asked to interpret studies or research in a particular area, the expert need not have personally conducted similar studies or research. ([People v. Vu, 227 Cal. App. 3d 810, 814, 278 Cal. Rptr. 153 \(4th Dist. 1991\).](#)) An expert may rely on scientific tests performed by other experts. ([Williams v. Volkswagenwerk Aktiengesellschaft, 180 Cal. App. 3d 1244, 1259–1261, 226 Cal. Rptr. 306 \(2d Dist. 1986\).](#))

When an expert relies on inadmissible matter in forming an opinion and so testifies, such matter is not admitted as proof of the facts stated, but to enable the expert to explain and the jury to evaluate the basis of the opinion. ([People v. Brown, 49 Cal. 2d 577, 586, 320 P.2d 5 \(1958\)](#); see [§ 4:31 \(1958\)](#).)

An expert may base an opinion on a case-specific survey if it is conducted pursuant to the principles accepted by social scientists and statisticians for gathering and analyzing survey data. ([Leighton v. Old Heidelberg, Ltd., 219 Cal. App. 3d 1062, 1082–1083, 268 Cal. Rptr. 647 \(2d Dist. 1990\).](#)) In *Korsak v. Atlas Hotels, Inc.*, the court found that an expert had based his opinion on an “unexplained, casual sampling of unknown sources” in a particular field. This was not the equivalent of a scientific study, survey, or investigation and was, therefore, inadmissible. ([Korsak v. Atlas Hotels, Inc., 2 Cal. App. 4th 1516, 1526, 3 Cal. Rptr. 2d 833 \(4th Dist. 1992\).](#))

A police officer, testifying on the accuracy of the PAS device, relied on a test solution, provided by the manufacturer, and was permitted to rely on a label affixed to the test solution's container stating that the solution contained 10 percent blood alcohol. ([People v. Hallquist, 133 Cal. App. 4th 291, 295–296, 34 Cal. Rptr. 3d 621 \(3d Dist. 2005\).](#)) Though an expert may rely upon the opinion of other experts, the testifying expert may not simply read the absent expert's conclusions into the record. ([Stephen v. Ford Motor Co., 134 Cal. App. 4th 1363, 1375, 37 Cal. Rptr. 3d 9 \(2d Dist. 2005\).](#))

An expert may rely on inadmissible matter only if it is of a type that could reasonably be relied on by the expert. (*People v. Gardeley*, 14 Cal. 4th 605, 618, 59 Cal. Rptr. 2d 356, 927 P.2d 713 (1996).) In *People v. Miller*, the court held that a clinical psychologist testifying at a mentally disordered offender proceeding may rely on a probation report prepared in the underlying felony case in giving an expert opinion. (*People v. Miller*, 25 Cal. App. 4th 913, 917–919, 31 Cal. Rptr. 2d 423 (2d Dist. 1994).) The reasonableness of the reliance is a question of degree, and may vary with the circumstances. Where there is little or no direct evidence, the expert may need to turn to circumstantial evidence on which the expert might not otherwise rely. (*Buckwalter v. Air-line Training Center*, 134 Cal. App. 3d 547, 553–554, 184 Cal. Rptr. 659 (4th Dist. 1982). See, also, *People v. Bui*, 86 Cal. App. 4th 1187, 1195, 103 Cal. Rptr. 2d 908 (3d Dist. 2001) (upholding an expert's reliance on certain studies to support the opinion that the use of methamphetamine in greater than therapeutic doses results in impaired driving).) In *People ex rel. Dept. of Transp. v. Clauser/Wells Partnership*, 95 Cal. App. 4th 1066, 1084–1086, 116 Cal. Rptr. 2d 240 (4th Dist. 2002), the court reversed the trial court, in part, because it excluded expert valuation testimony of a salvage auto parts inventory. To determine the percentage of markup to be deducted from the retail price of the parts, the expert relied on “conversations with ‘six or eight different distributors or dealers’ about the ‘typical markup.’ ” (*Clauser/Wells*, 95 Cal. App. 4th at 1085.) Because there is no precisely prescribed method for valuing this type of inventory, under *Buckwalter*, the opinion should have been admitted. (*Clauser/Wells*, 95 Cal. App. 4th at 1084–1086.) When an expert relies on inadmissible matter in reaching an opinion, the trial court has “considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.” (*People v. Price*, 1 Cal. 4th 324, 416, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991); see the discussion in § 4:31.)

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§ 4:24. Examples of matters properly relied on by experts—Protecting adverse party when expert relies on statement of another**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 🔑 486West's Key Number Digest, [Evidence](#) 🔑 555**Legal Encyclopedias**[C.J.S., Criminal Law §§ 1460, 1465 to 1466, 1469](#)[C.J.S., Evidence §§ 597 to 598, 601 to 609, 611 to 614, 619, 634, 639 to 652, 662 to 665, 682, 713](#)

An expert opinion may be based in whole or in part on the statement or opinion of another. As the Comment to [Evidence Code § 801](#) notes, a physician-witness commonly relies on the history provided by a patient and on reports or opinions of other physicians. Section 804(a), provides that when an expert relies on the statement or opinion of another person, that other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

[Evidence Code § 804\(a\)](#), is inapplicable if the person whose opinion or statement was relied on by the expert is:

- A party,
- A person identified with a party pursuant to § 776(d), or
- A witness who has already testified concerning the same subject matter. ([Evidence Code § 804\(b\)](#).)

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§ 4:25. Examples of matters improperly relied on by experts—In general

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An expert may not testify that a particular person abused a child based on the results of a standardized psychological test administered to that person. Such evidence, in effect, established that the defendant had a character trait and acted in conformity with it. This is prohibited by [Evidence Code § 1101](#). (*In re Cheryl H.*, 153 Cal. App. 3d 1098, 1123–1124, 200 Cal. Rptr. 789 (2d Dist. 1984).) A defendant may, however, introduce expert testimony, based in part on standardized psychological tests, that he or she lacks any pathology in the nature of sexual deviation because such evidence is admissible under an exception to [§ 1101](#) provided for in [§ 1102](#). (*People v. Stoll*, 49 Cal. 3d 1136, 1146, 1152, 265 Cal. Rptr. 111, 783 P.2d 698 (1989).) A defense psychologist was not permitted to testify that the defendant did not have the characteristics of a pedophile because his opinion was based on “profiles of the primary types of pedophile” and there had been no showing under [§ 801\(b\)](#), that such profiles are reliable. (*People v. Ruiz*, 222 Cal. App. 3d 1241, 1245–1246, 272 Cal. Rptr. 368 (1st Dist. 1990).)

In a personal injury case, an expert was not permitted to give an opinion on the crime problem in Pasadena since it was based on an unreliable source: an unidentified contact in an unidentified police department. Had such opinion been based on a California Department of Justice report, there would have been a different result. (*Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 133–134, 211 Cal. Rptr. 356, 695 P.2d 653 (1985).) In a tire defect case, plaintiff's expert's opinion was properly excluded as speculative when not based on any actual visual or tactile examination of the tire by the expert, but only on amateur photographs taken of the tire, post-accident. (*Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1371–1372, 37 Cal. Rptr. 3d 9 (2d Dist. 2005).)

Though one expert may rely on the opinion of another, this is so only if the proponent establishes that the absent expert's opinion is of a “type reasonably relied upon by professionals in the field. (*Stephen*, 134 Cal.App.4th at 1375.) An expert in a Mentally Disordered Offender case may not base an opinion that the defendant suffers from pedophilia on “a brief and conjectured reference“ to a prior incident of sexual molestation contained in a parole report. (*People v. Dodd*, 133 Cal. App. 4th 1564, 35 Cal. Rptr. 3d 692 (2d Dist. 2005).)

A patient's statements made while under hypnosis may not reasonably be relied on by a psychotherapist in forming an opinion about the patient's past mental state. (*People v. Parnell*, 16 Cal. App. 4th 862, 869, 20 Cal. Rptr. 2d 302 (2d Dist. 1993).) Note that in *Parnell*, the therapist conceded that he had no familiarity with hypnosis and its use in psychotherapy.

In a suit for asbestos related damages, plaintiff's expert relied on black and white photos of a plant site taken during the 1950s to conclude there were certain specific concentration levels of asbestos in the air. The court found this violated the reliability component of § 801 and reversed. (*Smith v. ACandS, Inc.*, 31 Cal. App. 4th 77, 93, 37 Cal. Rptr. 2d 457 (1st Dist. 1994).)

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§ 4:26. Examples of matters improperly relied on by experts—Where an opinion is based on improper matter

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The court may, and upon objection shall, exclude an expert opinion 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 the opinion, then state it after excluding from consideration the improper matter. ([Evidence Code § 803](#).) Thus, in a wrongful death action, an expert's opinion concerning the cause of a head injury was based in part on improper matter, that is, the pretrial statements of witnesses. Since there was no showing that the opinion “in whole or in significant part” was based on the statements, and the opinion would have remained the same even if the statements had not been considered, the opinion was admissible. ([Pineda v. Los Angeles Turf Club, Inc.](#), 112 Cal. App. 3d 53, 62, 169 Cal. Rptr. 66 (2d Dist. 1980).) In [People v. Sims](#), 5 Cal. 4th 405, 435, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (1993), a capital murder case, the court reached the same conclusion and admitted the prosecution expert's opinion as to the cause of the victim's death.

While the court may exclude an opinion based in whole or insignificant part on matter that is not a proper basis for such an opinion, the court is not required to do so unless an objection is made. ([In re Powell](#), 45 Cal. 3d 894, 905–906, 248 Cal. Rptr. 431, 755 P.2d 881 (1988).)

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§ 4:27. Kelly rule—In general

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It is not uncommon for an expert to base an opinion on some scientific technique. [Evidence Code § 801\(b\)](#) requires that the technique be sufficiently reliable. The *Kelly* rule prescribes how the reliability of a new scientific technique is to be determined.

Kelly provides that the admissibility of expert testimony based on the application of a new scientific technique requires:

- The reliability of the method must be established, usually by expert testimony;
- The witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject; and
- The proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.

To be reliable, a technique “must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” ([People v. Kelly](#), 17 Cal. 3d 24, 30, 130 Cal. Rptr. 144, 549 P.2d 1240 (1976).) In determining if a particular technique has gained general acceptance, the appellate courts may rely on publications that were not admitted in the trial court. ([People v. Wallace](#), 14 Cal. App. 4th 651, 658, 17 Cal. Rptr. 2d 721 (1st Dist. 1993).) “[O]nce a scientific procedure ... has become generally accepted, mere variations in tech-

nique or procedure go to the weight of the evidence, not its admissibility.” (*People v. Cook*, 40 Cal. 4th 1334, 1345, 58 Cal. Rptr. 3d 340, 157 P.3d 950 (2007), cert. denied, 2007 WL 2982324 (U.S. 2007).)

In *People v. Leahy*, the court held that *general acceptance* in the particular field to which it belongs means that there is “a consensus drawn from a typical cross-section of the relevant, qualified scientific community.” (*People v. Leahy*, 8 Cal. 4th 587, 612, 34 Cal. Rptr. 2d 663, 882 P.2d 321 (1994).) In determining the general acceptance issue, trial courts “must consider the quality, as well as the quantity, of the evidence supporting or opposing a new scientific technique. Mere numerical majority support or opposition by persons minimally qualified to state an authoritative opinion is of little value” (*People v. Leahy*, 8 Cal. 4th 587, 612, 34 Cal. Rptr. 2d 663, 882 P.2d 321 (1994).)

The purpose of this rule is to restrict the expert to generally accepted scientific techniques and, thereby, protect the trier of fact from being misled by the “aura of infallibility” of unproven and ultimately unscientific methods. (*People v. McDonald*, 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).) In *People v. Bowker*, 203 Cal. App. 3d 385, 390, 249 Cal. Rptr. 886 (4th Dist. 1988), the court provided this excellent description of the reason for the *Kelly* rule:

Opinion testimony by experts has long generated controversy in both civil and criminal trials. Even the most casual observer of the legal scene is aware of the crucial and often determinative weight an expert's opinion may carry [Expert] testimony must be of assistance to the trier of fact and must be reliable California adopted the *Frye v. U.S.*, 293 F. 1013 (App. D.C. 1923)] standard of reliability in *People v. Kelly*, 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240 (1976). A scientific technique utilized by an expert witness must “be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

The United States Supreme Court has abandoned the *Frye* rule, finding that it has been superseded by the Federal Rules of Evidence, which are more permissive. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).) In *People v. Leahy*, the California Supreme Court held that *Kelly* still governed in California and refused to adopt the *Daubert* standards. (*People v. Leahy*, 8 Cal. 4th 587, 34, 34 Cal. Rptr. 2d 663, 882 P.2d 321 (1994).)

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4. Expert And Other Opinion Testimony

§ 4:28. *Kelly* rule—When does *Kelly* apply: New scientific techniques

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Kelly applies only when a “new scientific technique” is utilized. *Kelly* involved the use of voiceprints and found that the prosecution had failed to comply with the *Frye* requirements. Since then, the cases have distinguished those techniques that must pass *Kelly*, because, though novel or experimental, they convey “a misleading aura of certainty,” from those that need not. For example, in *People v. Stoll*, the court concluded that a psychologist may testify that a defendant charged with child abuse shows no indication of “deviance” or “abnormality” and may base that opinion on standardized personality tests (MMPI and MCMI) without complying with *Kelly*. (*People v. Stoll*, 49 Cal. 3d 1136, 265 Cal. Rptr. 111, 783 P.2d 698 (1989).) *Stoll* held that *Kelly* applies to a “technique, process or theory which is new to science and, even more so, the law.” It only applies when the “technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data. Lay minds might easily, but erroneously, assume that such procedures are objective and infallible.” (*People v. Stoll*, 49 Cal. 3d 1136, 1156, 265 Cal. Rptr. 111, 783 P.2d 698 (1989).) In *People v. Nelson*, 139 Cal. App. 4th 1135, 43 Cal. Rptr. 3d 587 (5th Dist. 2006), the California Supreme Court has granted review to determine if the methodology for assessing the statistical significance of a “cold hit” from a DNA database is a novel scientific question subject to the *Kelly* standard of admissibility and to determine how the statistical significance of such a “cold hit” is to be calculated.

Kelly has been applied to the use of a dog in a scent identification lineup in a criminal case and to the use of a scent transfer unit in that lineup (*People v. Mitchell*, 110 Cal. App. 4th 772, 787–794, 2 Cal. Rptr. 3d 49 (2d

Dist. 2003)); the admissibility of DNA analysis evidence (*People v. Venegas*, 18 Cal. 4th 47, 74, 74 Cal. Rptr. 2d 262, 954 P.2d 525 (1998); *People v. Soto*, 21 Cal. 4th 512, 88, 88 Cal. Rptr. 2d 34, 981 P.2d 958 (1999)); the use of sodium amytal to retrieve repressed memories of child sexual molestation (*Ramona v. Superior Court*, 57 Cal. App. 4th 107, 66, 66 Cal. Rptr. 2d 766 (2d Dist. 1997)); the “hemostick” method of testing for the presence of blood (*People v. Coleman*, 46 Cal. 3d 749, 774–775, 251 Cal. Rptr. 83, 759 P.2d 1260 (1988)); polygraph examinations (*People v. Wochnick*, 98 Cal. App. 2d 124, 127–128, 219 P.2d 70 (2d Dist. 1950)); “truth serum” (*People v. Jones*, 52 Cal. 2d 636, 653, 343 P.2d 577 (1959)); Nalline testing (*People v. Williams*, 164 Cal. App. 2d Supp. 858, 860–862, 331 P.2d 251 (App. Dep’t Super. Ct. 1958)); microscopic examination of gunshot residue particles (*People v. Palmer*, 80 Cal. App. 3d 239, 250–255, 145 Cal. Rptr. 466 (1st Dist. 1978)); human bite marks (*People v. Slone*, 76 Cal. App. 3d 611, 623–625, 143 Cal. Rptr. 61 (2d Dist. 1978)); the use of hypnosis to improve memory (*People v. Shirley*, 31 Cal. 3d 18, 51–54, 181 Cal. Rptr. 243, 723 P.2d 1354 (1982)); and the use of an electronic physiological test known as the penile plethysmograph to determine if a defendant is a sexual deviant. (*People v. John W.*, 185 Cal. App. 3d 801, 803–806, 229 Cal. Rptr. 783 (1st Dist. 1986).)

In *People v. Leahy*, the court held that in a driving-under-the-influence case it was improper to admit evidence of a horizontal gaze-nystagmus test without complying with the requirements of *Kelly*. (*People v. Leahy*, 8 Cal. 4th 587, 34, 34 Cal. Rptr. 2d 663, 882 P.2d 321 (1994).) In *People v. Joehnk*, the court found that the prosecution had provided a sufficient basis, under *Leahy*, to admit the results of a nystagmus test given by a police officer as a basis for the officer's opinion the defendant was driving under the influence. The prosecution had presented the testimony of a research psychologist, a county criminalist and an independent forensic scientist and toxicologist to support the test's reliability. (*People v. Joehnk*, 35 Cal. App. 4th 1488, 42, 42 Cal. Rptr. 2d 6 (4th Dist. 1995).) In *People v. Bui*, the court held that *Kelly* did not apply to an expert's testimony that the “use of methamphetamine in greater than therapeutic doses results in impaired driving” because the testimony did not involve a “novel process or a new scientific technique.” (*People v. Bui*, 86 Cal. App. 4th 1187, 1195, 103 Cal. Rptr. 2d 908 (3d Dist. 2001).)

Kelly was not applied to the use of a computer animation of a shooting (*People v. Hood*, 53 Cal. App. 4th 965, 969, 62 Cal. Rptr. 2d 137 (4th Dist. 1997)) or to the use of the product rule to calculate the odds in a “cold hit” case (*People v. Nelson*, 43 Cal.4th 1242, 1259–1265 (2008)), or to the use of a standardized personality test to determine if an accused pedophile had a deviant personality. (*People v. Stoll*, 49 Cal. 3d 1136, 1157–1161, 265 Cal. Rptr. 111, 783 P.2d 698 (1989).) *Kelly* has been applied to scientific processes relying on purely psychological, as opposed to physical, evidence. (*People v. Shirley*, 31 Cal. 3d 18, 51–54, 181 Cal. Rptr. 243, 723 P.2d 1354 (1982), hypnotically refreshed testimony.) However, in *People v. McDonald*, the court stated that *Kelly* usually will not apply in this area. (*People v. McDonald*, 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).) *McDonald* held that *Kelly* did not apply to expert testimony on the psychological factors affecting eyewitness identification. The court ruled that “when a witness gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may temper their acceptance of his testimony with a healthy skepticism We have never applied the *Kelly* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is esoteric.” (*People v. McDonald*, 37 Cal. 3d 351, 372–373, 208 Cal. Rptr. 236, 690 P.2d 709 (1984); see also *People v. Rowland*, 4 Cal. 4th 238, 266, 14 Cal. Rptr. 2d 377, 841 P.2d 897 (1992) (refused to apply *Kelly* to a doctor's testimony that the absence of genital trauma does not disprove rape); *Roberti v. Andy's Termite & Pest Control, Inc.*, 113 Cal. App. 4th 893, 899–904, 6 Cal. Rptr. 3d 827 (2d Dist. 2003) [*Kelly* inapplicable to expert medical opinion stating a theory that a particular chemical caused plaintiff's autism.]) In *People v. Ward*, the court held that psychiatric and psychological testimony relating to the defendant's

propensity to repeat sexually violent behavior was not subject to *Kelly*. (*People v. Ward*, 71 Cal. App. 4th 368, 83, 83 Cal. Rptr. 2d 828 (4th Dist. 1999).) For a concise discussion of the cases refusing to apply *Kelly* to medical or psychological testimony, see *People v. Cegers*, 7 Cal. App. 4th 988, 9, 9 Cal. Rptr. 2d 297 (4th Dist. 1992), which held that the trial court erred in excluding a psychologist's testimony about sleep disorders.

The application of the *Kelly* test to the phenomena of recovered memory has provoked discussion in the cases. When memory is enhanced by hypnosis, courts have imposed the *Kelly* test. (*People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 723 P.2d 1354 (1982); *Schall v. Lockheed Missiles & Space Co.*, 37 Cal. App. 4th 1485, 44, 44 Cal. Rptr. 2d 191 (6th Dist. 1995).) In *Trear v. Sills*, the court suggested, without deciding, that evidence of therapy-induced memories of abuse would fail a *Kelly* test. (*Trear v. Sills*, 69 Cal. App. 4th 1341, 1345, 82 Cal. Rptr. 2d 281 (4th Dist. 1999).) However, when a recollection of abuse occurs without outside assistance, a psychologist specializing in the field of sexual abuse and memory can examine the person and testify that “their psychological profiles, including the manner in which they recalled being molested, were consistent with other individuals who had repressed their memories of childhood sexual abuse” without being subject to the *Kelly* test. (*Wilson v. Phillips*, 73 Cal. App. 4th 250, 253–256, 86 Cal. Rptr. 2d 204 (4th Dist. 1999).)

Since unreliable scientific evidence is not relevant, it seems unlikely that the truth-in-evidence provision of Proposition 8 has affected *Kelly*. (Compare *People v. Stoll*, 49 Cal. 3d 1136, 1165, 265 Cal. Rptr. 111, 783 P.2d 698 (1989)(Lucas, C.J., dissenting).)

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§ 4:29. *Kelly* rule—Alternatives to *Kelly* hearings

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If a procedure is challenged as a new technique requiring compliance with the *Kelly* test, no hearing need be held if another trial court has already admitted such evidence and that decision has been affirmed on appeal by a published decision. This precedent prevails at least until new scientific evidence is presented reflecting a change in the attitude of the scientific community. ([People v. Kelly](#), 17 Cal. 3d 24, 32, 130 Cal. Rptr. 144, 549 P.2d 1240 (1976).) If one department of a trial court has held a *Kelly* hearing, it is appropriate for another department to take judicial notice of the transcripts of that hearing so long as the adverse party is entitled to show new information that may affect the reliability of the procedure or that demonstrates a change in the consensus of the scientific community in regards to the technique. ([People v. Smith](#), 215 Cal. App. 3d 19, 25, 263 Cal. Rptr. 678 (1st Dist. 1989).)

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§ 4:30. Testifying as to the basis of the opinion—General rule

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A witness testifying in the form of an opinion may state on direct examination the reasons for the opinion and the matter (including, in the case of an expert, any special knowledge, skill, experience, training, and education) on which it is based, unless precluded by law from using such reasons or matter as a basis for the 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 on which the opinion is based. ([Evidence Code § 802.](#)) As the Comment to [§ 802](#) notes, this section provides that a witness may state the basis for an opinion on direct. However, in some cases, a witness *is required to do so* in order for the opinion to be admissible.

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§ 4:31. Testifying as to the basis of the opinion—Where the opinion is based on inadmissible matter

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It is not uncommon for an expert opinion to be based in whole or in part on inadmissible matter, frequently hearsay. (See the cases discussed in [§ 4:23](#).) To what extent may the expert discuss the inadmissible matter in disclosing the basis of the opinion on direct examination? To phrase it differently: To what extent are we prepared to expose the jury to inadmissible hearsay or other evidence in order to inform it fully of the expert's reasoning process?

The general rule was stated in *People v. Coleman*: “While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent, hearsay evidence.” ([People v. Coleman](#), 38 Cal. 3d 69, 92, 211 Cal. Rptr. 102, 695 P.2d 189 (1985); see also [Grimshaw v. Ford Motor Co.](#), 119 Cal. App. 3d 757, 788–789, 174 Cal. Rptr. 348 (4th Dist. 1981).) In *Coleman*, the court reversed a murder conviction because an expert was permitted to read letters of the victim into evidence. In *People v. Nicolaus*, the court followed *Coleman* and ruled that a defense psychiatrist could discuss certain journal articles and letters from the defendant on which he had relied, but the articles and letters themselves were inadmissible. ([People v. Nicolaus](#), 54 Cal. 3d 551, 583, 286 Cal. Rptr. 628, 817 P.2d 893 (1991).) In *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, an action for misrepresentation, a defense expert was called to give an opinion on the causes of certain damages suffered. Relying on *Coleman*, the court refused to permit the witness to testify in detail about an exhibit on which he had relied. (*Contin-*

ental Airlines, Inc. v. McDonnell Douglas Corp., 216 Cal. App. 3d 388, 413–416, 264 Cal. Rptr. 779 (2d Dist. 1989).)

A testifying physician may rely on the opinions of another physician in forming an opinion, and then testify as to those out-of-court opinions (*Kelley v. Bailey*, 189 Cal. App. 2d 728, 737–738, 11 Cal. Rptr. 448 (2d Dist. 1961).) However, these out-of-court opinions are only admissible for the limited purpose of showing the basis of the witness's opinion. Even this limited admissibility is inappropriate unless the out-of-court opinions are “on a parity with a patient's history ... given to his physician” and are a part of the information used by the testifying physician in the course of treatment or diagnosis of the patient. (*Whitfield v. Roth*, 10 Cal. 3d 874, 895, 112 Cal. Rptr. 540, 519 P.2d 588 (1974).)

Comment

Coleman does not provide that on direct examination an expert may never testify to extrajudicial statements when giving the reasons for an opinion. (*People v. Mickey*, 54 Cal. 3d 612, 689, 286 Cal. Rptr. 801, 818 P.2d 84 (1991).) In *Mickey*, the court permitted a prosecution expert to discuss a phone interview with the defendant's ex-wife, which served as one basis for the opinion. In fact, *Coleman* itself noted that a limiting instruction informing the jury that the matters relied on by the expert are admitted only to show the basis for the opinion and not for their truth eliminates any hearsay problem except in an aggravated situation. (*People v. Coleman*, 38 Cal. 3d 69, 92, 211 Cal. Rptr. 102, 695 P.2d 189 (1985).) Because an expert's need to consider extrajudicial matters and a jury's need for information sufficient to evaluate an expert opinion may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area are generally left to the trial court's sound judgment. (*People v. Vanegas*, 115 Cal. App. 4th 592, 597–598, 9 Cal. Rptr. 3d 398 (2d Dist. 2004); *People v. Valdez*, 58 Cal. App. 4th 494, 509–510, 68 Cal. Rptr. 2d 135 (6th Dist. 1997).) The limiting instruction, however, need only be given if requested. (*Genrich v. State of California*, 202 Cal. App. 3d 221, 230, 248 Cal. Rptr. 303 (4th Dist. 1988).)

People v. Bordelon, 162 Cal. App. 4th 1311, 1324–1326, 77 Cal. Rptr. 3d 14 (1st Dist. 2008), suggests an expert may testify to “all facts” upon which the expert opinion is based (at p. 1324). Only if the hearsay contains facts that are irrelevant, unreliable or unduly prejudicial should the trial court exclude it (at p. 1325). *Bordelon* went on to distinguish expert testimony relying on multiple opinions from other experts; these opinions from nontestifying experts may properly be excluded (at pp. 1325–1326). *Bordelon* dealt with an expert witness called by a criminal defendant. For the possible impact of the 6th Amendment on a prosecution expert's right to rely on hearsay facts, see Note 4:23.

On cross-examination of the expert, the details of out-of-court statements and opinions may be developed more fully. (*Mosesian v. Pennwalt Corp.*, 191 Cal. App. 3d 851, 864, 236 Cal. Rptr. 778 (5th Dist. 1987).) However, even on cross-examination, restrictions apply. It should be noted that *Coleman*, discussed above, involved excessive examination of the expert by the prosecution on cross-examination.

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§ 4:32. Hypothetical questions

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[C.J.S., Evidence §§ 693, 700](#)

Often the proponent of an expert opinion will ask the witness a hypothetical question. Such a question sets forth a series of facts that the witness is asked to assume true and then to render an opinion. See, for example, *People v. Douglas*, in which the lengthy hypothetical question asked the officer to assume virtually all the prosecution evidence to be true. His opinion that marijuana was possessed for sale was upheld. (*People v. Douglas*, 193 Cal. App. 3d 1691, 1694, 239 Cal. Rptr. 252 (1st Dist. 1987).)

The assumptions on which the hypothetical is based must be supported by evidence in the record and should not otherwise be permitted. (*People v. Hayes*, 172 Cal. App. 3d 517, 522, 218 Cal. Rptr. 362 (4th Dist. 1985).) An expert opinion may not be based on conjecture. Moreover, an assumption of facts contrary to the proof “destroys the opinion.” (*Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 338, 145 Cal. Rptr. 47 (1st Dist. 1978).)

In discussing the range of the evidence that can be relied on in a hypothetical question, the court, in *People v. Sims*, stated that “a hypothetical question, however, may be ‘framed upon any theory which can be deduced’ from any evidence properly admitted at trial, including the assumption of ‘any facts within the limits of the evidence,’ and a prosecutor may elicit an expert opinion by employing a hypothetical based upon such evidence.” (*People v. Sims*, 5 Cal. 4th 405, 436, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (1993); citing *Witkin, California Evidence* (3d ed.) § 1848, p. 1804.)

Opposing counsel must lodge an objection to a hypothetical question at trial at a time when the questioner

still has the opportunity to correct the error, otherwise the objection is waived. ([Waller v. Southern Pac. Co.](#), 66 Cal. 2d 201, 210, 57 Cal. Rptr. 353, 424 P.2d 937 (1967).)

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§ 4:33. Cross-examining the expert—General rules

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[C.J.S., Evidence §§ 703 to 708, 745 to 750, 756, 759](#)

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 his or her qualifications, the subject to which the expert testimony relates, the matter on which the opinion is based, and the reasons for it. ([Evidence Code § 721\(a\)](#).)

The allowable cross-examination is broad. A party may attack the expert's credibility by raising material relevant to the issue that the expert was unaware of or did not consider, including inadmissible hearsay. ([People v. Montiel](#), 5 Cal. 4th 877, 923–924, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993); see [People v. Snow](#), 30 Cal. 4th 43, 84, 132 Cal. Rptr. 2d 271, 65 P.3d 749 (2003), cert. denied, 540 U.S. 1076, 124 S. Ct. 922, 157 L. Ed. 2d 747 (2003).) However, the right to impeach is limited and does not provide an adverse party with the opportunity to cross-examine the expert on matters irrelevant to the weight or credibility of the opinion rendered. ([People v. Bell](#), 49 Cal. 3d 502, 532, 262 Cal. Rptr. 1, 778 P.2d 129 (1989).) In *Bell*, an expert on eyewitness identification had testified on factors that might have influenced child identification witnesses. The prosecutor's effort to ask whether the expert witness considered a hearsay statement by an adult informant that implicated the defendant was found improper. (See also [People v. Visciotti](#), 2 Cal. 4th 1, 80–81, 5 Cal. Rptr. 2d 495, 825 P.2d 388 (1992).)

When an expert relies on the report of another expert in forming an opinion, the opposing party may cross-examine on the contents of that report. ([People v. Coleman](#), 48 Cal. 3d 112, 151, 255 Cal. Rptr. 813, 768 P.2d 32 (1989).) The prosecutor may cross-examine a defense expert on an otherwise privileged report considered by the

expert in arriving at his/her opinion. (*People v. Ledesma*, 39 Cal. 4th 641, 695–696, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).) When one expert examines a defendant and prepares a report that is considered by a second expert and only the second expert testifies, that expert may be cross-examined on the first expert's report if the second expert relied on it to form an opinion. (*People v. Combs*, 34 Cal. 4th 821, 862–863, 22 Cal. Rptr. 3d 61, 101 P.3d 1007 (2004), cert. denied, 545 U.S. 1107, 125 S. Ct. 2549, 162 L. Ed. 2d 281 (2005).)

Some experts, particularly in the medical field, rely on statements of the party who retained them in giving an opinion of that party's physical or mental state. The opposing party may bring out such statements during cross-examination even if they were not mentioned on direct. (*People v. Coleman*, 48 Cal. 3d 112, 151–152, 255 Cal. Rptr. 813, 768 P.2d 32 (1989).) For example, In *People v. Boyer*, 38 Cal. 4th 412, 462, 42 Cal. Rptr. 3d 677, 133 P.3d 581 (2006) a defense expert related certain statements made to him by defendant as matters considered in forming his expert opinion. The prosecution was entitled to challenge the credibility of that opinion by cross-examining the expert with inconsistent statements given by the defendant to other defense experts, which the testifying expert had access to. Compare *People v. Caro*, which held that if a psychiatrist testifies that his opinion “was based in no part on statements by a defendant about the events surrounding the crimes,” the prosecution may be foreclosed from cross-examining the psychiatrist about those statements. (*People v. Caro*, 46 Cal. 3d 1035, 1059–1060, 251 Cal. Rptr. 757, 761 P.2d 680 (1988).)

An expert who relies on inadmissible hearsay in forming an opinion may be precluded from testifying on direct examination as to the details. On cross-examination, however, a broader range of evidence may be used and, subject to the constraints of *Evidence Code* § 352, the witness can be examined on the details of the otherwise inadmissible evidence. (*People v. Coleman*, 38 Cal. 3d 69, 211 Cal. Rptr. 102, 695 P.2d 189 (1985).)

Where a defense psychiatrist in a criminal case testifies as to the defendant's mental state at the time of the crime, the prosecution is permitted to cross-examine the psychiatrist concerning uncharged offenses committed by the defendant that may impeach that testimony. (*People v. Hendricks*, 44 Cal. 3d 635, 641–642, 244 Cal. Rptr. 181, 749 P.2d 836 (1988).) In *Hendricks*, the defendant was charged with two homicides and intended to call a psychiatrist to testify that the killings resulted from “homosexual rage.” The trial court properly ruled that if the psychiatrist so testified, he or she could be impeached with evidence of three uncharged murders allegedly committed by the defendant.

Opposing counsel may cross-examine the expert on the compensation and expenses paid or to be paid to that expert by the proponent of the testimony. (*Evidence Code* § 722.) There is no exception to this rule when the expert testifies in a capital case and is paid under *Penal Code* § 987.9. (*People v. Berryman*, 6 Cal. 4th 1048, 1071, 25 Cal. Rptr. 2d 867, 864 P.2d 40 (1993).)

Opposing counsel may cross-examine the expert on the frequency with which the expert testifies on one side of an issue. Thus, a cross-examiner can inquire if a physician usually testifies for the defense in personal injury cases. (*Allen v. Superior Court*, 151 Cal. App. 3d 447, 451, 198 Cal. Rptr. 737 (1st Dist. 1984).) A cross-examiner may ask if the psychiatrist-witness has testified for the defense in a large number of cases to the effect that the defendant was insane or suffered from diminished capacity. (*People v. Rich*, 45 Cal. 3d 1036, 1088, 248 Cal. Rptr. 510, 755 P.2d 960 (1988).)

Opposing counsel might also ask the court to exercise its discretion to limit the number of expert witnesses

a party may call. ([Evidence Code § 723](#); [Scalere v. Stenson](#), 211 Cal. App. 3d 1446, 1454, 260 Cal. Rptr. 152 (2d Dist. 1989).) The trial court may not use its authority to limit the number of expert witnesses “if it destroys a plaintiff’s evidentiary presentation Subtleties in response can be critical Identical or virtually identical evidence may not be cumulative (Citations.)” ([Monroy v. City of Los Angeles](#), 164 Cal.App.4th 248, 266–267 (2008).)

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§ 4:34. Cross-examining the expert—Cross-examination regarding texts

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[C.J.S., Criminal Law](#) §§ 1460, 1469 to 1470

[C.J.S., Evidence](#) §§ 703, 706 to 708, 745 to 750, 756, 759

An expert witness may not be cross-examined on the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless: (1) the witness referred to, considered, or relied on such publication in arriving at or forming an opinion; (2) such publication has already been admitted into evidence; or (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. ([Evidence Code § 721\(b\)](#).) Under subdivision (a), an expert may be cross-examined on a publication not relied on. As the Comment to [§ 721](#) states, “An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his [or her] opinion may reveal important information bearing upon the credibility of his [or her] testimony.”

[Evidence Code § 721\(b\)](#)(1) and (2) are designed to prevent the cross-examiner from presenting the hearsay opinion of an absent expert to the jury under the guise of impeaching an expert witness who has neither considered nor relied on it. ([McGarity v. Department of Transportation](#), 8 Cal. App. 4th 677, 10, 10 Cal. Rptr. 2d 344 (3d Dist. 1992).) In *McGarity*, an expert had testified for the state on plaintiff's speed at the time of a traffic accident. Plaintiff was prevented from cross-examining the expert on this issue with opinions contained in a crash test report prepared for another defendant in the case. The state's expert had not referred to or relied on the crash test report, but plaintiff contended that such a report was not covered by [§ 721\(b\)](#). The appellate court found that such a report need not be “published for mass consumption” to be covered. ([McGarity v. Department of Transportation](#), 8 Cal. App. 4th 677, 682, 10 Cal. Rptr. 2d 344 (3d Dist. 1992).) Moreover, it relied on the statute's purpose to construe broadly the term “similar publication” to cover the crash test report. However, *Gen-*

rich v. State of California more narrowly construed the ambit of § 721(b) in a traffic accident case and permitted plaintiff to cross-examine the state's highway design expert on statistics contained in a Statewide Integrated Traffic Survey (computerized accident data retrieval system) that the expert had not considered or relied on. (*Genrich v. State of California*, 202 Cal. App. 3d 221, 248 Cal. Rptr. 303 (4th Dist. 1988).)

Section 721(b)(3), however, permits a cross-examiner to challenge an expert with the hearsay opinion of an absent expert contained in a text neither considered nor relied upon by the witness, but only if the publication has been established as reliable.

Comment

McGarity approves asking the expert if he or she is aware of material relevant to the opinion given. (*McGarity v. Department of Transportation*, 8 Cal. App. 4th 677, 684, 10 Cal. Rptr. 2d 344 (3d Dist. 1992).) If the expert is aware of it, the adverse party should be entitled to ask why the expert did not read it. If the expert read it, the adverse party should be able to ask why he or she did not consider or rely on it. However, in none of these questions should the cross-examiner be permitted to reveal the content of the opinions in that material, unless the publication has been established as reliable pursuant to section 721 (b)(3).

In *People v. Clark*, the defense called an expert witness who testified that he “considered or relied upon all of his training in arriving at his conclusions.” The prosecutor was then able to cross-examine the expert on a text and read part of the text to the jury because the witness had formerly been associated with the author and had testified that he was familiar with the author's works, including this text. (*People v. Clark*, 5 Cal. 4th 950, 1013, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (1993).)

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§ 4:35. Obtaining a court-appointed expert

West's Key Number Digest

West's Key Number Digest, [Trial](#) 🔑18

West's Key Number Digest, [Criminal Law](#) 🔑633

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[C.J.S., Criminal Law §§ 805, 1542 to 1544, 1547, 1562, 1569 to 1571, 1624 to 1625](#)

[C.J.S., Trial §§ 91 to 92](#)

When necessary, the court may appoint an expert to investigate, render a report, or testify. ([Evidence Code § 730.](#))

A party in a case may seek appointment of an expert for any number of reasons. For example, a psychiatrist might help in evaluating a criminal defendant's mental state, or a handwriting expert or an eyewitness identification expert may be useful to either party in a case. The court has discretion in granting the request, and the party seeking the appointment must make a showing of need. ([People v. Crandell](#), 46 Cal. 3d 833, 862, 251 Cal. Rptr. 227, 760 P.2d 423 (1988); [People v. Hurley](#), 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (5th Dist. 1979).) If a criminal defendant shows that the expert's services are reasonably necessary to his or her defense, the court must appoint one. ([People v. Campbell](#), 193 Cal. App. 3d 1653, 1662, 239 Cal. Rptr. 214 (4th Dist. 1987).)

The court may appoint an expert to assist it in determining an issue. Thus, the court may appoint a psychiatrist to assist in determining if a doubt exists as to the defendant's mental competence. ([Evidence Code § 730](#); [People v. Mayes](#), 202 Cal. App. 3d 908, 915, 248 Cal. Rptr. 899 (4th Dist. 1988).) In a marriage dissolution, the court must value and divide the community property. If the evidence produced by the parties is insufficient to permit a proper valuation, the court may appoint an independent appraiser to provide expert testimony. ([In re Marriage of Andresen](#), 28 Cal. App. 4th 873, 34, 34 Cal. Rptr. 2d 147 (5th Dist. 1994).) In a child dependency case, a psychological examination of the parents and the children can be ordered by the court. ([In re Alexis W.](#), 71 Cal. App. 4th 28, 31, 83 Cal. Rptr. 2d 488 (4th Dist. 1999).) In determining the existence of the physician-pa-

tient or psychotherapist-patient privilege, or the applicability of any exception to either, the court may be obliged to review patient records in camera. If the review suggests the need for expert testimony to assist the court in making its ruling, it should utilize § 730 to obtain this assistance. The expert would then testify in camera.

If the court appoints an expert in a civil matter, the compensation shall be apportioned and charged to the parties in such proportion as the court determines and may thereafter be taxed and allowed as other costs. (*Evidence Code* § 731(c).) If the court appoints an evaluator in a family law case under *section 730*, the court “may fix the compensation for these services.” (§ 730.) *California Rules of Court*, rule 5.220 states it is the trial court's duty to “[d]etermine and allocate between the parties” the fees charged in the evaluation. Thus, a trial court may not simply direct one of the parties to pay whatever the evaluator bills. (*In re Marriage of Laurenti*, 154 Cal.App.4th 395, 403–404 (2007).)

Equal protection mandates that an indigent criminal defendant is entitled to public payment of expert fees even if that defendant has privately hired an attorney or has a pro bono private attorney rather than the public defender. (*Taylor v. Superior Court*, 168 Cal. App. 3d 1217, 215 Cal. Rptr. 73 (1st Dist. 1985).) A conservatee who has a pro bono private counsel also has a right to an appointed psychiatrist if the conservatee is indigent. (*Conservatorship of Scharles*, 233 Cal. App. 3d 1334, 1341, 285 Cal. Rptr. 325 (4th Dist. 1991).) Finally, an administrative law judge, appointed pursuant to *Penal Code* § 2600, has the authority to appoint a forensic psychiatrist to assist an inmate and counsel in an involuntary medication proceeding. (*Department of Corrections v. Office of Admin. Hearings*, 53 Cal. App. 4th 780, 61, 61 Cal. Rptr. 2d 903 (2d Dist. 1997).)

When a psychotherapist is appointed to advise the defendant in a criminal proceeding or to present a defense based on a mental condition, the psychotherapist privilege applies. Thus, if the issue of the defendant's mental state is not tendered, the privilege will protect the confidentiality of the communication between the defendant and the court-appointed therapist. (See the Comment to *Evidence Code* § 1017.) But under the patient-litigant exception, the privilege is lost if the defendant puts his mental and emotional state in issue at trial. (*Evid. Code*, *section 1016*.) However, if the therapist conducted the interview of the defendant to assist defendant's counsel, the defendant's statements are also protected under the attorney-client privilege and there is no client-litigant exception to that privilege. (*People v. Ledesma*, 39 Cal. 4th 641, 690, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).) A proceeding under the Sexually Violent Predator Act does not qualify as a “criminal proceeding” under *section 1017* and, so, a psychotherapist appointed by the court under *section 730* at the defendant's request is not protected by the confidentiality provisions of the psychotherapist-patient privilege. (*People v. Angulo*, 129 Cal. App. 4th 303, 315–320, 28 Cal. Rptr. 3d 483 (4th Dist. 2005).) All experts appointed by the court to assist a party should be covered by the lawyer-client privilege. (*People v. Clark*, 50 Cal. 3d 583, 621, 268 Cal. Rptr. 399, 789 P.2d 127 (1990).)

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§ 4:36. Role of the jury in evaluating expert testimony

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Wests Key Number Digest, [Criminal Law](#) 🔑 494

Wests Key Number Digest, [Evidence](#) 🔑 569, 574

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[C.J.S., Criminal Law §§ 1473 to 1474](#)

[C.J.S., Evidence §§ 725 to 743, 751 to 754](#)

Where different experts testify as to opposing views, it is “for the jury to resolve the conflicts in the expert testimony, accepting some of it, or none of it, as they see fit.” ([People v. Carter](#), 56 Cal. 2d 549, 560, 15 Cal. Rptr. 645, 364 P.2d 477 (1961).) In addition, a jury is entitled to disregard the unanimous opinion of experts. In *People v. Drew*, both court-appointed psychiatrists concluded that the defendant was unaware of the wrongfulness of his actions (assault). The court upheld the jury's finding of sanity: “The jurors ... are not automatically required to render a verdict which conforms to the expert opinion ‘It is only in the rare case when the evidence is uncontradicted and entirely to the effect that the accused is insane that a unanimity of expert opinion could authorize upsetting a jury finding to the contrary.’ ” ([People v. Drew](#), 22 Cal. 3d 333, 350, 149 Cal. Rptr. 275, 583 P.2d 1318 (1978); accord: *Conservatorship of Amanda B.*, 145 Cal. App. 4th 342, 350 (2007).)

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§ 4:37. Lay opinion—In general

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 448 to 467

West's Key Number Digest, [Evidence](#) 🔑 470 to 503

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[C.J.S., Criminal Law §§ 1425 to 1431, 1455 to 1459](#)

[C.J.S., Evidence §§ 509 to 523, 527 to 596, 610 to 612, 619, 628, 633, 636, 649 to 652, 654, 656, 659, 661 to 663, 665 to 675, 677, 688 to 690, 698, 708 to 711, 744 to 745](#)

[C.J.S., Executions § 431](#)

A nonexpert witness may testify in the form of an opinion only if the opinion is permitted by law, including but not limited to an opinion that is:

- Rationally based on the perception of the witness, and
- Helpful to a clear understanding of the testimony. ([Evidence Code § 800.](#))

Note that the rule is not exclusionary: lay opinion may be admissible though it is neither based on the witness's perception nor helpful to understanding testimony. Thus, a nonexpert witness may provide an opinion as to the value of his or her property or services. ([Evidence Code § 800](#), Comment; see also [Evidence Code § 813\(a\)\(2\).](#)) Trial courts are given wide discretion in admitting lay opinion. Generally, where the court has allowed adequate cross-examination, the decision to admit the lay opinion will not be overturned on appeal. ([Osborn v. Mission Ready Mix](#), 224 Cal. App. 3d 104, 112, 273 Cal. Rptr. 457 (4th Dist. 1990).)

[Section 800](#), in effect, requires nonexpert witnesses to express themselves at the lowest level of abstraction. When the details of an observation are too complex or subtle for a concrete description, the witness may state conclusions. ([Osborn v. Mission Ready Mix](#), 224 Cal. App. 3d 104, 112, 273 Cal. Rptr. 457 (4th Dist. 1990);

[Bartlett v. State of California, 199 Cal. App. 3d 392, 400, 245 Cal. Rptr. 32 \(2d Dist. 1988\).](#))

Expert opinion may be based on information furnished to the expert by others provided that it is the kind of information on which experts may reasonably rely. For a nonexpert to give an opinion, “he must be testifying about facts that he has personally observed; but the expert ... may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses [and] put to him in the form of hypothetical questions.” ([Manney v. Housing Authority of City of Richmond, 79 Cal. App. 2d 453, 459–460, 180 P.2d 69 \(1st Dist. 1947\).](#))

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§ 4:38. Lay opinion—Permissible lay opinion

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West's Key Number Digest, [Evidence](#) 🔑 470 to 503

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[C.J.S., Criminal Law §§ 1425 to 1431, 1455 to 1459](#)

[C.J.S., Evidence §§ 509 to 523, 527 to 596, 610 to 612, 619, 628, 633, 636, 649 to 652, 654, 656, 659, 661 to 663, 665 to 675, 677, 688 to 690, 698, 708 to 711, 744 to 745](#)

[C.J.S., Executions § 431](#)

A witness may testify about the speed of a motor vehicle that was observed. ([Jordan v. Great Western Motorways](#), 213 Cal. 606, 612, 2 P.2d 786 (1931).)

Lay opinion testimony is admissible on the extent of an accident victim's pain and suffering. ([Kline v. Santa Barbara Consol. Ry. Co.](#), 150 Cal. 741, 750, 90 P. 125 (1907).)

A lay witness may express an opinion that a person was drunk ([People v. Garcia](#), 27 Cal. App. 3d 639, 643, 104 Cal. Rptr. 69 (2d Dist. 1972)) when the opinion is based on the witness's observations of commonly recognized signs of intoxication such as the odor of alcohol, slurring of speech, and unsteadiness. However, a police officer cannot testify as to special training using the nystagmus test and then, based on the results of that test, provide a lay opinion that a person was intoxicated. ([People v. Williams](#), 3 Cal. App. 4th 1326, 1332–1333, 5 Cal. Rptr. 2d 130 (5th Dist. 1992).) The officer's training is beyond common experience, so the opinion fails to qualify under § 800. A lay witness can also provide an opinion that a person was not “strung out,” that is, intoxicated by drugs. ([People v. Williams](#), 44 Cal. 3d 883, 914, 245 Cal. Rptr. 336, 751 P.2d 395 (1988).) A non-expert police officer may testify that shoe prints found at a crime scene were “similar” to the pattern on the soles of defendant's shoes. ([People v. Maglaya](#), 112 Cal. App. 4th 1604, 6, 6 Cal. Rptr. 3d 155 (3d Dist. 2003).) There

might be a different result if the officer had testified that defendant's shoes left the prints. (*Maglaya*, 112 Cal. App. 4th at 1609.)

Lay opinion is admissible that certain people were “angry” (*People v. Deacon*, 117 Cal. App. 2d 206, 210, 255 P.2d 98 (1st Dist. 1953)), or that someone seemed to be trying to stop a fight. (*People v. Harris*, 270 Cal. App. 2d 863, 872, 76 Cal. Rptr. 130 (1st Dist. 1969).)

In a child molesting case, women friends of the defendant were permitted to testify that they had seen the defendant in the company of their daughters, saw no unusual behavior, and, in their opinion, the defendant was not a person given to lewd conduct with children. (*People v. McAlpin*, 53 Cal. 3d 1289, 1309, 283 Cal. Rptr. 382, 812 P.2d 563 (1991).)

A party in an action for personal injuries suffered in a fall at a construction site can testify as to whether the condition of the area where the fall occurred was open and obvious. (*Osborn v. Mission Ready Mix*, 224 Cal. App. 3d 104, 113, 273 Cal. Rptr. 457 (4th Dist. 1990).) However, the court found it was improper to ask the witness if the condition was “unreasonable”; that question called for a legal conclusion. (*Osborn v. Mission Ready Mix*, 224 Cal. App. 3d 104, 113–114, 273 Cal. Rptr. 457 (4th Dist. 1990).)

At a competency hearing in a capital case, the prosecution called a deputy sheriff who had conversed with the defendant at the county jail about his housing situation. The deputy was permitted to testify that the defendant “understood” the conversation, and was “very responsive” and “very descriptive” in the discussion. (*People v. Medina*, 51 Cal. 3d 870, 886–887, 274 Cal. Rptr. 849, 799 P.2d 1282 (1990).) In a capital case, the defense attacked the mental health of a prosecution witness and a police officer was permitted to testify that during his questioning of the witness, he observed no “delusional or hallucinatory speech or conduct on the [witness] part” This was approved because the trial court made it clear to the jury that the answer would reflect “[the witness] own observations as a layperson.” (*People v. Gurule*, 28 Cal. 4th 557, 621, 123 Cal. Rptr. 2d 345, 51 P.3d 224 (2002), cert. denied, 538 U.S. 964, 123 S. Ct. 1754, 155 L. Ed. 2d 517 (2003).)

Section 800 permits the prosecution to call a police officer who has viewed the surveillance film of a robbery and to give an opinion that the person depicted committing the crime was in fact the defendant. (*People v. Mixon*, 129 Cal. App. 3d 118, 127–131, 180 Cal. Rptr. 772 (5th Dist. 1982).)

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§ 4:39. Lay opinion—When lay opinion is inadmissible

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[C.J.S., Executions § 431](#)

A lay witness may not give an opinion that a vest is “a body armor vest,” where the opinion rests in part on the witness's past experience. ([People v. Chapple](#), 138 Cal. App. 4th 540, 547–549, 41 Cal. Rptr. 3d 680 (1st Dist. 2006).) The identification of a body armor vest is not sufficiently within common experience. Where a lay opinion is otherwise admissible, the witness's experience may affect the weight of the testimony. ([People v. McAlpin](#), 53 Cal. 3d 1289, 1307, 283 Cal. Rptr. 382, 812 P.2d 563 (1991).)

A lifeguard is not permitted to testify that, from his observation of the victim's body, he formed the opinion that drowning had been the cause of death. ([Kinsey v. Pacific Mut. Life Ins. Co. of California](#), 178 Cal. 153, 172 P. 1098 (1918).)

Lay opinion testimony about the veracity of another is inadmissible. ([People v. Melton](#), 44 Cal. 3d 713, 744, 244 Cal. Rptr. 867, 750 P.2d 741 (1988)); but see [People v. Padilla](#), 11 Cal.4th 891, 946–947, 47 Cal.Rptr.2d 426, 906 P.2d 388 (1995) [declining to decide if this aspect of *Melton* survived Proposition 8].) For example, a police officer was not permitted to testify that, based on their prior relationship, he believed the victim's dying declaration. ([People v. Smith](#), 214 Cal. App. 3d 904, 914, 263 Cal. Rptr. 155 (2d Dist. 1989).) When a prosecutor asks a criminal defendant on cross-examination if the police were lying and these questions serve no pur-

pose save to elicit an inadmissible lay opinion about the officer's veracity, the questions are inadmissible. (*People v. Zambrano*, 124 Cal. App. 4th 228, 236–241, 21 Cal. Rptr. 3d 160 (4th Dist. 2004).) Such questions can constitute prosecutorial misconduct and require reversal. (*Zambrano*, 124 Cal. App. 4th at 241–243, finding the questions to be misconduct, but harmless.) However, the prosecution may ask the defendant if a previous witness who provided contradictory testimony had any reason to lie. (*People v. Chatman*, 38 Cal. 4th 344, 381–383, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (2006); *People v. Guerra*, 37 Cal. 4th 1067, 1126, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006).)

A lay witness may not give an opinion that an allegedly mentally retarded person has significantly subaverage intelligence. (*In re Krall*, 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91 (2d Dist. 1984).)

A police officer may not be asked whether the defendant or a third party known to the officer more closely resembles the description of the assailant given to the officer by the victim. (*People v. Farmer*, 47 Cal. 3d 888, 907–908, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).)

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§ 4:40. Opinion evidence: Market value of property—Scope of market value provisions

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 [474\(16\)](#) to [474\(19\)](#), [485](#), [521](#), [543](#), [555.6](#), [501\(7\)](#)

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[C.J.S.](#), [Evidence](#) §§ [521](#) to [523](#), [528](#), [531](#) to [532](#), [537](#), [582](#), [584](#) to [588](#), [595](#), [598](#), [601](#), [610](#), [649](#) to [652](#), [659](#) to [675](#), [677](#), [688](#) to [689](#), [698](#), [711](#) to [713](#)

[Evidence Code](#) §§ [810](#) to [824](#) limit the ways in which the value of real property or real and personal property taken as a unit can be determined. The limits are of two types: first, § 813 specifies who can testify as to value, which is discussed in [§ 4:41](#). Second, §§ 814 to 822 specify the matter on which such an opinion may be based. These rules are discussed in §§ [4:42](#) and [4:43](#). [Sections 823](#) and [824](#) describe how to value special use properties and are discussed in [§ 4:44](#).

According to the 1980 Comment to § 811, these valuation provisions must be utilized to determine the market value of:

- Real property,
- An interest in real property (for example, a leasehold), or
- Tangible personal property when valued together with real property.

These provisions do not apply to the valuation of intangible personal property alone. It is governed by the general rules of evidence. ([Evidence Code § 811\(b\)](#), Comment.) The court, if appropriate, may utilize these special valuation rules. Thus, in an inverse condemnation proceeding where recovery was sought for loss to both real and personal property, these valuation provisions were applied to both the real and the personal property even though the personal property was valued separately from the land and fixtures. ([Aetna Life & Casualty Co. v. City of Los Angeles](#), 170 Cal. App. 3d 865, 878, 216 Cal. Rptr. 831 (2d Dist. 1985).)

In valuing fixtures on the condemned property, California law incorporates the principle of consistent use. That is, “ ‘land cannot be valued based on one use while improvements are valued based on another.’ ” (Emeryville Redevelopment v. Harcros Pigments, Inc., 101 Cal. App. 4th 1083, 1102–1110, 125 Cal. Rptr. 2d 12 (1st Dist. 2002).)

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§ 4:41. Opinion evidence: Market value of property—Who may testify as to valuation?

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 474(16) to 474(19), 543

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[C.J.S.](#), [Evidence](#) §§ 521 to 523, 537, 582, 588, 595, 610, 659 to 661, 666 to 675, 677, 688

Witnesses qualified to express such opinions may testify as to value. ([Evidence Code § 813\(a\)\(1\)](#).) A witness who through knowledge and experience is able to “form an intelligent judgment as to the value of land beyond that possessed by persons generally is competent to give an opinion on fair market value even though he is not a real estate appraiser or broker.” ([San Bernardino County Flood Control Dist. v. Sweet](#), 255 Cal. App. 2d 889, 898, 63 Cal. Rptr. 640 (4th Dist. 1967).)

The owner or spouse of the owner may testify. ([Evidence Code § 813\(a\)\(2\)](#); [In re Marriage of Stoll](#), 63 Cal. App. 4th 837, 843, 74 Cal. Rptr. 2d 506 (4th Dist. 1998) (court refused to interpret [Family Code § 2640](#) to require documentation supporting a spouse's opinion regarding the value of his separate property house at the time he acquired it).) An “owner” includes, but is not limited to, the person who is entitled to possession, or either party in a case determining the ownership of the property between the parties. ([Evidence Code § 813\(c\)](#).) An owner's testimony as to value is subject to the same rules of admissibility as any other witness and cannot be based in whole or in significant part on improper matter. ([Evidence Code § 803](#); [Contra Costa Water Dist. v. Bar-C Properties](#), 5 Cal. App. 4th 652, 660, 7 Cal. Rptr. 2d 91 (1st Dist. 1992); [Sacramento & San Joaquin Drainage Dist. v. Goehring](#), 13 Cal. App. 3d 58, 65, 91 Cal. Rptr. 375 (3d Dist. 1970).) In addition, in [Padre Dam Mun. Water Dist. v. Burkhardt](#), 38 Cal. App. 4th 988, 45, 45 Cal. Rptr. 2d 506 (4th Dist. 1995), the court held that an owner's right to testify as to value is subject to [Code of Civil Procedure § 1258.250](#), which requires parties to exchange statements of valuation data for each person the party intends to call as a witness to give an opinion on the value of property being taken. [Section 1258.250](#) further provides a preclusion sanction to enforce the exchange requirement. An owner's opinion is competent evidence of the value of personal property and sufficient to support a judgment based on that value. ([Resort Video, Ltd. v. Laser Video, Inc.](#), 35 Cal. App. 4th

1679, 1700, 42 Cal. Rptr. 2d 136 (2d Dist. 1995).) Note that a property owner's statement in a probation report in a criminal case can establish a prima facie basis for the amount of restitution owed. (*People v. Gemelli*, 161 Cal.App.4th 1539, 1543 (2008).)

The owner of a building may testify as to the fair rental value of any unit. (*Castillo v. Friedman*, 197 Cal. App. 3d Supp. 6, 20, 243 Cal. Rptr. 206 (App. Dep't Super. Ct. 1987).)

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 may provide an opinion as to the value of the property if the designee is knowledgeable as to the value of the property or property interest. (*Evidence Code § 813(a)(3)*.)

Nothing in § 813 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 trier of fact to understand and weigh the property valuation testimony. 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. (*Evidence Code § 813(b)*.)

When value is disputed, the factors relied on by the witness to support the valuation opinion are admissible, can be contradicted, and have no independent probative value. Rather, evidence of the factors goes only to the weight to be accorded to the valuation opinion. (*Sacramento & San Joaquin Drainage Dist. v. Goehring*, 13 Cal. App. 3d 58, 65, 91 Cal. Rptr. 375 (3d Dist. 1970).)

The limitations set forth in § 813 are designed to prevent otherwise admissible evidence from being relied on to support a verdict outside the range of opinion testimony. (*State By and Through State Public Works Bd. v. Wherity*, 275 Cal. App. 2d 241, 249, 79 Cal. Rptr. 591 (3d Dist. 1969).) Section 813 provides that value may only be shown by the opinion testimony of either experts or owners. In assessing these opinions, the judge or jury is not required to accept completely the testimony of any one witness, but may, after considering the various opinions and the reasons therefore, decide on a value that falls within the range of the opinion testimony. (*People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.*, 91 Cal. App. 3d 332, 346–347, 153 Cal. Rptr. 895 (2d Dist. 1979).)

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4. Expert And Other Opinion Testimony

§ 4:42. Opinion evidence: Market value of property—On what may the valuation opinion be based?

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 555.6, 501(7)

Legal Encyclopedias

[C.J.S.](#), [Evidence](#) §§ 528, 531 to 532, 582, 584 to 586, 595, 598, 601, 649 to 652, 659, 662 to 665, 689, 698, 711 to 713

Generally, a valuation opinion must be 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 which may be reasonably relied on by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in §§ 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion. ([Evidence Code § 814](#).) This rule is simply a specific application of the general rule for all experts set forth in § 801(b).

The “appraisal trinity,” which combines three appraisal methods to reach the market value of real estate, is codified in [Evidence Code §§ 815 to 820](#). These three approaches are:

- 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,” the value that the property's net earning power will support based on the capitalization of net income. ([State of Cal. ex rel. State Pub. Wks. Bd. v. Stevenson](#), 5 Cal. App. 3d 60, 63, 84 Cal. Rptr. 742 (3d Dist. 1970).)

All three methods are normally utilized by an appraiser.

Reproduction cost.

[Section 820](#) permits the valuation witness to rely on either replacement or reproduction cost less depreciation or obsolescence. This method provides a more just approach in evaluating special use buildings such as churches. In using this method, depreciation and obsolescence often become the major points of controversy. ([Redevelopment Agency v. First Christian Church](#), 140 Cal. App. 3d 690, 698, 189 Cal. Rptr. 749 (2d Dist. 1983).) However, the addition of § 824 in 1992 eliminates consideration of depreciation and obsolescence in the valuation of most nonprofit special use buildings. (See the discussion in [§ 4:44](#).)

Comparable sales.

Section 816 permits the valuation witness to consider comparable sales, unless the comparable property was purchased “for a public use for which the property could have been taken by eminent domain” ([Evidence Code § 822\(a\)\(1\)](#), discussed in [§ 4:43](#) of this volume.) To be comparable the sale must have been made sufficiently near in time to the date of valuation, the property must be located sufficiently near the property being valued, and the properties must be sufficiently alike in respect to character, size, situation, usability, and improvements. This statute vests considerable discretion in the trial judge in determining comparability. ([County of San Luis Obispo v. Bailey](#), 4 Cal. 3d 518, 526, 93 Cal. Rptr. 859, 483 P.2d 27 (1971).) When the subject property is known to be included in a certain government project, the owner is not entitled to compensation for “project enhanced” value. ([Merced Irrigation Dist. v. Woolstenhulme](#), 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P.2d 1 (1971).) However, the trial judge may allow into evidence sales of property that do reflect project enhancement, if the court is satisfied that such sales shed light on the value of the subject property. ([County of San Luis Obispo v. Bailey](#), 4 Cal. 3d 518, 524, 93 Cal. Rptr. 859, 483 P.2d 27 (1971); see, generally, [Emeryville Redevelopment v. Harcross Pigments, Inc.](#), 101 Cal. App. 4th 1083, 1102–1106, 125 Cal. Rptr. 2d 12 (1st Dist. 2002).) Sales in bankruptcy or probate, though made in haste and under compulsion, may be admitted by the court as comparable sales. ([San Diego Gas & Electric Co. v. 3250 Corp.](#), 205 Cal. App. 3d 1075, 1083, 252 Cal. Rptr. 853 (4th Dist. 1988).)

Leases of comparable properties.

Section 818 permits a witness to consider leases on other properties in arriving at an opinion of net rental value and then to capitalize that value. The section requires that the leases be of comparable properties. ([People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.](#), 91 Cal. App. 3d 332, 349–350, 153 Cal. Rptr. 895 (2d Dist. 1979).) In *Peninsula*, the owners’ witnesses were permitted to consider noncomparable properties because a different valuation method was utilized: the expected return on investment of other non-comparable property owners in the general area was determined and used to shed some light on the defendant’s precondemnation damages.

In valuing the property, the witness may base the opinion on the capitalized value of the reasonable net rental value attributable to the land and improvements thereon, as distinguished from the capitalized value of the income attributable to the business conducted thereon. ([Evidence Code § 819](#).) However, the expert may not base the opinion on a projected rental income stream from a nonexistent improvement. ([San Diego Metropolitan Transit Development Bd. v. Cushman](#), 53 Cal. App. 4th 918, 930, 62 Cal. Rptr. 2d 121 (4th Dist. 1997).)

Section 817 permits valuation based on rental and lease terms, including a lease providing for a rental fixed by a portion of gross sales or income from a business on the property.

A lessee is entitled to the fair market value of the leasehold interest in the property taken. Rent reserved and other terms of the lease, including an option to renew, are factors to be considered by the experts and the trier of fact in determining the fair market value of the tenancy. ([San Francisco Bay Area Rapid Transit Dist. v. McKee-gan](#), 265 Cal. App. 2d 263, 270–271, 71 Cal. Rptr. 204 (1st Dist. 1968).)

When relevant to the determination of the value of property, a witness may take into account, as a basis for the 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 those properties. ([Evidence Code § 821.](#))

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Chapter
4. Expert And Other Opinion Testimony

§ 4:43. Opinion evidence: Market value of property—Improper basis for an opinion on valuation

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 555.6, 501(7)

Legal Encyclopedias

[C.J.S.](#), [Evidence](#) §§ 528, 531 to 532, 582, 584 to 586, 595, 598, 601, 649 to 652, 659, 662 to 665, 689, 698, 711 to 713

Notwithstanding [Evidence Code](#) §§ 814 to 821, certain restrictions have been set on the matters that can be relied on in eminent domain and inverse condemnation proceedings. ([Evidence Code](#) § 822(a).)

The witness cannot rely on the price or terms of a sale of property for public use if the property could have been taken by eminent domain. ([Evidence Code](#) § 822(a)(1).) The price paid under the circumstances of such a sale is not a reasonable or fair test of market value. ([South Bay Irr. Dist. v. California–American Water Co.](#), 61 Cal. App. 3d 944, 983, 133 Cal. Rptr. 166 (4th Dist. 1976).) Section 822 is not intended solely or primarily to protect the landowner; evidence of comparable sales introduced by the condemnee is also subject to this provision. ([Emeryville Redevelopment v. Harcros Pigments, Inc.](#), 101 Cal. App. 4th 1083, 1095–1096, 125 Cal. Rptr. 2d 12 (1st Dist. 2002).) Where the state has purchased certain property from owners and sold other property to owners as part of an integrated transaction, since evidence of the state purchase may not be considered under § 822(a)(1), fairness requires that evidence of the state sale also be excluded. ([San Diego Gas & Electric Co. v. 3250 Corp.](#), 205 Cal. App. 3d 1075, 1085, 252 Cal. Rptr. 853 (4th Dist. 1988).) By an amendment enacted in 2000, this exclusion of certain evidence of comparable sales is limited, so that the purchase terms are admissible if the proceeding relates to the valuation of a water system as defined in Public Utilities Code § 200.

The witness cannot rely on the price at which an offer to purchase or lease the property being valued was made, except one party may introduce it as an admission of another party to the proceeding. Such an admission may not be used as direct evidence of any matter that may be shown only by opinion evidence under § 813. ([Evidence Code](#) § 822(a)(2).)

The witness cannot rely on the assessed value of property for taxation purposes or on the amount of taxes due. ([Evidence Code § 822\(a\)\(3\)](#).)

The witness cannot rely on an opinion of the value of any property or interest other than that being valued. ([Evidence Code § 822\(a\)\(4\)](#).) This prevents 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.” It does not preclude evidence of a prior inconsistent value opinion to impeach the appraiser's credibility. ([State of Cal. ex rel. State Pub. Wks. Bd. v. Stevenson](#), 5 Cal. App. 3d 60, 65, 84 Cal. Rptr. 742 (3d Dist. 1970); [City of Los Angeles v. Waller](#), 90 Cal. App. 3d 766, 775–776, 154 Cal. Rptr. 12 (2d Dist. 1979).) This subsection does not preclude a witness from testifying to adjustments made in sales of comparable property used as a basis for an opinion. ([Merced Irrigation Dist. v. Woolstenhulme](#), 4 Cal. 3d 478, 501–503, 93 Cal. Rptr. 833, 483 P.2d 1 (1971).)

The witness cannot rely on the influence on the value of the property being valued of noncompensable items. ([Evidence Code § 822\(a\)\(5\)](#).) The rental value of a quarry, which was the best use of the owner's land, is not excluded. ([People ex rel. Dept. of Water Resources v. Andresen](#), 193 Cal. App. 3d 1144, 1165, 238 Cal. Rptr. 826 (5th Dist. 1987).)

The witness cannot rely on the capitalized value of the income or rental from any property other than that being valued. Capitalized rental values of the subject property may be considered. ([People ex rel. Dept. of Water Resources v. Andresen](#), 193 Cal. App. 3d 1144, 1165, 238 Cal. Rptr. 826 (5th Dist. 1987).)

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4. Expert And Other Opinion Testimony

§ 4:44. Opinion evidence: Market value of property—Valuation when there is no relevant market

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 555.6, 501(7)

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[C.J.S., Evidence §§ 528, 531 to 532, 582, 584 to 586, 595, 598, 601, 649 to 652, 659, 662 to 665, 689, 698, 711 to 713](#)

Notwithstanding any other provision, the value of property for which there is no relevant comparable market may be determined by any valuation that is just and equitable. ([Evidence Code § 823](#).) This Code section is designed to cover those special purpose properties, such as parks and utilities, where no relevant market may exist. ([Evidence Code § 823](#), Comment; [Pacific Gas & Electric Co. v. Zuckerman](#), 189 Cal. App. 3d 1113, 1127, 234 Cal. Rptr. 630 (3d Dist. 1987).)

With the exception of certain actions or proceedings described in § 824(c), if the property is nonprofit, special use property, as defined by [Code of Civil Procedure § 1235.155](#), for which there is no relevant, comparable market, a just and equitable method for determining its value is the cost of purchasing land and the reasonable cost of making it suitable for the same nonprofit, special use together with the cost of constructing similar improvements. ([Evidence Code § 824\(a\)](#).) A witness providing testimony about this shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements. ([Evidence Code § 824\(b\)](#).)

[Code of Civil Procedure § 1235.155](#) provides that “nonprofit, special use property” means property that is operated for a special nonprofit, tax-exempt use such as a school, church, cemetery, hospital, or similar property. It does not include property owned by a public entity.

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4. Expert And Other Opinion Testimony

§ 4:45. Sanity

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 456, 474, 452(2)

West's Key Number Digest, [Evidence](#) 🔑 474(4), 478, 510, 537

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1426, 1431, 1444](#)

[C.J.S., Evidence §§ 521 to 523, 537, 563 to 575, 582, 588, 610, 636 to 637, 649 to 652, 677, 688](#)

A witness may state an opinion as to the sanity of a person when the witness is an intimate acquaintance of that person. ([Evidence Code § 870\(a\)](#).) The court has discretion to determine if the witness was an intimate acquaintance even if the witness denies it. However, the witness may give an opinion only as to the person's mental soundness in general and not on the person's capacity to do specific acts, like make a will. ([In re Goulart's Estate](#), 222 Cal. App. 2d 808, 817, 35 Cal. Rptr. 465 (1st Dist. 1963).)

A witness may state an opinion as to the sanity of a person when the witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is questioned, and the opinion relates to the person's sanity at the time of the writing. ([Evidence Code § 870\(b\)](#).)

A witness may state an opinion as to the sanity of a person when the witness is qualified to give a lay opinion or an expert opinion. ([Evidence Code § 870\(c\)](#).) As an example of a permissible lay opinion, in a competency proceeding for a capital case, a police officer was permitted to testify as to whether the defendant understood a conversation they had at the jail. An interrogating officer may testify that the defendant did not appear disoriented. ([People v. Medina](#), 51 Cal. 3d 870, 887, 274 Cal. Rptr. 849, 799 P.2d 1282 (1990).)

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Chapter
5. Privileges

A. General Rules Relating To Privileges

§ 5:1. Evidence Code privileges apply in all proceedings

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [184](#), [293.5](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [297](#) to [298](#), [527](#) to [528](#), [531](#)

Unless specifically provided for by statute, the privileges set forth in the Evidence Code apply to all proceedings. Even if a statute makes the rules of evidence inapplicable to particular proceedings, or limits the applicability of the rules of evidence in particular proceedings, the rules on privileges are still applicable to those proceedings. ([Evidence Code § 910](#).)

“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. ([Evidence Code § 901](#).) Privileges apply in administrative proceedings. ([Southern Cal. Gas Co. v. Public Utilities Com.](#), 50 Cal. 3d 31, 38, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990).)

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Chapter
5. Privileges

A. General Rules Relating To Privileges

§ 5:2. Prohibition against judicially created privileges

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  184

Legal Encyclopedias

[C.J.S., Witnesses §§ 297 to 298](#)

[Evidence Code § 911](#) bars the judicial creation of new common law privileges. ([Mitchell v. Superior Court](#), 37 Cal. 3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625 (1984).) Thus, courts have refused to create privileges protecting:

- “Sliding scale recovery agreements” from review by nonsettling defendants who oppose a motion to confirm the agreement was made in good faith. ([J. Allen Radford Co. v. Superior Court](#), 216 Cal. App. 3d 1418, 265 Cal. Rptr. 535 (2d Dist. 1989).)
- Communications to a non-attorney “jailhouse lawyer.” ([People v. Velasquez](#), 192 Cal. App. 3d 319, 329–330, 237 Cal. Rptr. 366 (5th Dist. 1987).)
- A “self-critical analysis.” ([Cloud v. Superior Court](#), 50 Cal. App. 4th 1552, 58 Cal. Rptr. 2d 365 (2d Dist. 1996).) *Cloud* involved a suit for gender-based discrimination, in which the defendant sought to prevent disclosure of certain of its documents relating to its affirmative action plan.

In addition, courts may not imply exceptions to existing privileges. ([Roberts v. City of Palmdale](#), 5 Cal. 4th 363, 373, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (1993); [Jurcoane v. Superior Court](#), 93 Cal. App. 4th 886, 895–896, 113 Cal. Rptr. 2d 483 (2d Dist. 2001).) Note that the Federal Rules of Evidence permit the courts to define new privileges and create new exceptions. ([Jurcoane](#), 93 Cal. App. 4th at 898–900.)

Warning

On occasion, constitutional considerations will require judicial creation of a new privilege. Thus, the constitutional right of privacy justifies the creation of certain protections for confidential consumer banking information sought by a third party in a civil suit. (*Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 656, 658, 125 Cal. Rptr. 553, 542 P.2d 977 (1975).) In addition, the court in *Webb v. Standard Oil Co. of Cal.*, 49 Cal. 2d 509, 319 P.2d 621 (1957) created the privilege accorded to income tax returns. This privilege is not absolute, and “may be lost where ... ‘a public policy greater than that of confidentiality of tax returns is involved.’ [Citation.] In addition, this exception is narrow and only applies ‘when warranted by a legislatively declared public policy.’ [Citation.]” (*Deary v. Superior Court*, 87 Cal. App. 4th 1072, 1080, 105 Cal. Rptr. 2d 132 (3d Dist. 2001), which extended the privilege to estate tax returns.) This privilege does not apply to foreign tax returns. (*Firestone v. Hoffman*, 140 Cal. App. 4th 1408, 1420, 45 Cal. Rptr. 3d 534 (2d Dist. 2006).) Though the privilege against disclosure of tax returns may be waived by an intentional relinquishment of it (*Schnabel v. Superior Court*, 5 Cal. 4th 704, 721, 21 Cal. Rptr. 2d 200, 854 P.2d 1117 (1993)), such a waiver does not result from a party's simply providing his or her tax return to a bank as part of a loan application. (*Fortunato v. Superior Court*, 114 Cal. App. 4th 475, 481–483, 8 Cal. Rptr. 3d 82 (2d Dist. 2003).)

See *Hooser v. Superior Court* for a general discussion of the protections provided by the right of privacy to information, when no statutory privilege provides protection. (*Hooser v. Superior Court*, 84 Cal. App. 4th 997, 1003–1004, 101 Cal. Rptr. 2d 341 (4th Dist. 2000).) In *Hooser* the court held that an attorney-judgment debtor could not be compelled to disclose to his creditor certain information about his clients' identities or funds in their individual accounts. (*Hooser v. Superior Court*, 84 Cal. App. 4th 997, 1001, 101 Cal. Rptr. 2d 341 (4th Dist. 2000).)

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Chapter
5. Privileges

A. General Rules Relating To Privileges

§ 5:3. Constitutional limitations on existing privileges

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑184

West's Key Number Digest, [Criminal Law](#) 🔑662

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1515 to 1531, 1535 to 1541](#)

[C.J.S., Witnesses §§ 297 to 298](#)

A statutory privilege cannot be enforced if nondisclosure of the information deprives a criminal defendant of the federal constitutional right to a fair trial. (*Delaney v. Superior Court*, 50 Cal. 3d 785, 805, 268 Cal. Rptr. 753, 789 P.2d 934 (1990) (newsperson's privilege, [Evidence Code § 1070](#)).) The leading case in this area is *Davis v. Alaska*, which permitted a criminal defendant to cross-examine a witness concerning his juvenile probation status, despite an Alaska statute protecting the anonymity of juvenile offenders. (*Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).) *People v. Reber* found that the court should weigh, at an in camera hearing, the defendant's constitutional right to confront a witness against the witness's privilege to keep psychiatric records confidential. (*People v. Reber*, 177 Cal. App. 3d 523, 531, 223 Cal. Rptr. 139 (3d Dist. 1986); see discussion of *Reber* in §§ [3:44](#) and [5:56](#).) However, in *People v. Gurule*, 28 Cal. 4th 557, 594, 123 Cal. Rptr. 2d 345, 51 P.3d 224 (2002), cert. denied, 538 U.S. 964, 123 S. Ct. 1754, 155 L. Ed. 2d 517 (2003), the court held that “a criminal defendant's right to due process does not entitle him to invade the attorney-client privilege of another.” (But, see, *Murdoch v. Castro*, 365 F.3d 699 (9th Cir.2004).)

In *Menendez v. Superior Court*, the court denied the prosecution's claim that the psychotherapist-patient privilege must yield to their interest in successful criminal prosecutions and their state constitutional right to due process of law. It found that the privilege was paramount to prosecution and was not “trumped” by the state constitution. The court noted that the “truth in evidence” provision contained in the [state constitution \(article I, §](#)

(d)) expressly did not affect statutory rules of privilege. ([Menendez v. Superior Court, 3 Cal. 4th 435, 457, 11 Cal. Rptr. 2d 92, 834 P.2d 786 \(1992\).](#))

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Chapter
5. Privileges

A. General Rules Relating To Privileges

§ 5:4. Waiver of a privilege—Disclosure of the communication

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  219

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[C.J.S., Witnesses §§ 378 to 389](#)

As to those privileges set forth in [Evidence Code §§ 954](#) (lawyer-client), 980 (marital communications), 994 (physician-patient), 1014 (psychotherapist-patient), 1033 (penitent), 1034 (clergy), 1035.8 (sexual assault victim-counselor), and 1037.5 (domestic violence victim-counselor), a waiver occurs if without coercion a holder of the privilege discloses a significant part of the communication. ([Evidence Code § 912.](#))

“What constitutes a significant part of the communication is a matter of judicial interpretation.” ([Transamerica Title Ins. Co. v. Superior Court](#), 188 Cal. App. 3d 1047, 1052, 233 Cal. Rptr. 825 (6th Dist. 1987).) Thus, in [Jones v. Superior Court](#), 119 Cal. App. 3d 534, 546, 174 Cal. Rptr. 148 (1st Dist. 1981), the court found that a non-party witness had waived her physician-patient privilege by making partial disclosures. “By testifying freely that she ingested DES and as to certain of the circumstances in which she did so, petitioner has disclosed a ‘significant part’ of her communications with physicians on that subject ... and waived her statutory privilege as to these matters.” ([Jones v. Superior Court](#), 119 Cal. App. 3d 534, 546, 174 Cal. Rptr. 148 (1st Dist. 1981).) However, merely disclosing that counsel was consulted in deciding on a course of action and disclosing counsel's conclusions is not a disclosure of the communication. ([Southern Cal. Gas Co. v. Public Utilities Com.](#), 50 Cal. 3d 31, 49, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990); see also [Mitchell v. Superior Court](#), 37 Cal. 3d 591, 603, 208 Cal. Rptr. 886, 691 P.2d 642 (1984).) Simply because a party testifies to the facts that were discussed with counsel does not waive the attorney-client privilege. ([De Los Santos v. Superior Court](#), 27 Cal. 3d 677, 685–686, 166 Cal. Rptr. 172, 613 P.2d 233 (1980).) Similarly, merely disclosing the existence or purpose of a relationship with a therapist does not reveal a significant part of the communication and constitute a waiver. ([Roberts v. Superior Court](#), 9 Cal. 3d 330, 340, 107 Cal. Rptr. 309, 508 P.2d 309 (1973).) A party may waive the

therapist-patient privilege at trial by calling his or her therapist to testify in an earlier hearing. In *People v. Clark*, the defendant called therapist A at a hearing on a motion to suppress a confession. During the trial, the defendant called two other therapists to testify. The prosecution was properly permitted to call therapist A in the trial. His earlier testimony waived the attorney-client privilege and tendering a mental defense in the trial waived the therapist-patient privilege. (*People v. Clark*, 5 Cal. 4th 950, 1004–1008, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (1993).)

Finally, a party may waive the therapist-patient privilege by calling his or her therapist to testify in an unrelated trial. The waiver relates to any communications of which a significant part is disclosed. To the extent the therapist relied on reports of other therapists while testifying, the patient's communications to the other therapists may also lose protection. (*People v. Superior Court (Broderick)*, 231 Cal. App. 3d 584, 590, 282 Cal. Rptr. 418 (4th Dist. 1991).) “Notwithstanding waiver of a statutory privilege, a patient retains the more general right to privacy protected by the state and federal constitutions. [Citation.] Thus, any waiver must be narrowly construed and limited to matters ‘as to which, based upon [the patient's] disclosures, it can reasonably be said [the patient] no longer retains a privacy interest.’ [Citation.]” (*San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 1092, 105 Cal. Rptr. 2d 476 (4th Dist. 2001).) In *San Diego Trolley*, the court concluded that a waiver of the therapist privilege in one proceeding “must be carefully limited with respect to its later use in entirely unrelated proceedings.” (*San Diego Trolley*, 87 Cal. App. 4th at 1093.) The court then refused to find a waiver of a witness' therapist-patient privilege, even if she had disclosed confidential communications regarding the therapy in an unrelated workers' compensation proceeding.

Disclosing that a communication with counsel occurred will not waive the privilege if it does not disclose the specific content of the communication. (*People v. Hayes*, 21 Cal. 4th 1211, 1265, 91 Cal. Rptr. 2d 211, 989 P.2d 645 (1999).) In *Hayes*, the witness's testimony that she had discussed obtaining immunity with her counsel was found insufficient to waive the attorney-client privilege. In addition, a party does not waive the privilege simply because testimony was changed as a result of information received from an attorney. (*Littlefield v. Superior Court*, 136 Cal. App. 3d 477, 482, 186 Cal. Rptr. 368 (2d Dist. 1982).) If, however, a client testifies that he wrote a letter to his attorney and discusses its contents, the privilege as to the letter is waived. (*Julrik Productions, Inc. v. Chester*, 38 Cal. App. 3d 807, 811, 113 Cal. Rptr. 527 (2d Dist. 1974).)

A waiver does not occur when there is an accidental, inadvertent disclosure of privileged information by an attorney during document production. In *State Compensation Ins. Fund v. WPS, Inc.*, the court noted that the proper focus is on the holder of the privilege, the client, and that a trial court analyzing a contention of waiver should “look to the words and conduct of the holder of the privilege to determine whether a waiver has occurred.” (*State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 652–654, 82 Cal. Rptr. 2d 799 (2d Dist. 1999).) See also *O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (4th Dist. 1997), where the court refused to adopt a “gotcha” theory of waiver, “in which an underling's slip-up in a document production becomes the equivalent of actual consent.” In *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, 12 Cal. Rptr. 3d 123 (Cal. App. 6th Dist. 2004), review granted July 21, 2004, the court distinguished *State Compensation Fund*, where counsel for the holder of the privilege had disclosed it. *Jasmine* held that when the holder of the privilege inadvertently makes the disclosure, the privilege is waived. The Supreme Court granted review of *Jasmine* on July 21, 2004.

While the attorney-client privilege normally protects expert reports prepared at the attorney's direction, the

privilege is waived once the expert is listed as a witness in a civil case. ([Kizer v. Sulnick](#), 202 Cal. App. 3d 431, 441, 248 Cal. Rptr. 712 (2d Dist. 1988); [Sanders v. Superior Court](#), 34 Cal. App. 3d 270, 277–280, 109 Cal. Rptr. 770 (2d Dist. 1973).) See the discussion in [§ 4:4](#).

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A. General Rules Relating To Privileges

§ 5:5. Waiver of a privilege—Placing matter in issue

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[C.J.S., Witnesses §§ 378 to 389](#)

When a party puts in issue a matter that is normally privileged, the privilege may be waived. This commonly occurs in personal injury cases: the plaintiff waives the physician-patient privilege to the extent that physical condition is an issue in the suit. ([Evidence Code § 996](#).) Plaintiffs may waive their rights to the attorney-client privilege in a similar fashion. Thus, in *Merritt v. Superior Court*, plaintiff sued on the theory that defendant's attorney had confused plaintiff's attorney and impeded settlement. ([Merritt v. Superior Court](#), 9 Cal. App. 3d 721, 730, 88 Cal. Rptr. 337 (2d Dist. 1970).) By putting his attorney's state of mind at issue, plaintiff was held to waive the privilege. (See generally [Southern Cal. Gas Co. v. Public Utilities Com.](#), 50 Cal. 3d 31, 40–42, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990).)

“Where privileged information goes to the heart of a claim, fundamental fairness requires that it be disclosed for the litigation to proceed.” ([Steiny & Co., Inc. v. California Electric Supply Co.](#), 79 Cal. App. 4th 285, 292, 93 Cal. Rptr. 2d 920 (2d Dist. 2000); see [Mitchell v. Superior Court](#), 37 Cal. 3d 591, 208 Cal. Rptr. 886, 691 P.2d 642 (1984); [Wellpoint Health Networks, Inc. v. Superior Court](#), 59 Cal. App. 4th 110, 125–129, 68 Cal. Rptr. 2d 844 (2d Dist. 1997) [Employer waives attorney-client privilege to extent it relies on attorney's investigation as a defense to the employee's claims].)

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§ 5:6. Waiver of a privilege—Failure to assert

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[C.J.S., Witnesses §§ 372, 378 to 389](#)

A waiver also occurs when a party fails to assert a privilege in a proceeding in which that party has standing and the opportunity to do so. ([Evidence Code § 912\(a\)](#).) Thus, in *Calvert v. State Bar*, an attorney testified on behalf of the attorney being investigated for having inadequately represented an individual. The attorney-witness had formerly represented the same client. The referee's decision to strike certain of the witness's testimony on the basis that it violated the attorney-client privilege was overturned because the client had waived the privilege. The client “was a holder of the privilege; as a witness who was present at the hearing she had standing and opportunity to claim it; she consulted with her attorney when the issue was raised by petitioner; and she evidently failed to instruct [the witness] to claim the privilege.” (*Calvert v. State Bar*, 54 Cal. 3d 765, 780, 1 Cal. Rptr. 2d 684, 819 P.2d 424 (1991).)

By the same reasoning, if a party fails to assert a privilege as an objection to an interrogatory within the 30-day period prescribed, the privilege is waived and the interrogatory must be answered. (*Brown v. Superior Court*, 180 Cal. App. 3d 701, 705, 226 Cal. Rptr. 10 (2d Dist. 1986) (Fifth Amendment privilege).) However, a technical failure to comply with discovery provisions does not create a waiver if the privilege is timely asserted. (*Blue Ridge Ins. Co. v. Superior Court*, 202 Cal. App. 3d 339, 347, 248 Cal. Rptr. 346 (2d Dist. 1988).) [Code of Civil Procedure § 2031\(k\)](#), provides that if a party served with an inspection demand “fails to serve a timely response to it, the party waives any objection to the demand, including one based on privilege or the protection for work product.” In *Korea Data Systems Co. v. Superior Court*, appellant timely served an objection to a motion to inspect that included nonspecific objections based on the attorney-client privilege. A privilege log was eventually filed but not in a timely fashion. The Court of Appeal found the nonspecific objection subjected appellant

to various potential sanctions for discovery abuse, but did not justify the trial court finding the privilege had been waived. ([Korea Data Systems Co. v. Superior Court](#), 51 Cal. App. 4th 1513, 59 Cal. Rptr. 2d 925 (4th Dist. 1997); accord: [People ex rel. Lockyer v. Superior Court](#), 122 Cal. App. 4th 1060, 1074, 19 Cal. Rptr. 3d 324 (4th Dist. 2004).) However, if the timely objection to the motion to inspect contains no reference to any objection based on the attorney-client privilege, the privilege is waived. ([Scottsdale Ins. Co. v. Superior Court](#), 59 Cal. App. 4th 263, 272–274, 69 Cal. Rptr. 2d 112 (2d Dist. 1997).)

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§ 5:7. Waiver of a privilege—Miscellaneous waiver situations

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West's Key Number Digest, [Witnesses](#)  219, 305

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[C.J.S., Witnesses §§ 378 to 389, 552 to 554](#)

A witness does not waive the privilege against self-incrimination at trial, even though the witness has testified at a pretrial proceeding. ([People v. Seijas](#), 36 Cal. 4th 291, 303, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (2005).)

There is a split in authority as to whether a waiver occurs if a witness's memory is refreshed by a privileged document prior to testifying on an issue. In *Kerns Constr. Co. v. Superior Court*, the court said that using a privileged document to refresh recollection at a deposition waived the privilege. ([Kerns Constr. Co. v. Superior Court for Orange County](#), 266 Cal. App. 2d 405, 413–414, 72 Cal. Rptr. 74 (4th Dist. 1968).) *Kerns* was cited with approval in [BP Alaska Exploration, Inc. v. Superior Court](#), 199 Cal. App. 3d 1240, 1258–1259, 245 Cal. Rptr. 682 (5th Dist. 1988). In *Sullivan v. Superior Court*, the court held that a witness who refreshed recollection before the deposition did not waive the privilege. *Kerns* was distinguished because the review of the document occurred at a hearing in which a party could have objected, but since no objection was made, the waiver occurred. ([Sullivan v. Superior Court](#), 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972).)

Simply manifesting an intent to disclose a confidential communication does not constitute a waiver, only actual disclosure does so. Thus, the court held that a client's attempt to subpoena records no longer in the possession of a former attorney was insufficient to constitute a waiver of the attorney-client privilege with that former attorney. ([Lohman v. Superior Court](#), 81 Cal. App. 3d 90, 95, 146 Cal. Rptr. 171 (1st Dist. 1978).) However, in another case, plaintiff's first attorney videotaped a statement with her. Before receiving a copy of the tape, her second attorney assisted her in filing a response to a request for production in which she agreed to produce the tape. This consent to disclosure was found to be a waiver of the privilege under [Evidence Code § 912\(a\)](#), and the

second attorney's objection to disclosure after reviewing the tape was overruled. (*Hiott v. Superior Court*, 16 Cal. App. 4th 712, 719–720, 20 Cal. Rptr. 2d 157 (2d Dist. 1993).)

When disputes occur between insurance companies and their insureds, questions about waiver of the attorney-client privilege often arise. For example, one court held that a surgeon insured under a medical malpractice policy could waive the privilege as to communications between him and his lawyer but could not waive the privilege as to communications between the insurance company and the same lawyer. (*American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 595, 113 Cal. Rptr. 561 (3d Dist. 1974).) In addition, in a dispute over coverage between an insurance company and its insured, the company's adjuster does not become an agent of the insured so as to destroy the privilege as to any communication received by the adjuster from the company's counsel. (*State Farm Fire & Casualty Co. v. Superior Court*, 216 Cal. App. 3d 1222, 1227–1228, 265 Cal. Rptr. 372 (4th Dist. 1989).)

The attorney-client 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” (*People v. Wilson*, 36 Cal. 4th 309, 336, 30 Cal. Rptr. 3d 513, 114 P.3d 758 (2005) [since the defendant had previously testified about the contents of the communications with counsel, he waived the privilege].)

When the target of a government investigation shares privileged documents with the government, it waives the attorney-client privilege and work product protection for these documents. (*McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1233, 9 Cal. Rptr. 3d 812 (1st Dist. 2004).) McKesson had hired a law firm to represent it in certain shareholder lawsuits and to perform an internal review of certain company procedures. That review led to the creation of certain documents that McKesson shared with the government, subject to agreements to preserve the confidentiality of the documents (though disclosure would occur if McKesson were prosecuted). The court rejected McKesson's argument that under § 912(d), the disclosure to the government was “necessary for the accomplishment of the purpose” for which the lawyer was consulted. (*McKesson HBOC, Inc.*, 115 Cal. App. 4th at 1236–1237.) The court concluded that the attorney-client relationship is not furthered simply because two parties have overlapping interests. (*McKesson HBOC, Inc.*, 115 Cal. App. 4th at 1237.) It rejected the selective waiver theory under which “a client could disclose a privileged or protected communication to the government, while continuing to assert it against other parties.” (*McKesson HBOC, Inc.*, 115 Cal. App. 4th at 1240.) The court distinguished the situation where two parties “aligned on the same side in an investigation or litigation” share information with each other. In “some circumstances” this showing will not waive the attorney-client privilege. (*McKesson HBOC, Inc.*, 115 Cal. App. 4th at 1238.) For a general discussion of this “joint defense” or “common interest” doctrine, see *OXY Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 888–891, 9 Cal. Rptr. 3d 621 (1st Dist. 2004). This doctrine is distinct from the statutorily recognized “joint client” exception set out in § 962 (*Oxy*, 115 Cal. App. 4th at 889, n.12), and is appropriately characterized as a non-waiver doctrine. (*Oxy*, 115 Cal. App. 4th at 889.) As such, it applies in the negotiation of a commercial transaction as well as in litigation. (*STI Outdoor v. Superior Court*, 91 Cal. App. 4th 334, 341, 109 Cal. Rptr. 2d 865 (2d Dist. 2001).)

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§ 5:8. Consequences of exercising a privilege in civil case

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[C.J.S., Witnesses §§ 525 to 526](#)

Neither the judge nor counsel may comment on the exercise of a privilege and no presumption arises because of its exercise. Moreover, the trier of fact may not draw any inference therefrom as to the witness's credibility or as to any matter at issue in the case. ([Evidence Code § 913\(a\)](#).)

[Evidence Code § 913](#) does not prohibit inferences drawn from or comment on the state of the evidence in the case. Nothing in [§ 913](#) affects the application of [§ 413](#), which provides that the trier of fact may consider a party's failure to explain or deny evidence against him or her. Counsel may argue that the evidence against the other party is uncontradicted. ([Evidence Code § 913](#), Comment.)

In a civil case a party's assertion of the privilege against self-incrimination may be penalized. If a plaintiff asserts it, the case may be dismissed. However, a court should not strike the answer of a defendant who does so. ([Alvarez v. Sanchez](#), 158 Cal. App. 3d 709, 712, 714, 204 Cal. Rptr. 864 (1st Dist. 1984); see also [Pacers, Inc. v. Superior Court](#), 162 Cal. App. 3d 686, 689, 208 Cal. Rptr. 743 (4th Dist. 1984).) In a civil case, it is appropriate for the court to prevent a defendant from testifying at trial after he or she has asserted the Fifth Amendment privilege in a deposition. ([A & M Records, Inc. v. Heilman](#), 75 Cal. App. 3d 554, 566, 142 Cal. Rptr. 390 (2d Dist. 1977).)

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§ 5:9. Ordering information disclosed to determine if it is privileged

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West's Key Number Digest, [Witnesses](#) 🔑223

West's Key Number Digest, [Criminal Law](#) 🔑627.8

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[C.J.S., Criminal Law §§ 663 to 664, 668, 693, 727, 732 to 736, 1636, 1638 to 1639](#)

[C.J.S., Witnesses § 377](#)

Generally, disclosure of information cannot be ordered to determine if it is privileged or if it is attorney work product. ([Evidence Code § 915\(a\)](#), Comment.) No in-camera inspection of documents can be ordered to determine if the documents are protected by the attorney-client privilege. ([Southern Cal. Gas Co. v. Public Utilities Com.](#), 50 Cal. 3d 31, 45, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990); [Wellpoint Health Networks, Inc. v. Superior Court](#), 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844 (2d Dist. 1997); see [State Farm Fire & Casualty Co. v. Superior Court](#), 54 Cal. App. 4th 625, 645, 62 Cal. Rptr. 2d 834 (2d Dist. 1997) [Section 915 does not permit disclosure of privileged information in ruling on the crime/fraud exception to the attorney-client privilege.].) The statute, itself, provides for certain exceptions to this rule. For example, disclosure of information may be ordered to permit the court to rule on the claim of privilege when a law office is searched pursuant to a warrant and no other feasible means exists to rule on the claim. ([Evidence Code § 915\(a\)](#); [Deukmejian v. Superior Court](#), 103 Cal. App. 3d 253, 162 Cal. Rptr. 857 (2d Dist. 1980).) In addition, when a claim of privilege is raised under [Evidence Code §§ 1040](#) (official information), 1041 (identity of informant), 1060 (trade secret) or [subsection \(b\) of § 2018.030 of the Code of Civil Procedure](#) (attorney work product) and the court needs to know the information to make a ruling, it can order an in camera disclosure. ([Evidence Code § 915\(b\)](#), Comment.) However, when a claim of official privilege is raised, an in camera hearing is improper unless the party invoking the privilege explains in open court why that privilege applies or states that it cannot do so without undermining the privilege. ([Torres v. Superior Court](#), 80 Cal. App. 4th 867, 873, 95 Cal. Rptr. 2d 686 (2d Dist. 2000).)

In fact, the courts have ordered the in camera disclosure of information in ruling on virtually all privileges, if a consideration of the content of the communication is necessary to determine the existence of the privilege. (See, e.g., *In re Lifschutz*, 2 Cal. 3d 415, 437, 85 Cal. Rptr. 829, 467 P.2d 557 (1970) (patient-psychotherapist privilege); *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 606–607, 162 Cal. Rptr. 724 (1st Dist. 1980) (application of § 1024 exception to psychotherapist privilege); *Cornish v. Superior Court*, 209 Cal. App. 3d 467, 480, 257 Cal. Rptr. 383 (4th Dist. 1989) (attorney-client privilege); *People v. Manago*, 220 Cal. App. 3d 982, 989–990, 269 Cal. Rptr. 819 (4th Dist. 1990) (self-incrimination privilege); and *Lorenza P. v. Superior Court*, 197 Cal. App. 3d 607, 611, 242 Cal. Rptr. 877 (4th Dist. 1988) (juvenile records).) In *Costco Wholesale Corp. v. Superior Court*, 74 Cal. Rptr. 3d 345 (Cal. App. 2d Dist. 2008), rev. grtd. 6-9-08) the California Supreme Court will decide if section 915 prohibits a trial court from reviewing, in camera, a legal opinion letter to decide if the attorney-client privilege protects facts stated therein. Section 915 does not prevent consideration of a privileged communication that has already been disclosed. (*Roe v. Superior Court*, 229 Cal. App. 3d 832, 280 Cal. Rptr. 380 (2d Dist. 1991); *Klang v. Shell Oil Co.*, 17 Cal. App. 3d 933, 938, 95 Cal. Rptr. 265 (2d Dist. 1971).)

At any such in camera hearing, the proceedings should be transcribed by a court reporter. (See, e.g., *People v. Hertz*, 103 Cal. App. 3d 770, 163 Cal. Rptr. 233 (2d Dist. 1980).) Often these proceedings will consist of the judge reviewing certain documents and, on the record, giving a brief description of each and the reasons for finding it privileged or not. On occasion, testimony, perhaps from an expert, will be required to help the court determine if the documents are disclosable. For example, in *Brutsch v. City of Los Angeles*, the plaintiff-employees sought discovery of certain documents in their personnel files as part of a lawsuit over a promotional examination. The city claimed the documents were “testing materials” and therefore, privileged. The trial court's decision to disclose was overturned, in part, because no in camera hearing was held where the defendant could provide testimony by experts in the testing field who could explain the nature of the documents and, perhaps, justify the defendant's contention. (*Brutsch v. City of Los Angeles*, 3 Cal. App. 4th 354, 359, 4 Cal. Rptr. 2d 456 (2d Dist. 1992).)

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§ 5:10. Exclusion of privileged information on court's motion

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[C.J.S., Witnesses §§ 372 to 373, 377](#)

If a witness is questioned about privileged matter and is not authorized to claim the privilege, the court should exclude the testimony on its own motion if no party to the proceeding is authorized to claim the privilege. ([Evidence Code § 916\(a\)](#).) For example, when a hospital produces a rape victim's mental health records and does not assert the psychotherapist privilege, the court on its own motion must assert it on behalf of the victim who was not a party and had entered no waiver. ([People v. Pack](#), 201 Cal. App. 3d 679, 684–685, 248 Cal. Rptr. 240 (2d Dist. 1988); see also [People v. Corona](#), 211 Cal. App. 3d 529, 539, 259 Cal. Rptr. 524 (1st Dist. 1989) (the court should have raised the consular privilege on its own).)

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§ 5:11. Presumption that certain communications are confidential

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[C.J.S., Witnesses §§ 374 to 376](#)

When evaluating a claim of privilege based on the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, sexual assault victim-counselor, domestic violence victim-counselor or husband-wife relationship, the court should presume that the communication was made in confidence. ([Evidence Code § 917\(a\)](#).) Moreover, a communication between persons in such a relationship does not lose its privileged status simply because it is communicated by electronic means. ([Evidence Code § 917\(b\)](#).) Although [§ 917](#) creates a presumption of confidentiality when a privilege is claimed, it has no effect on the question of whether the privilege has been waived. ([People v. Edwards](#), 203 Cal. App. 3d 1358, 1363, 248 Cal. Rptr. 53 (1st Dist. 1988) (penitential privilege).)

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§ 5:12. Seeking review of ruling disallowing a privilege

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West's Key Number Digest, [Appeal and Error](#) 🔑 877 to 879

West's Key Number Digest, [Criminal Law](#) 🔑 1136

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[C.J.S., Appeal and Error §§ 831, 865 to 870](#)

[C.J.S., Criminal Law § 2383](#)

A party may seek review of a ruling disallowing a claim of privilege only if he or she is the holder of the privilege. ([Evidence Code § 918](#); [People v. Corona](#), 211 Cal. App. 3d 529, 540, 259 Cal. Rptr. 524 (1st Dist. 1989).) One exception exists to this rule. A party may seek reversal of a ruling disallowing a claim of privilege by the party's spouse under [Evidence Code § 970](#) or [971](#). ([Evidence Code § 918](#).)

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B. Privilege Not To Be Called As a Witness And Not To Testify

§ 5:13. The privilege

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West's Key Number Digest, [Witnesses](#)  [297](#), [299](#), [305](#), [293.5](#)

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[C.J.S., Witnesses §§ 522, 527 to 538, 545, 550, 552 to 554](#)

“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.” ([Evidence Code § 930](#).) The privilege not to be called as a witness in a criminal case does not apply in civil or quasi-criminal matters. Generally speaking, the right not to testify has not been extended to civil commitment proceedings. ([People v. Lopez](#), 137 Cal. App. 4th 1099, 40 Cal. Rptr. 3d 789 (4th Dist. 2006) [Mentally Disordered Offender proceedings]; [People v. Merfeld](#), 57 Cal. App. 4th 1440, 67 Cal. Rptr. 2d 759 (1st Dist. 1997) [same]; [People v. Leonard](#), 78 Cal. App. 4th 776, 792–793, 93 Cal. Rptr. 2d 180 (3d Dist. 2000) [Sexually Violent Predator proceedings].) The cases are split over whether a defendant has this right in proceedings under [Penal Code section 1026.5](#) to extend the commitment of a defendant found not guilty by reason of insanity. (Compare [People v. Lopez](#), 137 Cal. App. 4th 1099, 1110–1116, 40 Cal. Rptr. 3d 789 (4th Dist. 2006) [no such right] with [People v. Haynie](#), 116 Cal. App. 4th 1224, 1230, 11 Cal. Rptr. 3d 163 (5th Dist. 2004) [Defendant has the right not to testify].) The cases are similarly split over a defendant's right to refuse to testify in proceedings to extend Youth Authority commitments pursuant to [Welfare and Institution Code sections 1800–1803](#). (Compare [People v. Lopez](#), 137 Cal. App. 4th 1099, 1110–1116, 40 Cal. Rptr. 3d 789 (4th Dist. 2006) [no such right] with [In re Luis C.](#), 116 Cal. App. 4th 1397, 1403, 11 Cal. Rptr. 3d 429 (5th Dist. 2004) [Defendant has the right not to testify].)

Even when a person can be compelled to testify, the person may not be compelled to provide self-incriminating testimony. ([Cramer v. Tyars](#), 23 Cal. 3d 131, 137–138, 151 Cal. Rptr. 653, 588 P.2d 793 (1979); [Conservatorship of Bones](#), 189 Cal. App. 3d 1010, 1015–1016, 234 Cal. Rptr. 724 (1st Dist. 1987) (which con-

tains a list of such proceedings).) A defendant who testifies at an earlier stage in a criminal matter does not waive the privilege at trial. (*People v. Seijas*, 36 Cal. 4th 291, 303, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (2005); *In re Sales*, 134 Cal. App. 54, 61, 24 P.2d 916 (1st Dist. 1933).)

The privilege not to be called as a witness does not extend to a person charged in a separate complaint with the same offense as the defendant. That person is not presumed unavailable. The person should be called and, outside the presence of the jury, invoke the privilege against self-incrimination or not. (*People v. Ford*, 45 Cal. 3d 431, 439, 247 Cal. Rptr. 121, 754 P.2d 168 (1988).) The privilege not to be called as a witness is not violated absent affirmative state action. Thus, a court's proper decision not to sever the trials of two defendants is not a violation of the privilege, even though it indirectly caused one defendant to testify who otherwise would not have done so. (*People v. Kelly*, 183 Cal. App. 3d 1235, 228 Cal. Rptr. 681 (1st Dist. 1986).) The privilege applies to criminal defendants in their own cases. Where a defendant voluntarily takes the witness stand, that defendant need not be admonished by the court regardless of whether or not the defendant is represented by counsel. (*People v. Barnum*, 29 Cal. 4th 1210, 131 Cal. Rptr. 2d 499, 64 P.3d 788 (2003).)

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§ 5:14. Griffin error

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West's Key Number Digest, [Witnesses](#) 🔑309

West's Key Number Digest, [Criminal Law](#) 🔑721

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[C.J.S., Criminal Law §§ 1718 to 1720, 2128 to 2130](#)

[C.J.S., Witnesses §§ 525 to 526](#)

If a defendant chooses not to testify, the prosecution may not comment nor may the court instruct on that choice. (*Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).) A violation of this rule is commonly referred to as *Griffin* error. No *Griffin* error occurs if the prosecutor simply comments on the state of the evidence and notes that the evidence against the defendant is uncontradicted. (See [Evidence Code § 413](#); *People v. Bradford*, 15 Cal. 4th 1229, 1338–1340, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997).) However, *Griffin* error may occur “if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant” (*People v. Bradford*, 15 Cal. 4th 1229, 1339, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997) (emphasis in original).) If a defendant testifies as to only one aspect of the case against him or her and does not generally deny guilt, *Griffin* error occurs if the prosecutor comments on the defendant's failure to testify about other matters. (*People v. Eaton*, 275 Cal. App. 2d 584, 590, 80 Cal. Rptr. 192 (2d Dist. 1969).) This rule parallels the limit placed on cross-examining a defendant who provides only limited testimony. (See [§ 3:22](#).) *Griffin* error also occurs when, in a joint trial of multiple codefendants, there is comment by an attorney for one defendant on the silence of another. However, limits on codefendant's counsel are less stringent than on the prosecutor. (*People v. Hardy*, 2 Cal. 4th 86, 157, 5 Cal. Rptr. 2d 796, 825 P.2d 781 (1992).)

If the prosecutor commits *Griffin* error but the comment is isolated, does not stress an inference of guilt

from silence, and is followed by a curative instruction, reversal is not required. (*U.S. v. Chan Yu–Chong*, 920 F.2d 594 (9th Cir. 1990); *People v. Vargas*, 9 Cal. 3d 470, 479, 108 Cal. Rptr. 15, 509 P.2d 959 (1973).) If *Griffin* error occurs, a conviction will be reversed unless the state establishes, beyond a reasonable doubt, that the comment or instruction did not contribute to the conviction. (*Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).) For *Griffin* error to be prejudicial, the improper comment must fill an evidentiary gap or “at least touch a live nerve in the defense.” (*People v. Vargas*, 9 Cal. 3d 470, 481, 108 Cal. Rptr. 15, 509 P.2d 959 (1973); see also *People v. Garnica*, 121 Cal. App. 3d 727, 737, 175 Cal. Rptr. 521 (5th Dist. 1981).)

In *People v. Lewis*, 117 Cal. App. 4th 246, 256–260, 12 Cal. Rptr. 3d 1 (1st Dist. 2004), the defendant contested identification and alleged problems with the photo lineups conducted by the police. The prosecution was entitled to ask the investigating officer if the defendant ever requested a live lineup. (See *Evans v. Superior Court*, 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974).) No *Griffin* error resulted from this question or the prosecutor's subsequent closing argument that raised the failure to request an *Evans* lineup. *People v. Prince*, 40 Cal. 4th 1179, 1245–1247, 57 Cal. Rptr. 3d 543, 156 P.3d 1015 (2007) concluded that the prosecution could elicit testimony from an officer who conducted a lineup, in which the defendant was selected, that defense counsel were present at the lineup and had positioned the defendant in the lineup.

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C. Privilege Against Self-Incrimination

§ 5:15. Scope of the privilege

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑292 to 310

West's Key Number Digest, [Criminal Law](#) 🔑393

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[C.J.S., Criminal Law §§ 902 to 914](#)

[C.J.S., Witnesses §§ 520 to 558](#)

When the following four factors all exist, the privilege against self-incrimination is triggered. ([Izazaga v. Superior Court](#), 54 Cal. 3d 356, 366, 285 Cal. Rptr. 231, 815 P.2d 304 (1991).) The information sought must be:

- Incriminating,
- Personal to the defendant,
- Obtained by compulsion, and
- Testimonial or communicative in nature.

In *Izazaga*, the court upheld California's reciprocal discovery rules in criminal cases. These rules were enacted by the voters in June 1990 as part of Proposition 115. The court noted that insofar as the rules required a defendant to turn over pretrial statements of witnesses who the defendant intended to call at trial, no self-incrimination occurred. Since such statements are of third persons, they are not personal to the defendant and, therefore, not protected. ([Izazaga v. Superior Court](#), 54 Cal. 3d 356, 367, 285 Cal. Rptr. 231, 815 P.2d 304 (1991); see also [U.S. v. Nobles](#), 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).)

The privilege bars evidence of “communications” or “testimony” of the accused but not “real or physical evidence derived from him.” (*Schmerber v. California*, 384 U.S. 757, 764, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (blood sample); *People v. Ellis*, 65 Cal. 2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966).) In *People v. Sims*, the court found that the Fifth Amendment provided no protection against compelling a defendant to speak the words uttered by the perpetrator in the jury’s presence so that the victim could attempt to identify the speaker. (*People v. Sims*, 64 Cal. App. 3d 544, 552, 134 Cal. Rptr. 566 (2d Dist. 1976).) In *People v. Huston*, evidence of the defendant’s refusal to participate in a lineup and his subsequent change in appearance was found admissible because it was not testimonial. (*People v. Huston*, 210 Cal. App. 3d 192, 217–218, 258 Cal. Rptr. 393 (4th Dist. 1989).) In addition, in *People v. Pretzer*, the court found that the privilege did not apply to “revelation of the witness’s physical or mental characteristics where they are relevant.” (*People v. Pretzer*, 9 Cal. App. 4th 1078, 1084, 11 Cal. Rptr. 2d 860 (2d Dist. 1992).) In a mentally disordered defendant hearing, the jury is entitled to observe the person sought to be committed and hear the person speak and respond in order to make a reasoned decision as to the level of functioning. (*Pretzer*, 9 Cal. App. 4th at 1084.) If a criminal defendant enters an insanity plea or raises a “diminished actuality” defense under *Penal Code* § 28, the prosecution is entitled to have its mental health expert interview the defendant and, if the defendant refuses to be interviewed, the jury may be informed of that lack of cooperation. (*People v. Carpenter*, 15 Cal. 4th 312, 412, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997).) In *Verdin v. Superior Court*, 40 Cal. Rptr. 3d 814 (Cal. App. 4th Dist. 2006), the California Supreme Court granted review to address whether the prosecution can compel a mental examination of the defendant in any criminal case where the defendant has placed his or her mental state at issue, even if none of the criminal discovery statutes expressly provides for such an examination.

Requiring a defendant to provide a handwriting exemplar does not violate the right against self-incrimination. (*Gilbert v. California*, 388 U.S. 263, 266–267, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967).) A defendant’s refusal to provide a handwriting exemplar is admissible proof of consciousness of guilt as is opinion evidence that a defendant attempted to disguise handwriting on an exemplar. (*People v. Clark*, 5 Cal. 4th 950, 1003, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (1993); *People v. Tai*, 37 Cal. App. 4th 990, 998, 44 Cal. Rptr. 2d 253 (1st Dist. 1995)); See *People v. Farnam*, 28 Cal. 4th 107, 152–153, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (2002), cert. denied, 537 U.S. 1124, 123 S. Ct. 861, 154 L. Ed. 2d 806 (2003) (evidence of a defendant’s initial refusal to provide blood and hair samples is admissible proof of consciousness of guilt, even if the defendant ultimately provided the samples).

Under the required records doctrine, the privilege does not exist to protect an individual’s business records that are required to be kept pursuant to a regulatory scheme that is essentially noncriminal. (*Shapiro v. U.S.*, 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948); *Craib v. Bulmash*, 49 Cal. 3d 475, 487, 261 Cal. Rptr. 686, 777 P.2d 1120 (1989).) The privilege does not prevent a court order to a person to execute a consent form authorizing a bank to produce the person’s bank records, even if the records may be incriminating. (*Doe v. U.S.*, 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).)

A criminal defendant’s right against self-incrimination is violated by ordering that he or she testify before another defense witness testifies. (*Brooks v. Tennessee*, 406 U.S. 605, 609–611, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972); cf. *People v. Wieve*, 133 Cal. App. 4th 1342, 1347–1348, 35 Cal. Rptr. 3d 482 (2d Dist. 2005).)

The privilege has not been extended to protect corporations. (*People v. Superior Court (Keuffel & Esser Co.)*, 181 Cal. App. 3d 785, 227 Cal. Rptr. 13 (2d Dist. 1986).) An agent of a corporation or partnership may be

ordered to produce records of that entity even if such production tends to incriminate the agent. (*Braswell v. U.S.*, 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988).)

While a person's criminal conviction is on appeal, the person retains the privilege for use in other proceedings. (*In re Strick*, 34 Cal. 3d 891, 899, 196 Cal. Rptr. 509, 671 P.2d 1251 (1983).) In *People v. Fonseca*, the court held that a defendant who pleads guilty can invoke his privilege and refuse to testify in the subsequent trial of his codefendant until the time to file an appeal has passed, with no notice of appeal filed, even though no certificate of probable cause has been obtained. (*People v. Fonseca*, 36 Cal. App. 4th 631, 637, 42 Cal. Rptr. 2d 525 (2d Dist. 1995).)

In *In re Marriage of Sachs*, 95 Cal. App. 4th 1144, 116 Cal. Rptr. 2d 273 (2d Dist. 2002), a father, who had accumulated a substantial arrearage in child and spousal support payments, invoked the right against self-incrimination and refused to answer questions or provide documents at a judgment debtor examination set by mother, because of his fear of a future contempt proceeding. The court balanced the parties' competing interests and relied on *Family Code* §§ 3552 and 3665 to order father to turn over his tax returns to the court, which would permit mother to examine them and question the father on them, subject to the statutory requirement of confidentiality. (*Sachs*, 95 Cal. App. 4th at 1160–1162.)

A party, including a criminal defendant, may not compel a witness to invoke the privilege against self-incrimination in front of the jury, (*People v. Mincey*, 2 Cal. 4th 408, 441, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (1992); accord, *People v. Holloway*, 33 Cal. 4th 96, 129–130, 14 Cal. Rptr. 3d 212, 91 P.3d 164 (2004), cert. denied, 125 S. Ct. 1302, 161 L. Ed. 2d 122 (U.S. 2005).)

A witness who testifies at a preliminary hearing is entitled to invoke the privilege at trial. (*People v. Seijas*, 36 Cal. 4th 291, 303, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (2005).) A trial court's decision that a witness is entitled to assert the privilege is subject to de novo review on appeal. (*Seijas*, 36 Cal. 4th at 303–304.) For a discussion of how the trial court should determine if the privilege is properly invoked, see § 1:41.

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§ 5:16. Broad application to all proceedings

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West's Key Number Digest, [Witnesses](#) 🔑 293.5

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[C.J.S., Witnesses §§ 527 to 528, 531](#)

“In any proceeding, *civil or criminal*, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity.” (*Cramer v. Tyars*, 23 Cal. 3d 131, 137, 151 Cal. Rptr. 653, 588 P.2d 793 (1979).) In *Cramer*, the court held that a mentally retarded person who is the subject of a petition for civil commitment under [Welfare and Institutions Code § 6502](#) could be questioned about subjects that did not incriminate him in criminal acts but that did reveal his mental condition to the jury. (*Cramer v. Tyars*, 23 Cal. 3d 131, 139, 151 Cal. Rptr. 653, 588 P.2d 793 (1979).)

The privilege has been found to exist in:

- Juvenile proceedings ([Application of Gault](#), 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)); including juvenile dependency proceedings. (*In re Mark A.*, 156 Cal.App.4th 1124, 1133–1147 (2007).)
- Civil contempt proceedings (*Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964));
- Attorney disbarment proceedings (*In re Vaughan*, 189 Cal. 491, 209 P. 353 (1922)); and
- Civil discovery proceedings (*Zonver v. Superior Court of Los Angeles County*, 270 Cal. App. 2d 613, 76 Cal. Rptr. 10 (2d Dist. 1969)).

On motion of either party, or on its own motion, if the court believes that a reasonable possibility exists that

a witness will incriminate himself or herself in response to a question, the court should inform the witness of the privilege. ([People v. Berry](#), 230 Cal. App. 3d 1449, 1453, 281 Cal. Rptr. 543 (4th Dist. 1991).) Further, the court should inform the witness of the right to counsel if advice on invoking the privilege is needed. However, the *Berry* court noted that a court need not admonish all witnesses appearing before it of the privilege, but only “where something in the circumstances of the hearing puts the judge on notice of the possibility of self-incrimination, e.g., persons identified as co-conspirators or perpetrators of some specific crime.”

Comment

The duty to admonish is the court's, and counsel should be discouraged from performing this function under the guise of raising an objection to the testimony.

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§ 5:17. Grant of immunity to compel testimony

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West's Key Number Digest, [Criminal Law](#) 🔑42

West's Key Number Digest, [Witnesses](#) 🔑304

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[C.J.S., Criminal Law §§ 97 to 112](#), 236

[C.J.S., Witnesses §§ 534 to 535, 555 to 558](#)

Once granted immunity, a witness cannot refuse to testify by asserting the privilege. (*Kastigar v. United States*, 406 U.S. 441, 453, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972); *People v. King*, 66 Cal. 2d 633, 58 Cal. Rptr. 571, 427 P.2d 171 (1967); *In re Mark A.*, 156 Cal.App.4th 1124, 1133 (2007).) [Penal Code § 1324](#) is the general immunity statute relied on by prosecutors in felony cases to overcome the privilege. In a misdemeanor case, the prosecution cannot use the immunity statute to force a recalcitrant witness to testify. [Penal Code § 1324.1](#) requires voluntary testimony by a witness offered immunity in a misdemeanor prosecution. As discussed in [§ 1:41](#), the defendant has no right to rely on [Penal Code § 1324](#) to obtain the testimony of a witness who would otherwise invoke the privilege. In *In re Mark A.*, 156 Cal.App.4th 1124, 1134 (2007), the court held that Welfare & Institutions section 355.1(f), which provides for use immunity for the testimony by a witness in a juvenile dependency hearing, if the witness has the care and custody of the minor, does not provide for derivative use immunity and, so, the witness's testimony cannot be compelled. The court concluded [California Rules of Court, rule 5.548](#) (c) and (d) provided the appropriate mechanism to confer immunity and, then, compel testimony.

The testimony of an accomplice is not inherently unreliable and subject to exclusion. (*People v. Allen*, 42 Cal. 3d 1222, 1251–1252, 232 Cal. Rptr. 849, 729 P.2d 115 (1986).) The same rule applies to the “testimony of an accomplice who has received a favorable plea agreement in return for his or her testimony.” (*People v. Jenkins*, 22 Cal. 4th 900, 1010, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000); see, also, *People v. Riel*, 22 Cal. 4th

1153, 1179, 96 Cal. Rptr. 2d 1, 998 P.2d 969 (2000).) However, neither immunity nor plea agreements may “properly place the accomplice under a strong compulsion to testify in a particular manner—a requirement that he or she testify in conformity with an earlier statement to the police, for example, or that the testimony result in defendant’s conviction, would place the witness under compulsion inconsistent with the defendant’s right to fair trial.” (*People v. Jenkins*, 22 Cal. 4th 900, 1010, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000); *People v. Boyer*, 38 Cal. 4th 412, 455–457, 42 Cal. Rptr. 3d 677, 133 P.3d 581 (2006); *People v. Gurule*, 28 Cal. 4th 557, 616–617, 123 Cal. Rptr. 2d 345, 51 P.3d 224 (2002), cert. denied, 538 U.S. 964, 123 S. Ct. 1754, 155 L. Ed. 2d 517 (2003) (A plea bargain that required an accomplice to testify against defendant and was conditioned on the prosecution obtaining no evidence that the accomplice was the actual killer was approved, though “this condition probably resulted in some pressure on [the witness] not to testify that he—and not defendant—actually stabbed the victim”).)

Although the testimony of an accomplice requires corroboration to sustain a conviction for a criminal offense (*Penal Code* section 1111) that rule does not apply to juvenile delinquency proceedings. (*In re Mitchell P.*, 22 Cal.3d 946, 151 Cal.Rptr. 330, 587 P.2d 1144 (1978). See *In re Christopher B.*, 156 Cal.App.4th 1557, 1563–1567 (2007) stating that the rationale of *Mitchell P.* has been undermined.

In addition, the corroboration rule does not apply to testimony received from an immunized witness or an informant. (*People v. Garceau*, 6 Cal. 4th 140, 191, 24 Cal. Rptr. 2d 664, 862 P.2d 664 (1993).)

In several different contexts, the courts have created an implied use immunity doctrine to effectuate some policy. A juvenile’s statements made at a hearing to determine her fitness to be tried in juvenile court cannot be used in a later criminal trial. (*Ramona R. v. Superior Court*, 37 Cal. 3d 802, 210 Cal. Rptr. 204, 693 P.2d 789 (1985).) A parent who willingly self-incriminates as part of the reunification process in a dependency case may preclude use of those statements in future criminal prosecutions. (*In re Mark A.*, 156 Cal.App.4th 1124, 1136–1137, (2007) and cases cited therein.) A defendant’s testimony at a probation violation hearing cannot be used at a later criminal trial on the charges involved in the probation hearing. (*People v. Coleman*, 13 Cal. 3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975).) Finally, statements of a defendant in support of a motion for new trial, on the grounds that counsel was ineffective, could not be used in a subsequent trial. (*People v. Dennis*, 177 Cal. App. 3d 863, 876, 223 Cal. Rptr. 236 (3d Dist. 1986).)

Warning

If in the later trial the defendant’s testimony is materially inconsistent with the earlier statements, the defendant may be impeached with those statements, despite the above rules. (See the discussion in § 3:23.)

Statements by a criminal defendant in a mental competency examination conducted pursuant to *Penal Code* section 1369 are inadmissible in the guilt phase of the trial. (*People v. Dunkle*, 36 Cal. 4th 861, 905–906, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005), cert. denied, 126 S. Ct. 1884, 164 L. Ed. 2d 571 (U.S. 2006).) Further, the statements made by the defendant at that examination may not be used at trial for impeachment if the defendant testifies inconsistently. (*People v. Pokovich*, 48 Cal. Rptr. 3d 158, 39 Cal. 4th 1240, 141 P.3d 267 (2006).) If the defendant places his mental health in issue in the guilt phase, the mental health professional who conducted the prior examination may testify, but the jury should be instructed that the testimony regarding the defendant’s statements given during the mental health examination are not admitted for their truth, but only to

show the information upon which the mental health professional based his or her opinion. (*In re Spencer*, 63 Cal. 2d 400, 411, 46 Cal. Rptr. 753, 406 P.2d 33 (1965). This same limiting instruction should be provided in sanity trials when the psychiatrist testifies regarding the defendant's incriminating statements. (*People v. Jantz*, 137 Cal. App. 4th 1283, 1294–1295, 40 Cal. Rptr. 3d 875 (2d Dist. 2006); *In re Hernandez*, 143 Cal. App. 4th 459, 49 Cal. Rptr. 3d 301 (4th Dist. 2006).)

In other contexts, use immunity has been denied. For example, in *People v. Harris*, the court permitted statements made by the defendant in the first phase of a bifurcated trial to be introduced in the second phase. (*People v. Harris*, 8 Cal. App. 4th 104, 108, 10 Cal. Rptr. 2d 42 (5th Dist. 1992).) In another case, a defendant testified in his first trial, which ended in a mistrial. His testimony was held to be admissible in the subsequent retrial. (*People v. O'Connell*, 152 Cal. App. 3d 548, 554, 199 Cal. Rptr. 542 (1st Dist. 1984).) In *People v. Carter*, the trial court admitted evidence of the defendant's involvement in an uncharged homicide. Before testifying, the defendant sought use immunity to preclude the use of any statements he might make concerning this uncharged offense in any subsequent trial for this offense. The trial court's refusal was upheld on appeal. (*People v. Carter*, 19 Cal. App. 4th 1236, 1249, 23 Cal. Rptr. 2d 888 (1st Dist. 1993); see also *People v. Hart*, 20 Cal. 4th 546, 650, 85 Cal. Rptr. 2d 132, 976 P.2d 683 (1999).) If a court bifurcates the trial of felony charges and the trial of a prior prison term enhancement, the defendant's admission of the prior in the guilt phase can be used to prove the prior conviction in the enhancement phase. (*People v. Harris*, 8 Cal. App. 4th 104, 10 Cal. Rptr. 2d 42 (5th Dist. 1992).)

In *People v. Lopez*, a non-party witness announced the intention to claim the privilege against self-incrimination. In a hearing conducted outside the jury's presence the court determined that the privilege was inapplicable and ordered the witness to testify. Despite the ruling, the witness asserted the privilege in front of the jury. The subsequent conviction was upheld. On appeal, the court held that the jury was entitled to consider the assertion of the privilege to support the testimony of the prosecution's gang expert that gang members cooperate to promote the interests of the gang and its members. (*People v. Lopez*, 71 Cal. App. 4th 1550, 84 Cal. Rptr. 2d 655 (4th Dist. 1999).)

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§ 5:18. Effect of voluntary testimony

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[C.J.S., Witnesses §§ 552 to 554](#)

A witness in a civil or criminal proceeding or a criminal defendant who voluntarily testifies waives the privilege against self-incrimination for the entire scope of relevant cross-examination. (*Brown v. U.S.*, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) (civil); *People v. Harris*, 28 Cal. 3d 935, 953, 171 Cal. Rptr. 679, 623 P.2d 240 (1981) (criminal).) If the witness or criminal defendant refuses to submit to cross-examination, all or part of the direct testimony may be stricken (*People v. Reynolds*, 152 Cal. App. 3d 42, 47, 199 Cal. Rptr. 379 (1st Dist. 1984) (cautions against striking all of a defendant's testimony)), or the jury may be instructed that it can draw a negative inference from the refusal. (*People v. Hecker*, 219 Cal. App. 3d 1238, 1248, 268 Cal. Rptr. 884 (4th Dist. 1990).) In *People v. Barnum*, 29 Cal. 4th 1210, 131 Cal. Rptr. 2d 499, 64 P.3d 788 (2003), the California Supreme Court rejected the long-standing California rule requiring a trial court to advise a self-represented defendant of the privilege against self-incrimination before the defendant is called as a witness by the prosecution or testifies on his or her own behalf.

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§ 5:19. Limitations on use of the defendant's extrajudicial statements in criminal cases—Voluntariness

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West's Key Number Digest, [Criminal Law](#) 🔑 393, 411, 516 to 538

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[C.J.S., Criminal Law §§ 902 to 914, 1058, 1220 to 1221, 1223 to 1230, 1235 to 1242, 1244 to 1246, 1253, 1247 to 1292, 1294, 1344 to 1347, 1329 to 1330](#)

The privilege against self-incrimination applies not only to testimony, but also to extrajudicial statements. ([People v. Azure](#), 178 Cal. App. 3d 591, 599, 224 Cal. Rptr. 158 (3d Dist. 1986).) Out-of-court confessions and admissions are admissible only if given voluntarily. Voluntariness must be proved by the prosecution by a preponderance of the evidence. ([People v. Rundle](#), 43 Cal.4th 76, 114 (2008).) A criminal defendant is entitled to exclude the trial testimony of a third person, if that testimony is coerced, and, due to that coercion, the reliability of the testimony is affected. ([People v. Badgett](#), 10 Cal. 4th 330, 345–348, 41 Cal. Rptr. 2d 635, 895 P.2d 877 (1995).) Simply showing that the trial testimony is the fruit of the witness' prior statement to the police, which was coerced, is insufficient. ([Badgett](#), 10 Cal. 4th at 345–350; see [People v. Jenkins](#), 22 Cal. 4th 900, 966, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000).) In [People v. Lee](#), 95 Cal. App. 4th 772, 781–788, 115 Cal. Rptr. 2d 828 (2d Dist. 2002), the court applied *Badgett* to conclude that the defendant may object to the admission of a third party's coerced pre-trial statement to the police, when the prosecution seeks to admit the pre-trial statement as a prior inconsistent statement to testimony the third person provided at trial.

For an excellent review of the general principles relied upon in determining the voluntariness of a confession, see [People v. Perdomo](#), 147 Cal. App. 4th 605, 614–615, 53 Cal. Rptr. 3d 918 (2d Dist. 2007), which distinguished [Mincey v. Arizona](#), 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) and upheld the voluntariness of a confession given while the defendant was hospitalized in the intensive care unit.

“Police deception ‘does not necessarily invalidate an incriminating statement.’” ([People v. Maury](#), 30 Cal.

4th 342, 411, 133 Cal. Rptr. 2d 561, 68 P.3d 1 (2003).)” (*People v. Smith*, 40 Cal. 4th 483, 505, 54 Cal. Rptr. 3d 245, 150 P.3d 1224 (2007), cert. denied, 2007 WL 2024989 (U.S. 2007).) In *Smith*, the court lists several “intimidating and deceptive” interrogation tactics that have been held to be proper. (*People v. Smith*, 40 Cal. 4th 483, 505–506, 54 Cal. Rptr. 3d 245, 150 P.3d 1224 (2007), cert. denied, 2007 WL 2024989 (U.S. 2007).)

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§ 5:20. Limitations on use of the defendant's extrajudicial statements in criminal cases—Corpus delicti rule

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West's Key Number Digest, [Criminal Law](#) 🔑 409(7), 412(6), 517.3, 535

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[C.J.S., Criminal Law §§ 1220 to 1221, 1223 to 1230, 1288 to 1291](#)

The corpus delicti rule long provided that no confession could be admitted in a criminal case unless the prosecution first established the body or elements of the crime. Thus, there had to be proof of the injury, loss, or harm, and a criminal agency as the cause. ([People v. Diaz](#), 3 Cal. 4th 495, 528, 11 Cal. Rptr. 2d 353, 834 P.2d 1171 (1992).) “The quantum of evidence the people must produce to satisfy the corpus delicti rule is quite modest; case law describes it as a ‘slight or prima facie’ showing.” ([People v. Jennings](#), 53 Cal. 3d 334, 368, 279 Cal. Rptr. 780, 807 P.2d 1009 (1991).) The purpose of the rule is to guard against false confessions. ([People v. Manson](#), 71 Cal. App. 3d 1, 41–42, 139 Cal. Rptr. 275 (2d Dist. 1977).)

In [People v. Alvarez](#), 27 Cal. 4th 1161, 1165, 119 Cal. Rptr. 2d 903, 46 P.3d 372 (2002), the California Supreme Court held that Proposition 8 abrogated the corpus delicti rule as a basis for excluding a defendant's extrajudicial statements from evidence. The court further held that Proposition 8 did not abrogate the rule insofar as it requires that every conviction be supported by some evidence of the corpus delicti aside from such statements, and the jury must be instructed about this requirement. However, the corpus delicti rule has no application when the defendant's extrajudicial statements constitute the crime. ([People v. Carpenter](#), 15 Cal. 4th 312, 394, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997).)

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§ 5:21. The Miranda rule—General requirements

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West's Key Number Digest, [Criminal Law](#) 🔑 516 to 538, 393, 405, 411

Legal Encyclopedias

[C.J.S., Criminal Law §§ 902 to 914, 1058, 1220 to 1221, 1223 to 1230, 1235 to 1242, 1244 to 1246, 1253, 1247 to 1292, 1294, 1344 to 1347, 1329 to 1330](#)

Out-of-court confessions and admissions may not be introduced in court against criminal defendants unless they are taken in compliance with [Miranda v. Arizona](#), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *Miranda* requires that persons subjected to a custodial interrogation be warned prior to any questioning that they have the right to remain silent, that anything they say can be used against them in a court of law, that they have the right to the presence of an attorney, and that if they cannot afford an attorney one will be appointed for them prior to any questioning if they so desire. Even an equivocal assertion of the right to silence invokes *Miranda*. ([People v. Wash](#), 6 Cal. 4th 215, 238, 24 Cal. Rptr. 2d 421, 861 P.2d 1107 (1993).) A minor's request to see his parents at the commencement of an interrogation requires a cessation of questioning. ([People v. Burton](#), 6 Cal. 3d 375, 381, 99 Cal. Rptr. 1, 491 P.2d 793 (1971).) In *People v. Hector*, the court held that *Burton* should be interpreted more narrowly. According to *Hector*, the minor's request indicates a desire to invoke *Miranda* and should be interpreted as an exercise of *Miranda* rights unless the totality of circumstances surrounding the interrogation shows that the juvenile did not invoke *Miranda*. ([People v. Hector](#), 83 Cal. App. 4th 228, 237, 99 Cal. Rptr. 2d 469 (2d Dist. 2000).) In *People v. Lessie*, 74 Cal. Rptr. 3d 792 (Cal. App. 4th Dist. 2008), rev. granted July 2008 the California Supreme court will decide if a minor's request to speak to a parent during a police interrogation constitutes an invocation of the privilege against self-incrimination, rendering any subsequent statement inadmissible.

Evidence that a defendant, following a *Miranda* admonition, refused to agree to a tape recording of the interrogation is not considered the equivalent of an invocation of silence. ([People v. Johnson](#), 6 Cal. 4th 1, 25–27,

23 Cal. Rptr. 2d 593, 859 P.2d 673 (1993).) When a defendant says, in the middle of an interrogation, that he wishes to speak “off the record,” the trial court determines if this relates to all or only some of the remaining conversation. (*People v. Johnson*, 6 Cal. 4th 1, 26, 23 Cal. Rptr. 2d 593, 859 P.2d 673 (1993).) “A defendant may indicate an unwillingness to discuss certain subjects without manifesting a determination to terminate ‘an interrogation already in progress.’ ” (*People v. Silva*, 45 Cal. 3d 604, 629–630, 247 Cal. Rptr. 573, 754 P.2d 1070 (1988).)

Evidence that the defendant refused to attend a lineup is admissible even though it occurred after he was given, and asserted, his *Miranda* rights. (*People v. Johnson*, 6 Cal. 4th 1, 30–32, 23 Cal. Rptr. 2d 593, 859 P.2d 673 (1993).)

The *Miranda* warnings are prophylactic and need not be given in the exact form described in the case so long as they reasonably convey to a suspect his or her rights. (*People v. Wader*, 5 Cal. 4th 610, 638, 20 Cal. Rptr. 2d 788, 854 P.2d 80 (1993); *People v. Mattson*, 50 Cal. 3d 826, 858, 268 Cal. Rptr. 802, 789 P.2d 983 (1990).) However, if the officer trivializes the *Miranda* rights, by minimizing their legal significance, this may indicate that a subsequent waiver was not knowing, informed and intelligent. (*People v. Musselwhite*, 17 Cal. 4th 1216, 74 Cal. Rptr. 2d 212, 954 P.2d 475 (1998).) There is no requirement that the suspect in a capital case be warned about the death penalty before the custodial interrogation. (*People v. Hill*, 3 Cal. 4th 959, 982, 13 Cal. Rptr. 2d 475, 839 P.2d 984 (1992).) In *People v. Mayfield*, 5 Cal. 4th 142, 19 Cal. Rptr. 2d 836, 852 P.2d 331 (1993), the defendant provided a videotaped reenactment of the crimes. The Supreme Court rejected his later contention that the law requires a more elaborate warning than the *Miranda* formula before such a videotape is made. (*People v. Mayfield*, 5 Cal. 4th 142, 173, 19 Cal. Rptr. 2d 836, 852 P.2d 331 (1993).)

The waiver must be knowing and voluntary and is ineffective if the accused's will to resist is overborne by physical or psychological pressure (*People v. Thompson*, 50 Cal. 3d 134, 166, 266 Cal. Rptr. 309, 785 P.2d 857 (1990)) or by the influence of alcohol or drugs (*In re Peter G.*, 110 Cal. App. 3d 576, 582, 168 Cal. Rptr. 3 (1st Dist. 1980)). The mere ingestion of alcohol or drugs, however, does not always mean the accused was incapable of a proper waiver. (*People v. Breaux*, 1 Cal. 4th 281, 301, 3 Cal. Rptr. 2d 81, 821 P.2d 585 (1991).)

Deception by the police, which elicits a confession, does not necessarily invalidate that confession unless the deception was of a type likely to lead to an untrue statement. (*People v. Thompson*, 50 Cal. 3d 134, 167, 266 Cal. Rptr. 309, 785 P.2d 857 (1990).)

Once *Miranda* rights have been waived, a defendant's subsequent request for counsel must be clear. (*Davis v. U.S.*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).] “Consistent with *Davis*, a reviewing court—like the trial court in the first instance—must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant.” (*Davis*, 512 U.S. at 460–462.) (*People v. Gonzalez*, 34 Cal. 4th 1111, 1125, 23 Cal. Rptr. 3d 295, 104 P.3d 98 (2005), cert. denied, 125 S. Ct. 2552, 162 L. Ed. 2d 282 (U.S. 2005); *People v. Stitely*, 35 Cal. 4th 514, 535, 26 Cal. Rptr. 3d 1, 108 P.3d 182 (2005).) Where a proper *Miranda* warning is given and the suspect waives his or her rights, readvisement of these rights is not necessary before a custodial interrogation is resumed, if the subsequent interrogation is “reasonably contemporaneous” with the prior waiver. (*People v. Smith*, 40 Cal.4th 483,

504, 54 Cal.Rptr.3d 245, 150 P.3d 1224 (2007).)

Once a defendant invokes the right to counsel, no subsequent statements in response to police questioning are admitted. The suspect may not be approached for further questioning until counsel has been made available and is present unless the suspect voluntarily initiates further communication. (*Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); *People v. Mattson*, 50 Cal. 3d 826, 859–862, 268 Cal. Rptr. 802, 789 P.2d 983 (1990).) If the court finds that the initiation of further communications was involuntary, subsequent statements are inadmissible. (*People v. Neal*, 31 Cal. 4th 63, 81–82, 1 Cal. Rptr. 3d 650, 72 P.3d 280 (2003) (taking into consideration that officer deliberately violated defendant's *Miranda* rights during the initial interrogation).) However, where a defendant invokes *Miranda* and is released from custody, *Edwards* is not violated when police “re-contact a suspect after a break in custody which gives the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel if he or she wishes to do so.” (*People v. Storm*, 28 Cal. 4th 1007, 1024–1025, 124 Cal. Rptr. 2d 110, 52 P.3d 52 (2002), cert. denied, 537 U.S. 1127, 123 S. Ct. 899, 154 L. Ed. 2d 812 (2003).) Even if the suspect executes a subsequent waiver, statements taken in the absence of counsel are inadmissible. This rule is not “offense specific.” Once the suspect invokes the right to counsel regarding one offense, the suspect may not be reapproached regarding any offense unless counsel is present. (*McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991).) So-called invocation of rights forms filed by counsel representing a defendant are ineffective. Counsel representing a defendant charged in one crime may not, by simply filing a form, effectively assert the rights to counsel and to remain silent as to other uncharged offenses. (*People v. Beltran*, 75 Cal. App. 4th 425, 89 Cal. Rptr. 2d 267 (4th Dist. 1999); *People v. Avila*, 75 Cal. App. 4th 416, 89 Cal. Rptr. 2d 320 (4th Dist. 1999).)

Comment

If the defendant invokes the right to remain silent, not the right to counsel, statements resulting from renewed police interrogation may be admissible if there is an intervening change in circumstances. Such a change may result from a proper *Miranda* warning and waiver and the passage of time. (See the discussion in *People v. DeLeon*, 22 Cal. App. 4th 1265, 1269–1272, 27 Cal. Rptr. 2d 818 (2d Dist. 1994).)

A subsequent confession need not necessarily be excluded because it followed an otherwise voluntary statement given without *Miranda* warnings. If an accused confesses as the result of improper police conduct and subsequently repeats the confession, it is presumed that the subsequent confession is a product of the first. However, “the foregoing presumption is rebuttable, with the prosecution bearing the burden of establishing a break in the causative chain between the first and the subsequent confession.” (*People v. Sims*, 5 Cal. 4th 405, 444–445, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (1993).) If no deliberately coercive or improper tactics are used to obtain the initial statement, a subsequent *Miranda* advisement should suffice to make the later statement admissible. (*People v. Lewis*, 50 Cal. 3d 262, 275, 266 Cal. Rptr. 834, 786 P.2d 892 (1990).)

A statement obtained in violation of *Miranda* may be used to impeach a defendant who testifies in a materially different fashion at trial. (*People v. May*, 44 Cal. 3d 309, 243 Cal. Rptr. 369, 748 P.2d 307 (1988); *People v. Aguilar*, 218 Cal. App. 3d 1556, 267 Cal. Rptr. 879 (2d Dist. 1990).) However, if the statement is involuntary, then *May* does not apply. In *People v. Bey*, 21 Cal. App. 4th 1623, 27 Cal. Rptr. 2d 28 (2d Dist. 1993), the court held that a statement was involuntary when the police continued questioning after invocation of the *Miranda*

rights as part of a deliberate effort to take advantage of the *May* rule and, during the interrogation, told the defendant that because he had invoked *Miranda*, nothing he said could be used in court. In *People v. Peevy*, the California Supreme Court clarified that the impeachment rule set forth in *May* applied even “when a police officer conducting a custodial interrogation *deliberately* fails to honor a suspect's request for counsel, with the *objective* of securing evidence for impeachment purposes.” (*People v. Peevy*, 17 Cal. 4th 1184, 1188, 73 Cal. Rptr. 2d 865, 953 P.2d 1212 (1998) (emphasis in original).) *Peevy* distinguished *Bey* on the basis that in *Bey* the statements were found inadmissible because they had been obtained involuntarily, not because they were a result of a deliberate *Miranda* violation. (*People v. Peevy*, 17 Cal. 4th 1184, 1202, 73 Cal. Rptr. 2d 865, 953 P.2d 1212 (1998).) In *People v. Jablonski*, 37 Cal. 4th 774, 813, 38 Cal. Rptr. 3d 98, 126 P.3d 938 (2006), cert. denied, 2006 WL 1674158 (U.S. 2006), the California Supreme Court left open the question whether a criminal defendant who does not testify forfeits his right to challenge a pre-trial ruling that his confession taken in violation of *Miranda* was voluntary, and, so, can be used to impeach.

A statement obtained in violation of the defendant's right to counsel may be used in another fashion. In *People v. Neely*, a defendant gave a statement to the police while in custody, which was found inadmissible under *Massiah v. U.S.*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), because the statement was elicited by a government agent, post-arraignment. Before the recording was found inadmissible, it had been played at the defendant's preliminary hearing where a witness to the threats against the victim had heard it. Though the contents of the tape were inadmissible at trial, this witness could testify to a voice identification based on the tape. (*People v. Neely*, 70 Cal. App. 4th 767, 82 Cal. Rptr. 2d 886 (3d Dist. 1999).)

If no *Miranda* warnings have been given and the defendant makes no statements to the police, evidence of this silence is admissible to impeach a defense offered subsequently at trial. (*People v. O'Sullivan*, 217 Cal. App. 3d 237, 244, 265 Cal. Rptr. 784 (1st Dist. 1990).) Once an accused has been given the *Miranda* warnings, his or her silence may not be used to impeach an explanation offered subsequently at trial. (*Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).) A *Doyle* violation occurs only if the prosecution makes use of a defendant's post—*Miranda* silence by questioning or by reference to it in closing argument and the court then approves that use. In *Greer v. Miller*, 483 U.S. 756, 761–765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987), the court found that no *Doyle* error occurred when the prosecution asked an impermissible question and the court sustained a defense objection. However, if the court overrules the objection, one court has held that *Doyle* is violated even though the defendant does not answer the question and the prosecutor moves on to a different subject. (*People v. Evans*, 25 Cal. App. 4th 358, 31 Cal. Rptr. 2d 20 (1st Dist. 1994).) In addition, in *People v. Champion*, 134 Cal. App. 4th 1440, 1448–1449, 37 Cal. Rptr. 3d 122 (4th Dist. 2005) the court held that if the criminal defendant's questions, testimony or argument suggest the police did not provide him with a “fair opportunity to explain his innocence,” the prosecutor may elicit testimony that the police did provide him with that opportunity without violating *Doyle*. In *People v. Austin*, 23 Cal. App. 4th 1596, 1611–1613, 28 Cal. Rptr. 2d 885 (2d Dist. 1994) the prosecutor was permitted to elicit testimony from an officer that the defendant invoked his *Miranda* rights, after defense counsel asked the officer if he had given the defendant an opportunity to make a full and complete statement. In such a circumstance the court should admonish the jury, consistently with section 913, that it should not hold it against the defendant that he invoked his privilege against self-incrimination. (*Champion*, 134 Cal. App. 4th at 1452.)

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the United States Supreme Court held that the admission of an involuntary confession does not automatically require reversal of the

conviction, but is subject to the harmless-error analysis set forth in [Chapman v. California](#), 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The *Fulminante* rule has been adopted in California. ([People v. Cahill](#), 5 Cal. 4th 478, 531–541, 20 Cal. Rptr. 2d 582, 853 P.2d 1037 (1993).) In *People v. Sims*, the *Fulminante* rule was applied to confessions admitted improperly under *Miranda*. ([People v. Sims](#), 5 Cal. 4th 405, 447, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (1993).)

Proposition 8, which required the admission of all relevant evidence, provided an exception for “any existing statutory rule of evidence relating to privilege.” ([California Const., Art. I, § 28\(d\)](#).) Despite this, the California Supreme Court has concluded that § 940 cannot be relied on by a defendant to suppress statements that would not be excluded under federal constitutional standards. ([People v. May](#), 44 Cal. 3d 309, 243 Cal. Rptr. 369, 748 P.2d 307 (1988).)

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Chapter
5. Privileges

C. Privilege Against Self-Incrimination

§ 5:22. The *Miranda* rule—Defining “custodial”

West's Key Number Digest

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Legal Encyclopedias

[C.J.S., Criminal Law §§ 1058, 1220 to 1221, 1223 to 1230, 1235 to 1242, 1244 to 1246, 1253, 1247 to 1292, 1294, 1344 to 1347, 1329 to 1330](#)

The *Miranda* warnings are required only if the suspect is in custody. In [People v. Morris](#), [53 Cal. 3d 152, 197, 279 Cal. Rptr. 720, 807 P.2d 949 \(1991\)](#), the Supreme Court stated:

Whether custody has occurred short of a formal arrest depends on the totality of the circumstances, including such factors as: (1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the indicia of arrest are present; and (4) the length and form of the questioning. No one factor is dispositive.

However, in [Stansbury v. California](#), [511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 \(1994\)](#), the United States Supreme Court found that this formulation was incorrect because the second factor focused on the subjective state of mind of the investigator and not the objective circumstances of the interrogation. “It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear on the question whether the individual is in custody. The same principle obtains if an officer's undisclosed assessment is that the person being questioned is not a suspect.” (On reconsideration, the California Supreme Court applied this different test and found, again, that the defendant was not in custody at the time the statements were made.) ([People v. Stansbury](#), [9 Cal. 4th 824, 38 Cal. Rptr. 2d 394, 889 P.2d 588 \(1995\)](#).)

Simply because the questioning occurs at the police station or the person is a suspect is not enough. A person is in custody only if, as a reasonable person, he or she is led to believe that he or she is physically deprived of freedom of action in any significant way. (*People v. Stansbury*, 9 Cal. 4th 824, 833–834, 38 Cal. Rptr. 2d 394, 889 P.2d 588 (1995); *People v. Holloway*, 50 Cal. 3d 1098, 1115, 269 Cal. Rptr. 530, 790 P.2d 1327 (1990).) Questioning a prisoner regarding a crime other than the one he is incarcerated on raises unique problems for defining "custody" for *Miranda* purposes. Courts have consistently rejected a per se rule finding all such questioning "custodial." (*People v. Fradive*, 80 Cal. App. 4th 15, 21, 95 Cal.Rptr.2d 1 (2000); *Cervantes v. Walker*, 589 F.2d 424, 427 (1978).) The appropriate question is "when is there an additional degree of 'formal arrest or restraint on freedom of movement' in jail?" (*People v. Macklem*, 149 Cal. App. 4th 674; see *People v. Roldan*, 35 Cal. 4th 646, 736 fn. 41, 27 Cal.Rptr.3d 360, 110 P.3d 289 (2005). Four factors are to be analyzed: were the language summoning the inmate to the interview and the physical circumstances of the interview coercive; whether the defendant was confronted with evidence of guilt; and whether the inmate had an opportunity to leave the site of the interview. (*Macklem*, 149 Cal. App. 4th at 687 and 695-696 [concluding a reasonable person in the defendant's position would have realized he could end the questioning and leave before the interview ended].) If a defendant is in an ambulance receiving treatment for a gunshot wound from paramedics and is under their control, an officer who enters the vehicle need not *Miranda* the defendant before questioning. (*People v. Mosley*, 73 Cal. App. 4th 1081, 87 Cal. Rptr. 2d 325 (2d Dist. 1999).) "Where the suspect does not know that he is talking to a government agent there is no reason to assume the possibility that the suspect might feel coerced." (*Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).) In *People v. Guilmette*, the defendant was in custody and had previously invoked his *Miranda* rights. His subsequent phone call to the victim was admissible even though she was prompted by the police to ask certain questions. (*People v. Guilmette*, 1 Cal. App. 4th 1534, 1540, 2 Cal. Rptr. 2d 750 (1st Dist. 1991).)

On those few occasions when the issue has come up, the courts have universally ruled that "telephone communications between police negotiators and an armed suspect who has taken refuge in a building that is surrounded by law enforcement officers do not constitute custodial interrogation." (*People v. Mayfield*, 14 Cal. 4th 668, 733, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (1997).)

Questioning during a routine, ordinary traffic stop, even for driving under the influence, need not be preceded by *Miranda* warnings unless the accused has been formally arrested or subjected to significant restraint. (*Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).) In *People v. Clair*, Berkemer was extended to cover a situation where an officer, responding to a burglary call, found the defendant in bed in the burgled premises and, at gunpoint, obtained a statement. Though custody " 'encompasses any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way' [citation] generally, it does not include a temporary detention for investigation." (*People v. Clair*, 2 Cal. 4th 629, 679, 7 Cal. Rptr. 2d 564, 828 P.2d 705 (1992).) The officer's conduct in *Clair* was found to be a "temporary detention for investigation."

For many years it had been the law that if an officer becomes aware of an apparent narcotics violation and detains a suspect, *Miranda* warnings must be given before questioning the suspect. (See, e.g., *People v. Layton*, 29 Cal. App. 3d 349, 105 Cal. Rptr. 509 (3d Dist. 1972); *People v. Abbott*, 3 Cal. App. 3d 966, 84 Cal. Rptr. 40 (1st Dist. 1970).) Those warnings would also have to precede the question/demand, "Where are the drugs?" In *People v. Vasquez*, the court rejected the reasoning of both *Layton* and *Abbott* and found that no warnings were necessary unless the defendant was the focus of investigation and that fact had been communicated to him or

her. ([People v. Vasquez](#), 14 Cal. App. 4th 1158, 18 Cal. Rptr. 2d 277 (6th Dist. 1993).)

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Chapter
5. Privileges

C. Privilege Against Self-Incrimination

§ 5:23. The Miranda rule—Defining “interrogation”

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The warnings are required only if there is an interrogation. An interrogation occurs when there is “express questioning,” or where there are words, or actions by the police that they should know are reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis*, 446 U.S. 291, 300–302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); *People v. O'Sullivan*, 217 Cal. App. 3d 237, 241–242, 265 Cal. Rptr. 784 (1st Dist. 1990).) In *People v. Sims*, the court found that an “interrogation” had occurred when the officer, after answering the defendant's questions about extradition provided defendant with an explanation of the defendant's involvement in the crime, including a detailed recitation of the evidence against him. (*People v. Sims*, 5 Cal. 4th 405, 437–442, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (1993). In *People v. Haley*, 34 Cal. 4th 283, 302, 17 Cal. Rptr. 3d 877, 96 P.3d 170 (2004), the court distinguished *Sims* and held that a police officer's “brief statement informing an in-custody defendant about the evidence against him is not the functional equivalent of interrogation because it is not the type of statement likely to elicit an incriminating response.” (See *People v. Huggins*, 38 Cal. 4th 175, 198, 41 Cal. Rptr. 3d 593, 131 P.3d 995 (2006), cert. denied, 2006 WL 2462734 (U.S. 2006) [Telling a defendant he was a murder suspect did not constitute an interrogation].)

“Just as custodial interrogation can occur in the absence of express questioning ..., not all questioning of a person in custody constitutes interrogation under *Miranda*.” (*People v. Ray*, 13 Cal. 4th 313, 338, 52 Cal. Rptr. 2d 296, 914 P.2d 846 (1996).) In *Ray*, the defendant had voluntarily sought out the police to make a confession and any questions asked during the defendant's rambling statement were “merely ‘neutral inquiries’ made for ‘the purpose of clarifying [statements] or points [the officer] did not understand.’ [Citation.] Nothing in the sub-

stance or tone of such inquiries was reasonably likely to elicit information that defendant did not otherwise intend to freely provide.” (*People v. Ray*, 13 Cal. 4th 313, 338, 52 Cal. Rptr. 2d 296, 914 P.2d 846 (1996).) “[P]olice may speak to a suspect in custody so long as the speech would not reasonably be construed as calling for an incriminating response.” *People v. Clark*, 5 Cal. 4th 950, 985, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (1993).) Thus, “inquiries” directed solely at identifying one found under suspicious circumstances or at a crime scene are permissible. (*People v. Clair*, 2 Cal. 4th 629, 679–680, 7 Cal. Rptr. 2d 564, 828 P.2d 705 (1992); *U.S. v. Guitierrez*, 92 F.3d 468, 471 (7th Cir. 1996).)

An interesting problem is created by the following situation. Assume that a defendant has been detained by the police during a search of certain premises and is in custody. Following the discovery of dangerous drugs and other related items, an officer comes into the room where the defendant is seated and says that he or she is under arrest for possession for sale of dangerous drugs. The defendant responds that the drugs were possessed for personal use only. May that statement be introduced against him at trial, although no *Miranda* warnings were given? In *People v. Celestine*, the court found that the statement was admissible. It pointed out that *Innis*, by its own terms, did not apply to police statements that were “normally attendant to arrest and custody.” (*People v. Celestine*, 9 Cal. App. 4th 1370, 12 Cal. Rptr. 2d 179 (2d Dist. 1992).)

Comment

The dissent in *Celestine*, however, seems to have the better of this issue. It points out that the law assumes that a defendant who fails to respond to a statement of arrest has made an adoptive admission. Further, the law permits silence in the face of an arrest statement to be used to impeach a defense later presented at trial. (*People v. Celestine*, 9 Cal. App. 4th 1370, 1379, 12 Cal. Rptr. 2d 179 (2d Dist. 1992).) Therefore, the dissent reasoned, it is illogical to conclude that the statement of arrest does not trigger the need to provide *Miranda* warnings promptly. Moreover, even if necessary *Miranda* warnings were not provided, the prosecution would still be permitted to impeach any contrary testimony provided by the defendant at trial.

Incriminating evidence derived from a routine booking interview is admissible even though no *Miranda* warnings were given. (*People v. Hall*, 199 Cal. App. 3d 914, 921, 245 Cal. Rptr. 458 (6th Dist. 1988).)

Police may question in-custody defendants without *Miranda* warnings in some cases if required to do so by a concern for public safety. (*New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); *People v. Panah*, 35 Cal. 4th 395, 471, 25 Cal. Rptr. 3d 672, 107 P.3d 790 (2005) [Quarles exception applied when officers believed missing victim was injured but still alive, the primary purpose of the questions was to rescue the victim, and the statements were otherwise voluntary]; *People v. Simpson*, 65 Cal. App. 4th 854, 66 Cal. App. 4th 231G, 76 Cal. Rptr. 2d 851 (4th Dist. 1998); *People v. Gilliard*, 189 Cal. App. 3d 285, 234 Cal. Rptr. 401 (3d Dist. 1987).)

Where two suspects are arrested and placed together in a police car, statements they make to each other in the absence of police questioning are admissible, though no *Miranda* warnings were provided. (*People v. Loyd*, 27 Cal. 4th 997, 1009, 119 Cal. Rptr. 2d 360, 45 P.3d 296 (2002); *Arizona v. Mauro*, 481 U.S. 520, 529, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987) (“ ‘When there is custody but not interrogation *Miranda* does not apply’ ”). In *People v. Leonard*, 40 Cal. 4th 1370, 58 Cal. Rptr. 3d 368, 157 P.3d 973 (2007), cert. denied, 2007 WL 2692238 (U.S. 2007), following the defendant's arrest, the police allowed the defendant and his father to discuss the murders at issue. Both the defendant and his father knew the conversation was taped. (*People v. Leonard*, 40

Cal. 4th 1370, 1401–1402, 58 Cal. Rptr. 3d 368, 157 P.3d 973 (2007), cert. denied, 2007 WL 2692238 (U.S. 2007).) No *Miranda* warnings were given, but the Supreme Court upheld admission of the conversation. “A defendant’s ‘conversations with his own visitors are not the constitutional equivalent of police interrogation.’” (*People v. Leonard*, 40 Cal. 4th 1370, 1442, 58 Cal. Rptr. 3d 368, 157 P.3d 973 (2007), cert. denied, 2007 WL 2692238 (U.S. 2007); accord: *People v. Thornton*, 41 Cal. 4th 391, 432–433, 61 Cal. Rptr. 3d 461, 161 P.3d 3 (2007) [officers initiate meeting between suspect and his grandmother where he makes incriminating statements; no *Miranda* warnings were necessary].)

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Chapter
5. Privileges

D. Lawyer–Client Privilege

§ 5:24. Purpose and scope of lawyer–client privilege

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The client, whether or not a party, has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between lawyer and client if the privilege is claimed by an appropriate person (see § 5:36, which describes who holds the privilege). ([Evidence Code § 954](#).) A party asserting the existence of the attorney-client privilege has the burden of showing the privilege exists. ([San Diego Professional Ass'n v. Superior Court of San Diego County](#), 58 Cal. 2d 194, 199, 23 Cal. Rptr. 384, 373 P.2d 448 (1962); [People v. Urbano](#), 128 Cal. App. 4th 396, 402, 26 Cal. Rptr. 3d 871 (5th Dist. 2005).) Communications made in the course of the attorney-client relationship are presumed confidential. The party opposing application of the privilege has the burden of showing a particular communication was not confidential or that an exception exists. ([State Farm Fire & Casualty Co. v. Superior Court](#), 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (2d Dist. 1997).)

Comment

An objection that a question will require disclosure of a communication protected by the attorney-client privilege should be sustained if the following is established:

- The communication was made in the course of the lawyer-client relationship;
- The communication was made in confidence;
- The privilege has not been waived; and

- The privilege is invoked by the client or other appropriate person, whether or not a party to the matter.

The purpose of the lawyer-client privilege is to encourage clients to make full disclosures to their attorneys without fear that others may be informed. (*People ex rel. Department of Public Works v. Donovan*, 57 Cal. 2d 346, 354, 19 Cal. Rptr. 473, 369 P.2d 1 (1962).) To accomplish this purpose courts have frequently found that the privilege should be construed liberally. (*Benge v. Superior Court*, 131 Cal. App. 3d 336, 344, 182 Cal. Rptr. 275 (5th Dist. 1982); *American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 583, 113 Cal. Rptr. 561 (3d Dist. 1974).) On the other hand, exercise of the privilege often suppresses relevant facts, and courts have just as frequently stated that the privilege should be strictly construed. (*McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236, 9 Cal. Rptr. 3d 812 (1st Dist. 2004); *Merritt v. Superior Court*, 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (2d Dist. 1970).)

Under § 954, the privilege can be asserted to prevent anyone, including eavesdroppers from testifying to a confidential communication. (*Evidence Code § 954*, Comment.) Unlike the privilege against self-incrimination, the attorney-client privilege continues even after the possibility of punishment has disappeared. (*Littlefield v. Superior Court*, 136 Cal. App. 3d 477, 482, 186 Cal. Rptr. 368 (2d Dist. 1982).)

Witnesses who are asked during cross-examination if they told their lawyer the same story as just testified to may invoke the privilege. (*People v. Tamborrino*, 215 Cal. App. 3d 575, 263 Cal. Rptr. 731 (2d Dist. 1989).)

See § 5:7 for a discussion of waiver of the attorney-client privilege.

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§ 5:25. Who qualifies as a lawyer?

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A lawyer is a person authorized or reasonably believed by the client to be authorized to practice law in any state or nation. ([Evidence Code § 950](#).) When a person consults with a former attorney who informs the person that he or she is no longer licensed and no longer practices law, subsequent conversations between the two are not protected by the attorney-client privilege. ([People v. Klvana](#), 11 Cal. App. 4th 1679, 1724, 15 Cal. Rptr. 2d 512 (2d Dist. 1992).)

A “jailhouse lawyer” is not considered a lawyer for purposes of this privilege. ([People v. Velasquez](#), 192 Cal. App. 3d 319, 237 Cal. Rptr. 366 (5th Dist. 1987).)

Lay representatives of welfare claimants are considered “lawyers” for purposes of this privilege because [§ 10950 of the Welfare and Institutions Code](#) permits dissatisfied welfare applicants to have a “fair hearing” and to be represented at that hearing by an attorney or layperson. ([Welfare Rights Organization v. Crisan](#), 33 Cal. 3d 766, 771, 190 Cal. Rptr. 919, 661 P.2d 1073 (1983).) In [American Airlines, Inc. v. Superior Court](#), 114 Cal. App. 4th 881, 888–890, 8 Cal. Rptr. 3d 146 (2d Dist. 2003), the court refused to extend *Crisan* to create a “union-representative-union member” privilege when a statute permits employees to have a lay representative.

In *People ex rel Lockyer v. Superior Court*, the court reversed a trial court's ruling upholding the right of a Deputy District Attorney, who was being investigated for criminal activity, to exercise the attorney-client and work product privileges as to documents prepared in the course of his employment as a prosecutor. ([People ex rel. Lockyer v. Superior Court](#), 83 Cal. App. 4th 387, 99 Cal. Rptr. 2d 646 (4th Dist. 2000).) “[W]e can only

conclude that ... a Deputy District Attorney, who was precluded from practicing law other than as a public prosecutor ... is not the holder of the attorney-client privilege for any materials generated as a Deputy District Attorney. Nor is he able to claim work product protection or privacy interest for such.” ([People ex rel. Lockyer v. Superior Court](#), 83 Cal. App. 4th 387, 399–400, 99 Cal. Rptr. 2d 646 (4th Dist. 2000).)

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D. Lawyer–Client Privilege

§ 5:26. Who qualifies as a client?

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A “client” is a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from the lawyer. This definition of “client” includes an incompetent who, alone or through a guardian, so consults the lawyer. ([Evidence Code § 951](#).)

Unincorporated organizations, such as labor unions, social clubs, and fraternal societies are protected by the privilege when the organization consults the lawyer. ([Evidence Code § 951](#), Comment; [HLC Properties, Ltd. v. Superior Court](#), 35 Cal. 4th 54, 60–64, 24 Cal. Rptr. 3d 199, 105 P.3d 560 (2005).) [If an individual member of an unincorporated organization and not the organization is the client, the organization is not a holder of the privilege.] Corporations are also entitled to the attorney-client privilege ([Southern Cal. Gas Co. v. Public Utilities Com.](#), 50 Cal. 3d 31, 37, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990)), and it may be invoked even against owners of closely held corporations. ([Hoiles v. Superior Court](#), 157 Cal. App. 3d 1192, 1198–1199, 204 Cal. Rptr. 111 (4th Dist. 1984).) There is no shareholder exception to the corporation's attorney-client privilege. ([National Football League Properties, Inc. v. Superior Court](#), 65 Cal. App. 4th 100, 107, 75 Cal. Rptr. 2d 893 (6th Dist. 1998).) When a condominium association brings a construction defect suit against a developer, individual homeowners may not obtain privileged documents. “Like closely held corporations and private trusts, the ‘client’ is the entity that retained the attorney to act on its behalf.” ([Smith v. Laguna Sur Villas Community Ass'n](#), 79 Cal. App. 4th 639, 642, 94 Cal. Rptr. 2d 321 (4th Dist. 2000).)

An executor may hire an attorney who acts not as the attorney for the estate but as counsel for the executor, and the attorney-client privilege applies to their communications. ([Shannon v. Superior Court](#), 217 Cal. App. 3d

986, 993, 266 Cal. Rptr. 242 (5th Dist. 1990).) A public entity, like a city council, may assert the attorney-client privilege to refuse to disclose the contents of a letter it receives from the city attorney. (*Roberts v. City of Palm-dale*, 5 Cal. 4th 363, 370–371, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (1993).)

A trustee can be the holder of the attorney-client privilege. (*Moeller v. Superior Court*, 16 Cal. 4th 1124, 1129, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (1997).) However, the privilege vests in the office of the trustee and not in any particular individual or institution that served as trustee at any particular time. Therefore, the current trustee is “the holder of the attorney-client privilege with respect to confidential communications between a predecessor trustee and an attorney concerning trust administration.” (*Moeller v. Superior Court*, 16 Cal. 4th 1124, 1132, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (1997).) In such situations, the former trustee may not assert the privilege as a basis for refusing to turn over information to the current trustee. *Moeller* limits the application of this rule to situations where the predecessor trustee, in its fiduciary capacity, sought advice for guidance in administering the trust. If the advice was sought by the trustee “in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds.” (*Moeller v. Superior Court*, 16 Cal. 4th 1124, 1134, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (1997).) In *Wells Fargo Bank v. Superior Court (Boltwood)*, the Supreme Court held that trust beneficiaries are not entitled to confidential communications between trustees and the trust's lawyers, regardless of whether the communications involved the trustees' potential liability or trust administration. The court rejected the contention that *Moeller* created an implied exception to the attorney-client privilege on behalf of the successor trustee and refused to create such an exception for the beneficiary. (*Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (2000).)

When an individual is the client and that person dies, the client's personal representative becomes the holder of the privilege. (*HLC Properties, Ltd. v. Superior Court*, 35 Cal. 4th 54, 65, 24 Cal. Rptr. 3d 199, 105 P.3d 560 (2005).) When the client's estate is distributed, the privilege ceases to exist. (Section 954, Comment; *HLC Properties, Ltd. v. Superior Court*, 35 Cal. 4th 54, 24 Cal. Rptr. 3d 199, 105 P.3d 560 (2005).)

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§ 5:27. When does attorney–client relationship trigger the privilege?

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Contacts between a person and a lawyer that are too insubstantial to prohibit the lawyer from accepting adverse employment may nevertheless be sufficient to trigger the privilege as to any confidential communications exchanged. (See [People v. Thoi](#), 213 Cal. App. 3d 689, 699, 261 Cal. Rptr. 789 (4th Dist. 1989).) In addition, statements given by individuals to their insurance claims agent in contemplation of litigation are privileged though litigation had not yet commenced and no attorney had been assigned to the case. ([Soltani-Rastegar v. Superior Court](#), 208 Cal. App. 3d 424, 425, 256 Cal. Rptr. 255 (1st Dist. 1989).) Confidential communications between a lawyer and client are protected though they relate only to anticipated litigation, even when no litigation is threatened. ([Roberts v. City of Palmdale](#), 5 Cal. 4th 363, 371, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (1993).)

Statements made to an attorney concerning a potential legal problem are privileged even if the attorney is never retained. ([Benge v. Superior Court](#), 131 Cal. App. 3d 336, 345, 182 Cal. Rptr. 275 (5th Dist. 1982).) An undelivered letter written by an inmate to an attorney with the intent of retaining the attorney is privileged. ([People v. Gardner](#), 106 Cal. App. 3d 882, 165 Cal. Rptr. 415 (1st Dist. 1980).)

Even if the client discharges the attorney, statements made during the course of the relationship retain protection. ([People v. Linden](#), 52 Cal. 2d 1, 23-24, 338 P.2d 397 (1959).) Though it refused to create a bright line rule, the California Supreme Court held that communications made after an attorney's refusal of representation are normally not privileged. It concluded the person could have no reasonable expectation of being represented by an attorney after an explicit refusal and, in continuing to speak to the attorney after the refusal, the person is not thereafter consulting with the attorney for advice in "his professional capacity." ([People v. Gionis](#), 9 Cal. 4th

[1196](#), [1211](#), [40 Cal. Rptr. 2d 456](#), [892 P.2d 1199 \(1995\)](#).)

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§ 5:28. Which communications are privileged?

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Only confidential communications are privileged. ([Evidence Code § 954](#).) The communication must be made in a way that, so far as the client knows, discloses the information to no third persons other than those listed below ([Evidence Code § 952](#)):

- Those present to further the interest of the client in the consultation. The presence of a spouse, parent, business associate, or any person with an interest in a matter of joint concern may not destroy the privilege. ([Evidence Code § 952](#), Comment; [Cooke v. Superior Court](#), 83 Cal. App. 3d 582, 588, 147 Cal. Rptr. 915 (2d Dist. 1978); [Barber v. Municipal Court](#), 24 Cal. 3d 742, 753, 157 Cal. Rptr. 658, 598 P.2d 818 (1979).)
- Those persons to whom disclosure is reasonably necessary for the transmission of information or the accomplishment of the purpose for which the lawyer is consulted. ([Evidence Code § 952](#).) Thus, a consultation with an expert that involves the transmission of information from the attorney to the expert does not destroy the privilege. ([Evidence Code § 952](#), Comment.) Disclosure of the legal opinion of a corporate subsidiary's counsel to its holding company and affiliated employees who need to know the information to perform their duties properly is a disclosure reasonably necessary to accomplish the purpose in consulting counsel and therefore privileged. ([Insurance Co. of North America v. Superior Court](#), 108 Cal. App. 3d 758, 769–770, 166 Cal. Rptr. 880 (2d Dist. 1980).) A guardian ad litem may be a third person to whom communication is reasonably necessary for the transmission of information to the lawyer. ([De Los Santos v. Superior Court](#), 27 Cal. 3d 677, 166 Cal. Rptr. 172, 613 P.2d 233 (1980).) Section 952 also protects a criminal defendant's disclosure of his or her financial background in a financial eligibility form to a non-lawyer work-

ing for the public defender's office. (*People v. Canfield*, 12 Cal. 3d 699, 704–705, 117 Cal. Rptr. 81, 527 P.2d 633 (1974).)

Under § 954, communications made by the client to a physician or psychotherapist for the purpose of assisting counsel are privileged. (*People v. Gurule*, 28 Cal. 4th 557, 594, 123 Cal. Rptr. 2d 345, 51 P.3d 224 (2002), cert. denied, 538 U.S. 964, 123 S. Ct. 1754, 155 L. Ed. 2d 517 (2003); *People v. Lines*, 13 Cal. 3d 500, 510, 119 Cal. Rptr. 225, 531 P.2d 793 (1975).) Thus, a communication between a person and his or her physician or psychotherapist can be protected under both the appropriate medical 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.” (*Gurule*, 28 Cal. 4th at 594.)

Defendant's expert attended the blood stain testing conducted by the prosecution's criminalist. The prosecution was entitled to call the defense expert to bolster the validity of its criminalist's test results at the *Kelly* hearing. The prosecution criminalist was also permitted to testify that the defense expert was present during the testing and that that expert had been hired by the defense to be there. None of this evidence violated the defendant's attorney-client privilege. (*People v. Bolden*, 29 Cal. 4th 515, 548–553, 127 Cal. Rptr. 2d 802, 58 P.3d 931 (2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854 (2003).)

The legal opinion formed and the advice given by the attorney are privileged. (*Evidence Code* § 952.) The lawyer's analysis of an expert's report is privileged, even if the report is not. (*Sheets v. Superior Court In and For Los Angeles County*, 257 Cal. App. 2d 1, 10, 64 Cal. Rptr. 753 (2d Dist. 1967).) Factual information as well as legal advice is protected. All information transmitted between a lawyer and his or her client while investigating, preparing, and pursuing a lawsuit is covered. (*Mitchell v. Superior Court*, 37 Cal. 3d 591, 600–601, 208 Cal. Rptr. 886, 691 P.2d 642 (1984).) In *Costco Wholesale Corp. v. Superior Court*, 74 Cal. Rptr. 3d 345 (Cal. App. 2d Dist. 2008), rev. grtd. 6-9-08 the California Supreme Court will decide if the attorney-client privilege protects factual statements in a legal opinion letter conveyed from outside counsel to corporate counsel. Law review articles and newspaper clippings, though public documents, are privileged when mailed by a lawyer to a client. (*In re Jordan*, 12 Cal. 3d 575, 580, 116 Cal. Rptr. 371, 526 P.2d 523 (1974).) In addition, a lawyer cannot be compelled to testify as to whether he or she showed the client a certain police report, even though the report is a public document. (*In re Navarro*, 93 Cal. App. 3d 325, 329, 155 Cal. Rptr. 522 (4th Dist. 1979).) The privilege covers actions, signs, or other means of communicating information. (*Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954).) “ ‘[A]lmost any act done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether ... it was intended to be done as such.’ ” (*City & County of San Francisco v. Superior Court In and For City and County of San Francisco*, 37 Cal. 2d 227, 235–236, 231 P.2d 26 (1951).)

Videotapes and photographs are “communications” and will be privileged if they are “information transmitted between a client and his lawyer” or “advice given by the lawyer.” In *Hiott v. Superior Court*, the videotaping of an attorney's interview with his client was privileged. (*Hiott v. Superior Court*, 16 Cal. App. 4th 712, 20 Cal. Rptr. 2d 157 (2d Dist. 1993).) In *People v. Gillard*, a prosecution for filing false workers compensation claims, a previous attorney had had a photographer take pictures of the defendant's injuries for an earlier, uncharged claim. The court found these photographs privileged because they were taken to convey confidential information from the client to his counsel. (*People v. Gillard*, 57 Cal. App. 4th 136, 162–163, 66 Cal. Rptr. 2d 790 (4th Dist. 1997).)

Confidential statements by a client to an attorney, overheard by an eavesdropper are privileged. (Section 954, Comment.) However, statements by a client to an attorney in court that are loud enough to be overheard by a third person lose their privilege. If the statements were made when court is not in session, they are not protected. (*People v. Urbano*, 128 Cal. App. 4th 396, 402–403, 26 Cal. Rptr. 3d 871 (5th Dist. 2005).) In *People v. Poulin*, 27 Cal. App. 3d 54, 59, 64–65, 103 Cal. Rptr. 623 (1st Dist. 1972) the court had adopted the same rule for statements made by a client to counsel at trial during the testimony of a witness. *Urbano* demonstrated a notable lack of enthusiasm for *Poulin* and did not rely on it. (*Urbano*, 128 Cal. App. 4th at 403, n.3.)

Where the trial court concludes that a criminal defendant is entitled to the appointment of an expert under Evidence Code § 730, communications to and from the expert are privileged under § 952. (*People v. Clark*, 50 Cal. 3d 583, 621, 268 Cal. Rptr. 399, 789 P.2d 127 (1990).)

Corporations are protected by the attorney-client privilege. It is axiomatic that corporations can speak only through individuals, yet not all of their communications are privileged. The statement of a corporate employee obtained for the purpose of transmitting it to the company's lawyer is privileged if that was the dominant purpose for making the statement. (*Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954).) This requires an evaluation of several factors: whether the employee may be liable, whether the employee's report is required in the ordinary course of business, and what is the employer's purpose. When the corporate employer has more than one purpose in requiring the report, the dominant purpose controls. (*D. I. Chadbourne, Inc. v. Superior Court of City and County of San Francisco*, 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700 (1964); *Scripps Health v. Superior Court*, 109 Cal. App. 4th 529, 533–536, 135 Cal. Rptr. 2d 126 (4th Dist. 2003).) “The ‘dominant purpose’ test not only looks to the dominant purpose for the communication, but also to the dominant purpose of the attorney's work. [Citations.] Thus the ‘attorney-client privilege [would] not apply without qualification where the attorney was merely acting as a negotiator for the client [citation] or merely giving business advice [citation] or was merely acting as a trustee for the client [citation].’ ” (2,022 *Ranch, L.L.C. v. Superior Court*, 113 Cal. App. 4th 1377, 1390, 7 Cal. Rptr. 3d 197 (4th Dist. 2003); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 121–122, 68 Cal. Rptr. 2d 844 (2d Dist. 1997) [Attorney hired by employer to conduct pre-litigation investigation of employee's discrimination claims.]) In 2,022 *Ranch*, 113 Cal. App. 4th at 1397, the court considered an insurance bad faith action where the in-house claims adjusters were also attorneys. The court rejected the competing claims that all or none of the claims investigation materials were privileged and held that the factual investigation materials were discoverable while those materials reflecting “the requesting of, or rendering of, legal advice are protected” The same distinction was applied to the work product privilege claimed for the information. (2,022 *Ranch*, 113 Cal. App. 4th at 1400.)

“The corporate attorney-client privilege extends to confidential communications between agents of the client regarding legal advice and strategy, though the corporation's attorneys are not directly involved [and the communications] do not include direct communications from the attorney.” (*Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1495–1504 (2007).)

Usually the identity of the attorney's clients is not protected by the privilege. (See, generally, *Hooser v. Superior Court*, 84 Cal. App. 4th 997, 1005, 101 Cal. Rptr. 2d 341 (4th Dist. 2000).) However, where such disclosure exposes the client to criminal or civil liability (*Hays v. Wood*, 25 Cal. 3d 772, 785, 160 Cal. Rptr. 102, 603 P.2d 19 (1979)), or reveals the medical nature of the client's problem (*Rosso, Johnson, Rosso & Ebersold v. Superior Court*, 191 Cal. App. 3d 1514, 1518–1519, 237 Cal. Rptr. 242 (1st Dist. 1987)), disclosure is prohibited.

(See also [Willis v. Superior Court](#), 112 Cal. App. 3d 277, 169 Cal. Rptr. 301 (2d Dist. 1980).) For example, in *Rosso*, the defendant law firm had placed a newspaper advertisement inviting women who might have suffered problems relating to a particular intrauterine device to contact the firm. Plaintiff sought the names of those who responded and the court conceded the information was relevant. It concluded, however, that revealing the names would reveal the nature of a medical problem and barred the disclosure.

When defense counsel obtains physical evidence of a crime from the client directly or by developing information provided by the client, the attorney must provide the physical evidence to the prosecution. ([People v. Lee](#), 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715 (4th Dist. 1970).) This must be done prior to trial. ([People v. Superior Court \(Fairbank\)](#), 192 Cal. App. 3d 32, 237 Cal. Rptr. 158 (1st Dist. 1987).) If the attorney is told the location of such evidence by the client and simply observes it, this information need not be provided to the prosecution unless the attorney removes or alters the evidence. ([People v. Meredith](#), 29 Cal. 3d 682, 686, 175 Cal. Rptr. 612, 631 P.2d 46 (1981). See [People v. Fairbank](#), 16 Cal. 4th 1223, 1240, 69 Cal. Rptr. 2d 784, 947 P.2d 1321 (1997); [Alhambra Police Officers Ass'n v. City of Alhambra Police Dept.](#), 113 Cal. App. 4th 1413, 1423, 7 Cal. Rptr. 3d 432 (2d Dist. 2003).)

A client is not able to transform any document in his or her possession into a confidential communication simply by transferring it to an attorney. ([Greyhound Corp. v. Superior Court In and For Merced County](#), 56 Cal. 2d 355, 397, 15 Cal. Rptr. 90, 364 P.2d 266 (1961).) In addition, the privilege does not “protect independent facts related to a communication; that a communication took place, and the time, date and participants in the communication.” ([State Farm Fire & Casualty Co. v. Superior Court](#), 54 Cal. App. 4th 625, 640, 62 Cal. Rptr. 2d 834 (2d Dist. 1997).) Further, the privilege does not protect disclosure of the underlying facts communicated or extend to independent witnesses. ([Martin v. Workers' Comp. Appeals Bd.](#), 59 Cal. App. 4th 333, 345, 69 Cal. Rptr. 2d 138 (2d Dist. 1997).)

When an attorney violates the privilege and provides police with privileged information and that information is utilized to obtain a warrant, the client's rights to due process are violated only if the government induced the violation. ([People v. Navarro](#), 138 Cal. App. 4th 146, 160, 41 Cal. Rptr. 3d 164 (2d Dist. 2006).)

The work product rule covers different information than that covered by the privilege. In civil cases, “core” work product consists of any document reflecting the attorney's impressions, conclusions, opinions, legal research, or theories and is absolutely protected from statutory discovery procedures. (See [Code of Civil Procedure § 2018.030\(a\)](#).) General work product covers any other aspect of an attorney's work product. It is provided only a qualified protection: discovery is not permitted unless its denial would unfairly prejudice a party or result in an injustice. ([Code of Civil Procedure § 2018.030\(b\)](#); [2,022 Ranch, L.L.C. v. Superior Court](#), 113 Cal. App. 4th 1377, 1390, 7 Cal. Rptr. 3d 197 (4th Dist. 2003).) The doctrine exists in criminal as well as civil cases. ([People v. Collie](#), 30 Cal. 3d 43, 59, 177 Cal. Rptr. 458, 634 P.2d 534 (1981).) The criminal reciprocal discovery statutes protect only “core” work product, as defined in [Code of Civil Procedure, section 2018.030 \(a\)](#). ([People v. Zamudio](#), 43 Cal.4th 327, 354–356 (2008) [Work product rule does not preclude prosecution from eliciting from its expert witness that certain evidentiary items were turned over to the criminalistics laboratory retained by the defense.] The qualified protection provided to general work product in subdivision (b) is no longer afforded in criminal cases. ([Izazaga v. Superior Court](#), 54 Cal. 3d 356, 382, 285 Cal. Rptr. 231, 815 P.2d 304 (1991).) This privilege belongs to the attorney, not the client. ([Fellows v. Superior Court](#), 108 Cal. App. 3d 55, 63–65, 166 Cal. Rptr. 274 (2d Dist. 1980).) Although exceptions to it exist, they are not identical to the excep-

tions to the attorney-client privilege set forth in [Evidence Code §§ 956 to 962](#). However, the waiver doctrine is applicable to the work product rule as well as the attorney-client privilege. ([Wells Fargo Bank v. Superior Court](#), 22 Cal. 4th 201, 214, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (2000); [McKesson HBOC, Inc. v. Superior Court](#), 115 Cal. App. 4th 1229, 1239, 9 Cal. Rptr. 3d 812 (1st Dist. 2004); [OXY Resources California LLC v. Superior Court](#), 115 Cal. App. 4th 874, 891, 9 Cal. Rptr. 3d 621 (1st Dist. 2004).)

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§ 5:29. Confidential communications that are not protected—Services sought to aid commission of crime or fraud

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The lawyer-client privilege cannot be invoked if the lawyer's services were sought or obtained to enable or aid the commission of a crime or fraud. ([Evidence Code § 956](#).) This exception is a very limited one. ([Geilim v. Superior Court](#), 234 Cal. App. 3d 166, 174, 285 Cal. Rptr. 602 (2d Dist. 1991).) To invoke this exception, mere assertion of fraud is insufficient. There must be a showing sufficient for proof of the fraud unless contradicted and overcome by other evidence. ([BP Alaska Exploration, Inc. v. Superior Court](#), 199 Cal. App. 3d 1240, 1262, 245 Cal. Rptr. 682 (5th Dist. 1988).)

This exception does not apply to communications involving torts other than fraud. ([Nowell v. Superior Court for Los Angeles County](#), 223 Cal. App. 2d 652, 657–658, 36 Cal. Rptr. 21 (2d Dist. 1963).) Also, this exception does not apply in an action against an attorney for misusing confidential information to defraud others, where there is no contention that the attorney's services were obtained with a fraudulent motive. ([Glade v. Superior Court](#), 76 Cal. App. 3d 738, 746, 143 Cal. Rptr. 119 (3d Dist. 1978).) In addition, this exception does not apply to documents protected by the work product rule. ([BP Alaska Exploration, Inc. v. Superior Court](#), 199 Cal. App. 3d 1240, 1249–1251, 245 Cal. Rptr. 682 (5th Dist. 1988).) The crime/fraud exception does not apply to communications that merely reveal a plan to commit a crime; the exception permits disclosure only of communications made to enable or aid one to commit a crime or fraud. ([People v. Clark](#), 50 Cal. 3d 583, 622, 268 Cal. Rptr. 399, 789 P.2d 127 (1990).)

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§ 5:30. Confidential communications that are not protected—Parties all claim through one deceased client

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The lawyer-client privilege cannot be invoked 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. ([Evidence Code § 957](#).) This exception is based on the theory that claimants in privity with the property claim through the deceased client, not adversely, and the client presumably would want his or her communications disclosed in litigation between such claimants so that his or her desires in regard to the disposition of the property might be correctly ascertained and carried out. ([Evidence Code § 957](#), Comment.) As the Comment suggests, the attorney-client relationship referred to in [§ 957](#) is only the one between the attorney and the deceased client. ([Fletcher v. Superior Court](#), 44 Cal. App. 4th 773, 778–780, 52 Cal. Rptr. 2d 65 (1st Dist. 1996).) In *Fletcher*, the court held that an attorney who worked for both the decedent and the trustee of her estate could not be compelled to disclose communications between himself and the trustee in a contest between the trustee and another who both claimed under the decedent.

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D. Lawyer–Client Privilege

§ 5:31. Confidential communications that are not protected—Relevant to attorney's breach of duty

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [197](#), [219\(3\)](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [316](#) to [340](#), [365](#), [378](#) to [389](#)

The lawyer-client privilege cannot be invoked as to a communication relevant to an issue of breach, by the lawyer or client, of a duty arising out of the relationship. ([Evidence Code § 958](#).) Thus, a client may not accuse an attorney of a breach of duty and then rely on the privilege to prevent the attorney from utilizing evidence to defend the charge. In addition, the client cannot refuse to pay the fee and then rely on the privilege to defeat the attorney's claim. ([Evidence Code § 958](#), Comment.) When a company fires an in-house counsel, who then sues for wrongful discharge, the employee may disclose to his or her attorney all relevant facts, including privileged communications with the employer. ([Fox Searchlight Pictures, Inc. v. Paladino](#), 89 Cal. App. 4th 294, 308–315, 106 Cal. Rptr. 2d 906 (2d Dist. 2001).) If a lawyer (plaintiff) hires an independent law firm for advice on the representation of a client and later sues the firm for malpractice for its advice, the law firm is entitled to defend by discussing the contents of its discussions with plaintiff. If those discussions involved confidential communications between plaintiff and his or her client, that client and the law firm are entitled to a dismissal of plaintiff's suit to protect the confidentiality of those communications. ([Solin v. O'Melveny & Myers, LLP](#), 89 Cal. App. 4th 451, 107 Cal. Rptr. 2d 456 (2d Dist. 2001).)

When a habeas corpus hearing is conducted to determine the competency of a criminal defense attorney in an earlier proceeding, the attorney-client privilege does not apply. ([People v. Ledesma](#), 39 Cal. 4th 641, 690–691, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).) In *Ledesma*, the defendant had prevailed in a habeas corpus proceeding on the basis that his counsel was ineffective. On retrial, the defendant conceded that [section 958](#) deprived him of his attorney-client privilege at the habeas proceeding, but argued that the privilege remained effective at the retrial. The Supreme Court agreed,

concluding the privilege continues to apply at a subsequent trial after otherwise privileged communications are disclosed in a habeas proceeding under [section 958](#). (*People v. Ledesma*, 39 Cal. 4th 641, 691–695, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).)

[Evidence Code § 958](#) abrogates the privilege between the client and the former attorney only. It does not permit the client to obtain communications between the former attorney and the malpractice carrier. (*Travelers Ins. Companies v. Superior Court*, 143 Cal. App. 3d 436, 445–446, 191 Cal. Rptr. 871 (1st Dist. 1983).) Moreover, it does not permit the former attorney to obtain communications between the client and the new attorney. (*Samuels v. Mix*, 22 Cal. 4th 1, 28, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (1999); *Brockway v. State Bar*, 53 Cal. 3d 51, 63, 278 Cal. Rptr. 836, 806 P.2d 308 (1991).)

There was a conflict in authority as to whether the exception in [Evidence Code § 958](#) applied to documents covered by the work product rule. In 1990, the confusion was eliminated by the addition of subdivision (f) to [Code of Civil Procedure § 2018.080](#): “In an action between an attorney and his or her client or former client, *no work product privilege under this section exists if the work product is relevant to an issue of breach* by the attorney of a duty to the attorney’s client arising out of the attorney-client relationship” (emphasis added).

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D. Lawyer–Client Privilege

§ 5:32. Confidential communications that are not protected—Lawyer attests document

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The lawyer-client privilege cannot be invoked 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. ([Evidence Code § 959](#).) 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; nevertheless, the privilege should not prohibit the lawyer from performing the duties expected of an attesting witness. ([Evidence Code § 959](#), Comment; [Estate of Kime](#), 144 Cal. App. 3d 246, 257–258, 193 Cal. Rptr. 718 (2d Dist. 1983).)

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§ 5:33. Confidential communications that are not protected—Attorney jointly retained

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When two or more clients have retained or consulted a lawyer on a matter of common interest, none of them may claim the lawyer-client privilege as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between the clients. ([Evidence Code § 962](#).) By selecting the same attorney, and making their communications in each other's presence, each party effectively waives the right to prevent the other from using the communication. ([Clyne v. Brock](#), 82 Cal. App. 2d 958, 188 P.2d 263 (3d Dist. 1947).) However, the privilege still exists as to third persons. ([Croce v. Superior Court of City and County of San Francisco](#), 21 Cal. App. 2d 18, 68 P.2d 369 (1st Dist. 1937).)

Despite dicta in [Glade v. Superior Court](#), 76 Cal. App. 3d 738, 747, 143 Cal. Rptr. 119 (3d Dist. 1978), no case has held that this exception applies only to communications made when all clients are present. It covers all communications with the jointly retained attorney that touch on matters affecting both clients. Thus, in [Wortham & Van Liew v. Superior Court](#), the court held that an attorney retained by a partnership may be compelled to divulge all partnership information to all partners. ([Wortham & Van Liew v. Superior Court](#), 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725 (4th Dist. 1987).) Further, in [Glacier Gen. Assurance Co. v. Superior Court](#), 95 Cal. App. 3d 836, 157 Cal. Rptr. 435 (2d Dist. 1979), the court found that an attorney hired by an insurer to represent its insured actually represents both so that communications by either one to the attorney are subject to the joint client exception, contained in [§ 962](#). However, conversations between the insurer and its attorney regarding the coverage of an insurance policy that take place before the company accepts its obligation under the policy and before it hires an attorney to defend the insured are protected by the privilege; the joint client exception is inapplicable. ([Native Sun Investment Group v. Ticor Title Ins. Co.](#), 189 Cal. App. 3d 1265, 1276, 235 Cal. Rptr. 34

(4th Dist. 1987); *Aetna Casualty & Surety Co. v. Superior Court*, 153 Cal. App. 3d 467, 474, 200 Cal. Rptr. 471 (1st Dist. 1984).)

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§ 5:34. Confidential communications that are not protected—“Dangerous client” exception

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In [People v. Clark](#), 50 Cal. 3d 583, 618–622, 268 Cal. Rptr. 399, 789 P.2d 127 (1990), the California Supreme Court held that the attorney-client privilege protects threats of future violence made by a client against third parties in a confidential communication to the lawyer. Subsequently § 956.5 was added to the Evidence Code. It provides that the lawyer-client privilege does not exist “if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.” (See [Business and Professions Code § 6068\(e\)](#).) This “dangerous client” provision is similar, though not identical, to the dangerous patient exception to the psychotherapist-patient privilege, in [Evidence Code § 1024. Section 1024](#) has been the subject of much controversy and a substantial body of California Supreme Court jurisprudence. See the discussion of the dangerous patient exception in [§ 5:66](#). In [People v. Dang](#), the court upheld the admission of testimony by the defendant's former lawyer that the defendant had threatened violence against the victims after criminal charges had been filed. ([People v. Dang](#), 93 Cal. App. 4th 1293, 113 Cal. Rptr. 2d 763 (2d Dist. 2001).)

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§ 5:35. Confidential communications that are not protected—Client deceased and certain writings contested

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The lawyer-client privilege cannot be invoked 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 that purports to affect an interest in property. ([Evidence Code § 960.](#))

The lawyer-client privilege cannot be invoked 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. ([Evidence Code § 961.](#))

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D. Lawyer–Client Privilege

§ 5:36. Who is holder of attorney–client privilege?

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[C.J.S., Witnesses §§ 316 to 340, 365, 373](#)

The client, when he or she has no guardian or conservator holds the privilege. ([Evidence Code § 953\(a\)](#).) A guardian or conservator of the client, when the client has one holds the privilege. ([Evidence Code § 953\(b\)](#).) The personal representative of a dead client holds the privilege. ([Evidence Code § 953\(c\)](#).) 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 holds the privilege. ([Evidence Code § 953\(d\)](#).) Thus, post-merger, the attorney-client privilege of the corporation that is no longer in existence belongs to the successor corporation. ([Venture Law Group v. Superior Court](#), 118 Cal. App. 4th 96, 103, 12 Cal. Rptr. 3d 656 (6th Dist. 2004).)

In *People v. Barnett*, a defense witness, W, testified about a conversation he had had with his attorney, A, who was then called by the prosecution to rebut W's testimony. The trial court found that W had made a limited waiver of the privilege and ordered A to testify. On appeal, the Supreme Court found that W was the sole holder of the privilege and the defendant could not vicariously assert the privilege on his own behalf. ([People v. Barnett](#), 17 Cal. 4th 1044, 1137, 74 Cal. Rptr. 2d 121, 954 P.2d 384 (1998).)

It is not uncommon that a party to a proceeding will seek to introduce evidence that a non-party believes violates his or her attorney-client privilege. Must the non-party intervene in the action in order to assert the privilege, or is it sufficient simply to file a motion to assert the privilege? In *Mylan Laboratories v. Soon-Shiong*, the court determined that intervention was unnecessary: “We find that the holder of the attorney-client privilege has ‘standing’ to assert the privilege in a proceeding to prevent disclosure simply by virtue of the fact that he or

she is the holder of the privilege, and that there is no need to intervene to become an actual party to the lawsuit in order to be able to assert the privilege.” (*Mylan Laboratories Inc. v. Soon-Shiong*, 76 Cal. App. 4th 71, 80, 90 Cal. Rptr. 2d 111 (2d Dist. 1999).)

Though the work product privilege belongs to the attorney, in the attorney's absence the client may claim it. The attorney may, however, waive it over the client's objection. (*Fellows v. Superior Court*, 108 Cal. App. 3d 55, 63–65, 166 Cal. Rptr. 274 (2d Dist. 1980).)

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E. Spousal Privileges

§ 5:37. Three spousal privileges

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[C.J.S., Witnesses §§ 147 to 173, 299 to 315](#)

There are three separate spousal privileges. If one assumes A and B are spouses, the privileges may be described as follows. First, each has a right not to be a witness against the other. This privilege belongs only to the witness. Second, if A is a party to a litigation, B has a right not to be called as a witness by the adverse party in the litigation. Third, A and B each have a right to prevent the disclosure of any confidential communication between them during their marriage.

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E. Spousal Privileges

§ 5:38. First two spousal privileges—Married person's privilege not to testify against his or her spouse

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[C.J.S., Witnesses §§ 147 to 173](#)

The witness spouse has a privilege not to testify against the other spouse. ([Evidence Code § 970](#).) The privilege may be claimed only if there is a valid marriage in effect at the time the witness testifies. ([People v. Bradford](#), 70 Cal. 2d 333, 343, 74 Cal. Rptr. 726, 450 P.2d 46 (1969).) Cohabitants “living together with ‘all the trappings of a marriage except the formality of a ceremony’ ” do not qualify for the privilege despite [Marvin v. Marvin](#), 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976). ([People v. Delph](#), 94 Cal. App. 3d 411, 415, 156 Cal. Rptr. 422 (2d Dist. 1979).) California does not recognize the validity of common law marriages, but it does recognize the validity of a marriage contracted in another state that would be valid by the laws of that state, including common law marriages. ([People v. Badgett](#), 10 Cal. 4th 330, 363–366, 41 Cal. Rptr. 2d 635, 895 P.2d 877 (1995).) “The privilege does not apply when a person enters into a second marriage before his or her first marriage legally is dissolved.” ([People v. Gallego](#), 52 Cal. 3d 115, 176–177, 276 Cal. Rptr. 679, 802 P.2d 169 (1990).) ([People v. Catlin](#), 26 Cal. 4th 81, 130, 26 Cal. 4th 1060c, 109 Cal. Rptr. 2d 31, 26 P.3d 357 (2001).) When a legal marriage is in effect at the time the witness testifies, the privilege is available, even if no “viable marital relationship” exists. ([Jurcoane v. Superior Court](#), 93 Cal. App. 4th 886, 113 Cal. Rptr. 2d 483 (2d Dist. 2001).) In *Jurcoane*, the wife and husband had had no contact for 17 years, but the two were legally married and, so, the wife was entitled to claim the privilege.

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§ 5:39. First two spousal privileges—Privilege of married person whose spouse is a party not to be called as witness by adverse party

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[C.J.S., Witnesses §§ 147 to 173](#)

This privilege is set forth in [Evidence Code § 971](#) and is designed to avoid the prejudice that would result if, for example, an adverse party could call a spouse to the stand and force the spouse to exercise the privilege in front of the jury. ([Evidence Code § 971](#), Comment.) If the adverse party calls the witness spouse in good faith without knowledge of the marital relationship, this privilege is not violated. ([Evidence Code § 971](#); compare [People v. Solis](#), 193 Cal. App. 2d 68, 77, 13 Cal. Rptr. 813 (2d Dist. 1961).) The privilege may be claimed only if there is a valid marriage in effect at the time the witness would be called to testify. (See the discussion in [§ 5:38](#).) Both the privilege not to testify and the privilege not to be called as a witness belong only to the witness spouse. ([Hand v. Superior Court](#), 134 Cal. App. 3d 436, 438, 184 Cal. Rptr. 588 (3d Dist. 1982).)

Comment

There is no privilege to refuse to testify on behalf of the party spouse. ([Evidence Code § 970](#), Comment.) For this reason, if a party fails to call his or her spouse as a witness, the other party may comment on it. ([People v. Hughey](#), 194 Cal. App. 3d 1383, 1395, 240 Cal. Rptr. 269 (2d Dist. 1987).) In *People v. Lucas*, the court seemed to permit nonparty spouses to refuse to testify for their spouses, despite the statutory provisions, in order to avoid questions on cross-examination that elicit unfavorable testimony. Why the witness spouse is in a better position to make this judgment than the party spouse is unclear. This conclusion was criticized in a concurrence by Justice Kennard. ([People v. Lucas](#), 12 Cal. 4th 415, 490–491, 12 Cal. 4th 825a, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (1995).)

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E. Spousal Privileges

§ 5:40. First two spousal privileges—Waiver of spousal privileges

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[C.J.S., Witnesses §§ 125 to 126, 147 to 175](#)

Special waiver rules for the first two spousal privileges are set forth in [Evidence Code § 973](#). If a married person testifies in a proceeding where his or her spouse is a party, both of the privileges are waived for that proceeding. ([Evidence Code § 973\(a\)](#) and Comment; [People v. Rice](#), 126 Cal. App. 3d 477, 485, 178 Cal. Rptr. 647 (5th Dist. 1981).) If the spouse is not a party, a witness spouse may testify without waiving any privilege. However, if the witness spouse testifies against the other spouse on any matter in a proceeding, the privilege not to testify is waived as to all matters in that proceeding. ([Evidence Code § 973](#), Comment.) Because of the broad definition given the word “criminal proceeding” in § 903, if a spouse testifies against his or her spouse at the preliminary examination, the privilege is waived for the trial as well. ([Evidence Code § 973](#), Comment.) This is true even if the witness did not know about the privilege before testifying and had not been informed of it by the court. ([People v. Resendez](#), 12 Cal. App. 4th 98, 107–109, 15 Cal. Rptr. 2d 575 (4th Dist. 1993).) Similarly, if a civil case involves issues being separately tried, a spouse who testifies in one trial cannot refuse to testify in a separate trial of a different issue in the same case when his or her spouse is a party. ([Evidence Code § 973](#), Comment.)

Where a married person brings or defends a lawsuit for the immediate benefit of his or her spouse, the spouse may not claim either of the first two spousal privileges. ([Evidence Code § 973\(b\)](#).) Since unliquidated claims for personal injury damages are community property ([Family Code § 2603](#); [In re Marriage of Devlin](#), 138 Cal. App. 3d 804, 807, 189 Cal. Rptr. 1 (3d Dist. 1982)), in effect, the first two spousal privileges cannot be relied on by a witness whose spouse has filed a personal injury claim. If the marriage is intact when spousal testimony is sought, it has been held that the unliquidated damages are for the “immediate benefit” of the noninjured

spouse and the exception contained in § 973(b) applies. ([Hand v. Superior Court](#), 134 Cal. App. 3d 436, 442, 184 Cal. Rptr. 588 (3d Dist. 1982).)

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§ 5:41. First two spousal privileges—When first two spousal privileges are not available

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[C.J.S., Witnesses §§ 147 to 173](#)

The first two spousal privileges do not apply to a criminal proceeding in which the defendant is charged with a crime against the parent, relative, or cohabitant of either spouse, whether committed before or during marriage. ([Evidence Code § 972\(e\)\(1\)](#).) The term “cohabitant” applies to a cotenant and to any other person who lives with the spouse even though no sexual relationship exists between them. ([People v. Siravo](#), 17 Cal. App. 4th 555, 21 Cal. Rptr. 2d 350 (2d Dist. 1993).)

The first two spousal privileges are not available in a proceeding resulting from a criminal act that occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to the marriage if prior to the 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 witness spouse is called to testify. ([Evidence Code § 972\(f\)](#).)

The first two spousal privileges are not available in 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. The first two spousal privileges are not available 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. The first two spousal privileges are not available 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. For the exceptions stated in this paragraph, the married person does not have a privilege to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but otherwise

may assert the privilege if other information is requested by the former spouse, guardian, or other parent of the child. Any person demanding this type of available financial information 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 privileged to the same extent as the witness spouse. ([Evidence Code § 972\(g\)](#).)

The first two spousal privileges are also unavailable in the proceedings listed in [§ 5:44](#).

To establish an exception to any spousal privilege, a party must make a prima facie showing. Thus, in *Fortes v. Municipal Court*, the court held that the prosecution had to make a prima facie showing of a crime against the spouse in order to establish the exception set forth in [§ 972\(e\)\(2\)](#). ([Fortes v. Municipal Court](#), 113 Cal. App. 3d 704, 711, 170 Cal. Rptr. 292 (3d Dist. 1980).)

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E. Spousal Privileges

§ 5:42. Third spousal privilege—Confidential marital communications

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[C.J.S., Witnesses §§ 299 to 315](#)

A spouse, 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 made in confidence with the other spouse while they were husband and wife. ([Evidence Code § 980](#).) Communications between a husband and wife are presumed confidential. ([Evidence Code § 917](#).) If the facts show, however, that the communication was not intended to be confidential, the communication was not made in confidence. This can occur, for example, if the spouse made the same communication to other people. ([People v. Gomez](#), 134 Cal. App. 3d 874, 879, 185 Cal. Rptr. 155 (2d Dist. 1982); see also [Solon v. Lichtenstein](#), 39 Cal. 2d 75, 80, 244 P.2d 907 (1952).) Confidential communications may be written or oral. A videotape is a writing under [Evidence Code § 250](#). The fact that a husband and wife performed sexual acts is not a privileged communication, but a videotape of these acts is a communication within the scope of the privilege. ([Rubio v. Superior Court](#), 202 Cal. App. 3d 1343, 1348, 249 Cal. Rptr. 419 (4th Dist. 1988).)

When nonverbal conduct is not intended to be a communication, it is unprotected by the privilege. In [People v. Cleveland](#), 32 Cal. 4th 704, 743, 11 Cal. Rptr. 3d 236, 86 P.3d 302 (2004), cert. denied, 125 S. Ct. 867, 160 L. Ed. 2d 784 (U.S. 2005), a defendant's wife was properly permitted to testify that when he returned to her home on the night of the murders, she observed him wearing a watch and possessing cocaine. The court held open the possibility that if the defendant had displayed these items to the wife in confidence, the privilege would not apply. (*Ibid*; see [Tanzola v. De Rita](#), 45 Cal. 2d 1, 7, 285 P.2d 897 (1955).)

In [People v. Saidi-Tabatabai](#), the prosecution was permitted to prove that defendant had possessed certain

photographs by having her husband testify that her handwriting appeared on them. The court noted that no court had ever prevented one spouse from identifying the other's handwriting. (*People v. Saidi-Tabatabai*, 7 Cal. App. 3d 981, 986, 86 Cal. Rptr. 866 (2d Dist. 1970).)

Jailhouse communications between an inmate and the inmate's spouse are privileged only on those rare occasions when they occur under circumstances that create a reasonable expectation of privacy. (Compare *North v. Superior Court*, 8 Cal. 3d 301, 311, 104 Cal. Rptr. 833, 502 P.2d 1305 (1972) (which protected the communication) with *People v. Rodriguez*, 117 Cal. App. 3d 706, 173 Cal. Rptr. 82 (2d Dist. 1981) (which did not).)

The communication must have been made during a valid marriage. (*People v. Gallego*, 52 Cal. 3d 115, 176–177, 276 Cal. Rptr. 679, 802 P.2d 169 (1990); *People v. Hunt*, 133 Cal. App. 3d 543, 559, 184 Cal. Rptr. 197 (2d Dist. 1982); see the discussion in § 5:38.) It is unclear if the privilege applies to communications made after the couple has separated but before the dissolution is final, but it seems unlikely that the appellate courts will so find. (*People v. Gomez*, 134 Cal. App. 3d 874, 879, 185 Cal. Rptr. 155 (2d Dist. 1982).) If the communication is made while the marriage is intact, the privilege can be claimed after the marriage has been terminated. (*Evidence Code* § 980, Comment.)

Both spouses are the holders of this privilege and either can claim it. (*Evidence Code* § 980, Comment.) A guardian can claim the privilege for an incompetent spouse. No one can claim it for a dead spouse. (*Evidence Code* § 980, Comment.) The privilege can be claimed against eavesdroppers. (*Evidence Code* § 980, Comment.) Testimony about the communication by an eavesdropper does not waive the privilege. (*Rubio v. Superior Court*, 202 Cal. App. 3d 1343, 1348, 249 Cal. Rptr. 419 (4th Dist. 1988).)

If one spouse reveals the communication to a third party, this constitutes a waiver under *Evidence Code* § 912, discussed in § 5:4. The waiver is effective only as to the spouse who revealed the communication. (*Evidence Code* § 980, Comment.) By testifying for her defendant husband, the wife waives her privilege not to be called as a witness by the prosecution. She does not, however, waive her right under § 980 not to divulge confidential communications. (*People v. Kelly*, 51 Cal. 3d 931, 964, 275 Cal. Rptr. 160, 800 P.2d 516 (1990).)

In establishing probable cause to arrest, the police are entitled to rely on a privileged marital communication. The rules of evidence at trial do not apply to the probable cause determination. (*People v. Morgan*, 207 Cal. App. 3d 1384, 1389, 255 Cal. Rptr. 680 (1st Dist. 1989).)

California recognizes no parent-child privilege similar to the marital privilege. (*Ahmad A. v. Superior Court*, 215 Cal. App. 3d 528, 535, 263 Cal. Rptr. 747 (2d Dist. 1989).)

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E. Spousal Privileges

§ 5:43. Third spousal privilege—Exceptions to the privilege

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[C.J.S., Witnesses §§ 299 to 315](#)

The confidential communications privilege does not apply if the communication was made to enable or aid anyone to commit or plan to commit a crime or a fraud. ([Evidence Code § 981](#).) This exception is limited. It does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud. Disclosure is required only for communications made to enable one to commit or plan a crime or fraud. ([Evidence Code § 981](#), Comment.)

The confidential communications privilege does not apply in proceedings 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. ([Evidence Code § 984\(b\)](#).)

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Chapter
5. Privileges
E. Spousal Privileges

§ 5:44. Proceedings in which no spousal privileges apply

West's Key Number Digest

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None of the three spousal privileges apply in a proceeding brought by or on behalf of one spouse against the other spouse. ([Evidence Code §§ 972\(a\), 984\(a\).](#))

None of the three spousal privileges apply in 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. ([Evidence Code §§ 972\(b\), 982.](#))

None of the three spousal privileges apply in a proceeding brought by or on behalf of a spouse to establish his or her competence. ([Evidence Code §§ 972\(c\), 983.](#))

None of the three spousal privileges apply in a proceeding under the Juvenile Court Law, chapter 2 (commencing with [200](#)) of part 1 of division 2 of the Welfare and Institutions Code. ([Evidence Code §§ 972\(d\), 986.](#))

None of the three spousal privileges apply in a criminal proceeding in which one spouse is charged with a crime against the person or property of the other spouse or a child of either spouse. ([Evidence Code §§ 972\(e\)\(1\) and 985\(a\).](#)) The “child” referred to may be an adult. ([People v. McGraw, 141 Cal. App. 3d 618, 190 Cal. Rptr. 461 \(5th Dist. 1983\).](#)) In [Dunn v. Superior Court, 21 Cal. App. 4th 721, 726, 26 Cal. Rptr. 2d 365 \(4th Dist. 1993\)](#), the court found that the privilege does not apply in a proceeding where the defendant is charged with the murder of a foster child. ([Dunn v. Superior Court, 21 Cal. App. 4th 721, 726, 26 Cal. Rptr. 2d 365 \(4th Dist.](#)

1993).)

In *People v. Johnson*, the defendant was charged with murdering Adrienne, a former girlfriend, in 1979, and attempting to murder his wife, Lenora, in 1985. At the preliminary hearing, Lenora was permitted to testify that while beating her in 1985, the defendant said that what had happened to Adrienne would happen to her. This was admissible under the exception set forth in § 985(a), which makes the marital communications privilege inapplicable in a criminal proceeding in which one spouse is charged with a crime against the other. Before trial on the charge of murdering Adrienne, the charge involving the defendant's wife was dismissed. When the wife was called at trial to repeat the defendant's statement regarding Adrienne, the defense objected on the basis that § 985(a) no longer applied. The court overruled the objection, finding that the testimony at the preliminary hearing waived the privilege. (*People v. Johnson*, 233 Cal. App. 3d 425, 437, 284 Cal. Rptr. 579 (6th Dist. 1991).)

None of the three spousal privileges apply in a criminal proceeding in which one spouse is charged with 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. (*Evidence Code* §§ 972(e)(2), 985(b).) In *People v. Sinohui*, 28 Cal. 4th 205, 212, 120 Cal. Rptr. 2d 783, 47 P.3d 629 (2002), the California Supreme Court held that a trial court may compel testimony pursuant to this exception “even if no accusatory pleading charges the defendant with a crime against his or her spouse.” In addition, the court broadly interpreted the phrase “in the course of committing a crime” against his or her spouse to apply if the crimes against the third person and the spouse “are part of a continuous course of criminal conduct and have some logical relationship to each other.” In *Sinohui*, the defendant and an accomplice surprised the defendant's wife and her male friend at an isolated location, threatened the wife and her friend with a firearm, ordered the friend into the trunk of a car and drove him away. The defendant was subsequently charged with kidnapping and murdering the friend and the wife was properly compelled to testify for the prosecution. In *Sinohui*, the court distinguished and approved the result in *People v. Resendez*, 12 Cal. App. 4th 98, 109-111, 15 Cal. Rptr. 2d 575 (4th Dist. 1993). In *Resendez*, a husband assaulted his wife and left the premises. A friend of the wife came by to assist her in moving out. Husband returned and, after a brief verbal exchange with the friend, shot him, in the wife's presence. The appellate court found that the shooting did not occur “in the course of a crime committed against the wife,” and held that the wife should not have been compelled to testify. (*Resendez*, 12 Cal. App. 4th at 109–111.) The *Sinohui* court concluded that since the husband in *Resendez* “was gone from the residence for some time after assaulting his wife and before [the] shooting ... the assault and the shooting were not part of a continuous course of criminal conduct ...” and the exception did not apply. (*Sinohui*, 28 Cal. 4th at 219–220.) Though not specifically adverted to in *Sinohui*, one other distinction with *Resendez* may have been significant. The victim in *Sinohui*, unlike the victim in *Resendez*, was romantically linked to the defendant's wife, and that link appeared to be the motive for the crimes.

None of the three spousal privileges apply in a criminal proceeding in which one spouse is charged with bigamy or a crime defined by § 270 or 270a of the Penal Code. (*Evidence Code* §§ 972(e)(3) and (4), 985(c) and (d).) Sections 270 and 270a of the Penal Code relate to failure to provide or support a minor child or spouse.

For a discussion of the burden of proof on a party claiming an exception to any spousal privilege, see § 5:43.

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Chapter
5. Privileges

F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:45. Purpose and scope of medical privileges

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Prior to 1960, California had no statute that dealt specifically with the privilege for psychotherapeutic communications. Until the adoption of the Evidence Code in 1965, psychiatrists were covered by the physician-patient privilege. (See the discussion in [In re Lifschutz](#), 2 Cal. 3d 415, 422, 85 Cal. Rptr. 829, 467 P.2d 557 (1970).) Joining the two medical privileges for the purpose of this discussion will help highlight their differences as well as assist litigants in finding citations for a parallel provision of the other privilege. Since the purposes of the two privileges are identical, where statutes governing each are worded the same, cross-citation seems appropriate. As the Supreme Court has noted, however, precedents for one privilege will not “always be helpful in resolving issues” for the other. The “physician-patient privilege has been the subject of rather severe criticism The psychotherapist-patient privilege, on the other hand, won legislative recognition in the face of legal antipathy toward privileges generally” ([In re Lifschutz](#), 2 Cal. 3d 415, 434, 85 Cal. Rptr. 829, 467 P.2d 557 (1970).)

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 ([Evidence Code § 994](#)) or between patient and psychotherapist ([Evidence Code § 1014](#)) if the privilege is claimed by the appropriate person.

Comment

An objection that a question will require disclosure of a communication protected by one of the medical privileges should be sustained if the following is established:

- A communication was made in the course of the physician-patient or psychotherapist-patient relationship;
- The communication was made in confidence;
- The privilege has not been waived; and
- The privilege is invoked by the patient or other appropriate person, whether or not a party to the matter.

The purpose of the patient-physician privilege is to create a “*zone of privacy*” and eliminate the humiliation that results from disclosure of one’s ailment while encouraging “*the patient’s full disclosure* to the doctor of all information necessary for effective diagnosis and treatment.” ([Binder v. Superior Court](#), 196 Cal. App. 3d 893, 898, 242 Cal. Rptr. 231 (5th Dist. 1987).) “ ‘The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame ... It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world’ We believe that a patient’s interest in keeping such confidential revelations from public purview ... has deeper roots than the California statute and draws sustenance from our constitutional heritage.” ([In re Lifschutz](#), 2 Cal. 3d 415, 431, 85 Cal. Rptr. 829, 467 P.2d 557 (1970) (quoting from Guttmacher et al., *Psychiatry and the Law* (1952) p. 272).)

An eavesdropper or other interceptor of a communication protected under either medical privilege cannot testify to the communication. ([Evidence Code § 994](#), Comment.) If a doctor or psychotherapist makes an unauthorized disclosure of privileged information to a third person, the communication does not lose its privileged status and the patient may object to a further disclosure by the doctor or third person. ([Menendez v. Superior Court](#), 3 Cal. 4th 435, 448, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (1992).)

[Welfare and Institutions Code § 5328](#) makes confidential records obtained in the course of providing services to individuals voluntarily or involuntarily committed for mental health reasons. This section operates independently of the Evidence Code privileges.

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:46. Who qualifies as patient?**West's Key Number Digest**West's Key Number Digest, [Witnesses](#)  [209, 214.5](#)**Legal Encyclopedias**[C.J.S., Witnesses §§ 341 to 355](#)

For the physician's privilege, a patient is one 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. ([Evidence Code § 991](#).) The patient is defined in a similar way for the psychotherapist privilege except that the consultation/examination must be for a mental or emotional condition, not a physical condition. ([Evidence Code § 1011](#).) In addition, the psychotherapist privilege applies to one “who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.” ([Evidence Code § 1011](#).) No similar provision exists for the physician's privilege. Simply consulting a physician is insufficient; the purpose of the consultation must be to obtain a diagnosis or treatment. Thus, a study of the effect of a waste facility on the health of certain individuals was not privileged, even though it involved communications between these individuals and physicians. ([Kizer v. Sulnick](#), 202 Cal. App. 3d 431, 439, 248 Cal. Rptr. 712 (2d Dist. 1988).) In addition, an individual who visits a medical facility solely to sell sperm does not become a “patient,” for purposes of the privilege, simply because he consults with a physician as part of that process. ([Johnson v. Superior Court](#), 80 Cal. App. 4th 1050, 1063, 95 Cal. Rptr. 2d 864 (2d Dist. 2000).)

In *People v. Cabral*, the defendant was charged with several sexual offenses involving children. He wrote a letter to a psychotherapist admitting his responsibility and asking to be admitted into a sex offender treatment program. The defendant conceded that he wrote the letter not only to receive treatment but because he believed that admission into the program would assist his efforts to be given probation. The court held that for the defendant to be considered a “patient” of the psychotherapist, the dominant purpose of the letter had to be obtain-

ing treatment. Since it was not, he was not a patient and the letter was not privileged. (*People v. Cabral*, 12 Cal. App. 4th 820, 826–828, 15 Cal. Rptr. 2d 866 (5th Dist. 1993).)

In *Story v. Superior Court*, 109 Cal. App. 4th 1007, 1016, 135 Cal. Rptr. 2d 532 (6th Dist. 2003) the court rejected *Cabral*'s dominant purpose test “to the extent the test would automatically preclude the application of the psychotherapist-patient privilege to records generated as the result of psychotherapy attended by a defendant as a condition of probation.” *Story* concluded that regardless of defendant's motivation, the purpose of psychotherapy required as a condition of probation must always be therapeutic because of the Penal Code's express statement that the general purpose of all probation conditions is “the reformation and rehabilitation of the probationer.” (*Menendez v. Superior Court*, 3 Cal. 4th 435, 454, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (1992) (Defendant's motive in attending psychotherapy is immaterial. “As a general matter, the dispositive fact is *what* the participants do, not *why*.”).) In *Story*, the prosecution sought to obtain records of psychotherapy defendant engaged in pursuant to a grant of probation. The prosecution believed such records would help prove defendant committed the pending charges that occurred long-after the therapy. Relying on *Cabral*, the prosecution claimed defendant was not a “patient” and, therefore, could not utilize the privilege. After rejecting this contention the court relied on *In re Pedro M.*, 81 Cal. App. 4th 550, 96 Cal. Rptr. 2d 839 (2d Dist. 2000) to conclude that a probationer's psychotherapy records may be disclosed to the extent necessary for the court to monitor the defendant's participation and progress in the psychotherapy ordered as a probation condition. However, disclosing the details of the therapy, specific statements by defendant, advice given by the therapist, and the therapist's diagnosis could not be compelled. (*Story*, 109 Cal. App. 4th at 1018–1019; *In re Christopher M.*, 127 Cal. App. 4th 684, 695–696, 26 Cal. Rptr. 3d 61 (4th Dist. 2005).)

It is not uncommon in family law and juvenile dependency cases for a party voluntarily to seek a psychological evaluation in order to assist in asserting custody. Because the party is not seeking diagnosis or treatment of a mental or emotional condition (or engaging in a scientific study) the party is not a “patient” and the privilege does not apply. This reasoning was adopted in *In re Tabatha G.*, which terminated the mother's parental rights, to deny protection of the privilege to a bonding study by a psychologist of the relationship between the mother and her two children. (*In re Tabatha G.*, 45 Cal. App. 4th 1159, 1168, 53 Cal. Rptr. 2d 93 (4th Dist. 1996).)

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§ 5:47. Who qualifies as physician?

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A physician is a person authorized or reasonably believed by the patient to be authorized to practice medicine. ([Evidence Code § 990](#).)

This definition protects confidential communications to persons reasonably but incorrectly believed to be licensed to practice medicine. ([Evidence Code § 990](#), Comment.)

A pharmacist is not a physician for purposes of this privilege. ([People v. Van Le](#), 194 Cal. App. 3d 845, 849, 239 Cal. Rptr. 858 (2d Dist. 1987).)

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:48. Who qualifies as psychotherapist?

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A “psychotherapist” is a person who is or is reasonably believed to be:

- A person authorized to practice medicine in any state or nation and who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry. ([Evidence Code § 1010\(a\)](#).) For a discussion of how a patient might reasonably but mistakenly believe that he or she is dealing with a psychiatrist, see [Luhdorff v. Superior Court](#), 166 Cal. App. 3d 485, 492, 212 Cal. Rptr. 516 (5th Dist. 1985).
- A person licensed as a psychologist under chapter 6.6 (commencing with [§ 2900](#)) of division 2 of the Business and Professions Code. ([Evidence Code § 1010\(b\)](#).)
- A person licensed as a clinical social worker under article 4 (commencing with [§ 9040](#)) of chapter 17 of division 3 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a nonmedical nature. ([Evidence Code § 1010\(c\)](#).)
- A person who is serving as a school psychologist and holds a credential issued by the state and authorizing such service. ([Evidence Code § 1010\(d\)](#).)
- A person licensed as a marriage, family, and child counselor under chapter 13 (commencing with [§ 4980](#)) of division 2 of the Business and Professions Code. ([Evidence Code § 1010\(e\)](#).)

- A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board-certified psychiatrist as required by [§ 2913 of the Business and Professions Code](#), or a person registered as a marriage, family, and child counselor intern who is under the supervision of a licensed marriage, family, and child counselor, a licensed clinical social worker, a licensed psychologist, or a licensed physician certified in psychiatry, as specified in [§ 4980.44 of the Business and Professions Code](#). ([Evidence Code § 1010\(f\)](#).)
- 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 [§ 4996.20 of the Business and Professions Code](#). ([Evidence Code § 1010\(g\)](#).)
- A person exempt from the Psychology Licensing Law pursuant to [§ 2909\(d\) of the Business and Professions Code](#), which relates to persons with a certain educational background and certain experience who work for specified nonprofit community agencies. This person must also be under the supervision of a licensed psychologist or board-certified psychiatrist. ([Evidence Code § 1010\(h\)](#).)
- A psychological intern as defined in [§ 2911 of the Business and Professions Code](#) who is under the supervision of a licensed psychologist or board-certified psychiatrist. ([Evidence Code § 1010\(i\)](#).)
- A trainee, as defined in [§ 4980.03\(c\) of the Business and Professions Code](#), who is fulfilling his or her supervised practicum and is supervised by a licensed psychologist, board-certified psychiatrist, a licensed clinical social worker, or a licensed marriage, family, and child counselor. ([Evidence Code § 1010\(j\)](#).)
- A person licensed as a registered nurse pursuant to Chapter 6 (commencing with [§ 2700](#)) of Division 2 of the Business and Professions Code, who possesses a master's degree in psychiatric mental health nursing. ([Evidence Code § 1010\(k\)](#).)
- An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with [§ 2838](#)) of Chapter 6 of Division 2 of the Business and Professional Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing. ([Evidence Code § 1010\(l\)](#).)
- A person who provides mental health treatment or counseling as authorized by [§ 6924 of the Family Code](#). ([Evidence Code § 1010\(m\)](#).)

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:49. Which communications are privileged?

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Only confidential communications are privileged. ([Evidence Code §§ 994, 1014](#).) The communication must be made in a way that, so far as the patient knows, discloses the information to no third persons other than those listed below ([Evidence Code §§ 992, 1012](#)):

- Those present to further the interest of the patient in the consultation or examination.
- Those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician or psychotherapist is consulted.

Thus, when a patient presents a doctor's prescription to a licensed pharmacist, the confidentiality is not breached because the doctor's communication (the prescription) is being disclosed solely to accomplish the purpose for which the doctor was consulted. ([Evidence Code § 912](#), Comment.) This is true even though confidential communications to a pharmacist are not otherwise protected under the physician-patient privilege. ([Rudnick v. Superior Court](#), 11 Cal. 3d 924, 932, 114 Cal. Rptr. 603, 523 P.2d 643 (1974); see also [Blue Cross v. Superior Court](#), 61 Cal. App. 3d 798, 801, 132 Cal. Rptr. 635 (3d Dist. 1976).)

In *In re Kristine W.*, the juvenile court had ordered therapy for a dependent child, who was 17 years old. The Social Services Agency subsequently was permitted by the juvenile court to talk to the therapist for the purpose of submitting a report on the child's progress to the court. In upholding the trial court's order, which the child had challenged as violating her psychotherapist privilege, the appellate court concluded that the "therapy

has a dual purpose—treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information from which reasoned recommendations and decisions regarding the child's welfare can be made.” (*In re Kristine W.*, 94 Cal. App. 4th 521, 527, 114 Cal. Rptr. 2d 369 (4th Dist. 2001).) The order was affirmed “only to the extent it permits disclosure by Kristine's therapist of matters that reasonably assist the court in evaluating whether further orders of the court are necessary for Kristine's benefit and preserves the confidentiality of the details of her therapy.” (*Kristine W.*, 94 Cal. App. 4th at 528.) See, also, *In re Mark L.*, 94 Cal. App. 4th 573, 580–584, 114 Cal. Rptr. 2d 499 (4th Dist. 2001).

When a student intern or an unlicensed individual with a degree in social work interviews a person with emotional problems, these communications may be privileged even though the interviewer is not a psychotherapist. To be privileged, however, the interviewer must be working under the supervision of a psychotherapist to whom the privilege attached. (Compare *Luhdorff v. Superior Court*, 166 Cal. App. 3d 485, 212 Cal. Rptr. 516 (5th Dist. 1985) with *People v. Gomez*, 134 Cal. App. 3d 874, 185 Cal. Rptr. 155 (2d Dist. 1982).)

Participants in a group therapy session are present to further the interests of the patient in the consultation. Communications made in confidence at such sessions are, therefore, privileged. (*Farrell L. v. Superior Court*, 203 Cal. App. 3d 521, 523, 250 Cal. Rptr. 25 (5th Dist. 1988).)

The information protected includes that obtained by a physician's examination of the patient. (*Evidence Code* § 992, Comment.) In *Hale v. Superior Court*, 28 Cal. App. 4th 1421, 34 Cal. Rptr. 2d 279 (4th Dist. 1994), a gravely injured person was hospitalized. She died several days later without having communicated verbally with any physician. Since she had been examined, diagnosed, and treated, the court found that “confidential communications” had occurred and that the physician-patient privilege applied. (*Hale v. Superior Court*, 28 Cal. App. 4th 1421, 1423–1424, 34 Cal. Rptr. 2d 279 (4th Dist. 1994).) Photographs taken by a physician of the patient's physical condition are protected. (*Binder v. Superior Court*, 196 Cal. App. 3d 893, 897–898, 242 Cal. Rptr. 231 (5th Dist. 1987).)

Any diagnosis made and advice given by the physician or psychotherapist is protected. (*Evidence Code* §§ 992, 1012.)

Disclosure of the patient's name can be required if it reveals nothing concerning the patient's medical condition. For example, in *Ascherman v. Superior Court*, a doctor sued for reinstatement of hospital staff privileges. He had been accused by another doctor of soliciting surgery from a patient of that doctor. The court found that the accuser could be ordered to disclose the name of the patient allegedly solicited. (*Ascherman v. Superior Court In and For City and County of San Francisco*, 254 Cal. App. 2d 506, 515–516, 62 Cal. Rptr. 547 (1st Dist. 1967).) However, a court will not issue a similar order where a party seeks disclosure of all patients treated by a physician for a particular ailment. (*Rosso, Johnson, Rosso & Ebersold v. Superior Court*, 191 Cal. App. 3d 1514, 1519, 237 Cal. Rptr. 242 (1st Dist. 1987) and cases discussed therein. Cf. *Pollock v. Superior Court*, 93 Cal. App. 4th 817, 821, 113 Cal. Rptr. 2d 453 (2d Dist. 2001) (in an action alleging an insurer's bad faith termination of benefits under a disability policy, plaintiff is not entitled to discovery of the names of other claimants for psychiatric disability who had been denied benefits.)

Application of this same rule in the psychotherapy field has almost uniformly led to a refusal to order disclosure of names; the fact of consultation discloses the nature of the patient's problem: emotional. *Scull v. Superior Court* held that a psychologist charged with molesting some of his patients cannot be compelled to turn

over a list of his other patients. (*Scull v. Superior Court*, 206 Cal. App. 3d 784, 254 Cal. Rptr. 24 (2d Dist. 1988).) *Smith v. Superior Court* held that a psychologist-husband in a marital dissolution proceeding cannot be ordered to disclose names and fees paid by his patients. (*Smith v. Superior Court*, 118 Cal. App. 3d 136, 141, 173 Cal. Rptr. 145 (1st Dist. 1981).) The same principle was applied to prevent plaintiffs from learning if defendant police officers in a false imprisonment suit had received psychiatric treatment. (*City of Alhambra v. Superior Court*, 110 Cal. App. 3d 513, 518, 168 Cal. Rptr. 49 (2d Dist. 1980).) The only time a court has ordered disclosure of the name of a psychiatric patient occurred when one mental patient was allegedly raped by another and sought disclosure of his identity. (*County of Alameda v. Superior Court*, 194 Cal. App. 3d 254, 261, 239 Cal. Rptr. 400 (1st Dist. 1987).) “In extraordinary cases of need for disclosure, a court retains discretion to order the patient's identity revealed.”

A doctor sued by a patient may retain the patient's former doctor as an expert to review certain medical records of the patient so long as no communications of the patient to the former doctor are disclosed. No “fiduciary relationship” between the former doctor and patient prevents such employment. (*Torres v. Superior Court*, 221 Cal. App. 3d 181, 270 Cal. Rptr. 401 (4th Dist. 1990).)

Any communication made in the course of the two medical privileges is presumed confidential. (*Evidence Code § 917*.)

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:50. Who is holder of the physician–patient or psychotherapist–patient privilege?

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The patient holds the privilege, when there is no guardian or conservator. ([Evidence Code §§ 993\(a\), 1013\(a\)](#).) A guardian or conservator of the patient holds the privilege, when the patient has one. ([Evidence Code §§ 993\(b\), 1013\(b\)](#).) However, if a conflict of interest exists between a minor patient and the minor's guardian, the guardian may not assert the privilege. Thus, in *In re Troy D.*, the parent-guardian was not permitted to block introduction of the child's medical records in a juvenile dependency hearing. (*In re Troy D.*, 215 Cal. App. 3d 889, 900, 263 Cal. Rptr. 869 (4th Dist. 1989).)

The personal representative of a dead patient holds the privilege. ([Evidence Code §§ 993\(c\), 1013\(c\)](#).) When the patient's estate has been distributed and the representative discharged, the privilege terminates. ([Evidence Code § 993](#), Comment.) The term “personal representative” should be interpreted to mean “executor” or “administrator.” In *Boling v. Superior Court*, the court held that the mother of a deceased patient who did not claim to be either an executor or administrator could not invoke the privilege. (*Boling v. Superior Court*, 105 Cal. App. 3d 430, 439–441, 164 Cal. Rptr. 432 (1st Dist. 1980).)

The privilege belongs to the patient, not the psychotherapist. (*In re Lifschutz*, 2 Cal. 3d 415, 429, 85 Cal. Rptr. 829, 467 P.2d 557 (1970).)

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:51. When must physician or psychotherapist claim the privilege?

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[C.J.S.](#), [Witnesses](#) §§ [341](#) to [355](#), [372](#) to [373](#), [378](#) to [389](#)

The physician or psychotherapist shall claim the privilege whenever he or she is present and disclosure is sought unless: (a) there is no holder of the privilege in existence; or (b) he or she is otherwise instructed by one authorized to permit disclosure. ([Evidence Code §§ 995, 1015](#).) Where a physician invokes the privilege on behalf of a nonparty patient, the proponent of the evidence must show that the patient or another so authorized has waived the privilege. ([Torbensen v. Family Life Ins. Co.](#), 163 Cal. App. 2d 401, 404, 329 P.2d 596 (3d Dist. 1958).)

A psychotherapist who voluntarily discloses privileged information in a judicial proceeding without claiming the privilege is not immune from liability. ([Cutter v. Brownbridge](#), 183 Cal. App. 3d 836, 228 Cal. Rptr. 545 (1st Dist. 1986).)

If a party receives notice pursuant to [§ 1985.3 of the Code of Civil Procedure](#) that opposing counsel has sought copies of the party's records from the treating therapist, and the party fails to object or otherwise claim the privilege, the privilege is waived and the therapist can provide the records without civil liability. ([Inabnit v. Berkson](#), 199 Cal. App. 3d 1230, 1238–1239, 245 Cal. Rptr. 525 (5th Dist. 1988).)

In the medical board's investigation of a physician, it subpoenaed the medical records of several patients kept by a hospital. That hospital may assert the statutory privilege of the absent nonconsenting patient. ([Board of Medical Quality Assurance v. Gherardini](#), 93 Cal. App. 3d 669, 675, 156 Cal. Rptr. 55 (4th Dist. 1979).) If a nonparty patient's psychotherapy records are subpoenaed from a hospital and the hospital does not assert the pa-

tient's privilege, the trial court must do so. ([Evidence Code § 916](#); [People v. Pack](#), 201 Cal. App. 3d 679, 685, 248 Cal. Rptr. 240 (2d Dist. 1988).)

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§ 5:52. When must medical provider permit inspection and copying of patient's records?

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑207

West's Key Number Digest, [Pretrial Procedure](#) 🔑382

Legal Encyclopedias

[C.J.S., Discovery § 86](#)

[C.J.S., Witnesses §§ 341 to 355](#)

[Evidence Code § 1158](#) permits a patient, or the patient's legal representative, before filing an action, to inspect/copy his or her own medical records if written authorization signed by the patient or other appropriate person is given to the medical provider by an attorney or the attorney's representative. This legislation permits a patient to “evaluate the treatment he or she received before deciding whether to bring an action against the medical provider.” ([National Football League Management Council v. Superior Court](#), 138 Cal. App. 3d 895, 903, 188 Cal. Rptr. 337 (1st Dist. 1983).)

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§ 5:53. Exceptions to both medical privileges—Patient–litigant exception

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  207, 214.5, 219(4)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ 341 to 355, 378 to 389

Neither medical privilege can be invoked as to a communication relevant to an issue concerning the patient's condition if such issue has been tendered by the patient. ([Evidence Code §§ 996\(a\), 1016\(a\)](#).) The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege He cannot have his cake and eat it too.” ([City & County of San Francisco v. Superior Court In and For City and County of San Francisco](#), 37 Cal. 2d 227, 232, 231 P.2d 26 (1951); [Kizer v. Sulnick](#), 202 Cal. App. 3d 431, 248 Cal. Rptr. 712 (2d Dist. 1988).) In *Kizer*, the court held that individuals who sue a waste facility for personal injuries cannot claim the privilege when the Department of Health Services subpoenas a copy of a medical study that had previously been conducted on the effects of the facility on certain individuals, including the plaintiffs. ([Kizer v. Sulnick](#), 202 Cal. App. 3d 431, 248 Cal. Rptr. 712 (2d Dist. 1988).)

Warning

Simply filing a lawsuit for physical or emotional damages does not automatically or completely waive either of the two medical privileges. Disclosure of the plaintiff's medical history should be limited only to medical treatment and communications concerning the very injury or impairment that is the subject matter of the litigation. ([In re Lifschutz](#), 2 Cal. 3d 415, 434–435, 85 Cal. Rptr. 829, 467 P.2d 557 (1970); [Britt v. Superior Court](#), 20 Cal. 3d 844, 862–864, 143 Cal. Rptr. 695, 574 P.2d 766 (1978); [Boling v. Superior Court](#), 105 Cal. App. 3d 430, 437–439, 164 Cal. Rptr. 432 (1st Dist. 1980).) The filing of a personal injury action seeking general damages for pain and suffering does not tender the plaintiff's mental condition so as to permit

discovery of post-injury psychotherapeutic records. (*Davis v. Superior Court*, 7 Cal. App. 4th 1008, 1011, 9 Cal. Rptr. 2d 331 (5th Dist. 1992).) In *Palay v. Superior Court*, a child sued, alleging negligent care in failing to diagnose cardiac disease, detected when he was born. The court refused to permit discovery of the entirety of the mother's medical records during the period of her pregnancy. Only records related to that pregnancy were discoverable. (*Palay v. Superior Court*, 18 Cal. App. 4th 919, 934, 22 Cal. Rptr. 2d 839 (2d Dist. 1993).)

Where a passenger has sued a driver for injuries from an automobile accident and claimed that the defendant was intoxicated, defendant's denial does not “tender” the issue of his intoxication so as to make § 996 applicable to defendant's medical records from the date of the accident. (*Carlton v. Superior Court*, 261 Cal.App.2d 282, 289–290, 67 Cal. Rptr. 568 (1968); see the discussion of Evidence Code § 999 in § 5:61.) See also *Koshman v. Superior Court*, 111 Cal. App. 3d 294, 298, 168 Cal. Rptr. 558 (3d Dist. 1980), which concerned a custody dispute, where one parent claimed the other was a drug addict. Her denial did not “tender” the issue and permit review of her medical records.

By seeking “extensive visitation” rights and legal custody, a parent does not implicitly tender his or her mental and emotional condition, thereby triggering this exception. (*Simek v. Superior Court*, 117 Cal. App. 3d 169, 174–176, 172 Cal. Rptr. 564 (1st Dist. 1981).)

When a child's complaints of molestation by the father lead to a dependency hearing under Welfare and Institutions Code § 300, the complaints are not a “tender” of the child's psychological state under § 1016. (*In re Daniel C. H.*, 220 Cal. App. 3d 814, 829, 269 Cal. Rptr. 624 (6th Dist. 1990).)

A defendant in a criminal case who puts mental or emotional condition in issue, for example, by a plea of insanity or a claim of incompetence, loses the psychotherapy privilege in the insanity proceeding (Penal Code § 1026) or the incompetency proceeding (Penal Code § 1369; see also Evidence Code § 1023). If a defendant claims incompetence or insanity, and is then interviewed by psychiatrists, these interviews cannot be used in the guilt phase of the trial unless the defendant tenders a mental defense. (*People v. Williams*, 197 Cal. App. 3d 1320, 1324, 243 Cal. Rptr. 480 (1st Dist. 1988).) If a defendant, in the penalty phase of a capital case, bases his claim for mitigation on evidence of an impaired mental condition, mental state is placed into issue, and the psychotherapist-patient privilege is waived. (*People v. Montiel*, 5 Cal. 4th 877, 923, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993).)

If a lawyer has referred the patient to a physician to prepare for the litigation, the attorney-client privilege or the attorney work product doctrine may provide protection for the communications between the patient and that doctor even if the physical or emotional issue discussed is or has been tendered. (*San Francisco Unified School Dist. v. Superior Court for City and County of San Francisco*, 55 Cal. 2d 451, 455, 11 Cal. Rptr. 373, 359 P.2d 925 (1961); compare *Kizer v. Sulnick*, 202 Cal. App. 3d 431, 440–441, 248 Cal. Rptr. 712 (2d Dist. 1988).) See the discussion in § 5:65.

The “tender” rule also applies if the patient's condition is tendered by one claiming through the patient or as a contractual beneficiary of the plaintiff. (Evidence Code §§ 996(b) and (c), 1016(b) and (c).) However, a woman who sues for an injury to her that resulted from her mother's ingestion of DES is neither “claiming through” her mother nor is she claiming as a beneficiary of her mother through a contract. Thus, the daughter's suit did

not waive the mother's privilege. (*Jones v. Superior Court*, 119 Cal. App. 3d 534, 545–546, 174 Cal. Rptr. 148 (1st Dist. 1981).)

The “tender” rule also applies if the patient's condition is put in issue by a plaintiff in a parent's action for injuries to a child or in an action for the wrongful death of the patient. (*Evidence Code* §§ 996(d), 1016(d).) However, a lawsuit on behalf of a dead patient does not automatically or completely waive the privilege any more than a suit on behalf of a live one. (*Boling v. Superior Court*, 105 Cal. App. 3d 430, 437–439, 164 Cal. Rptr. 432 (1st Dist. 1980).)

When a mother sues as guardian ad litem on behalf of her child for medical malpractice relating to the child's birth, it is not uncommon for the defendant to seek discovery of the mother's prenatal medical records. In *Palay v. Superior Court*, the court held that these records are shared records of the mother and child, that the mother does not lose her privilege simply because she serves as the guardian ad litem, but that she does lose the privilege because of the patient-litigant exception. (*Palay v. Superior Court*, 18 Cal. App. 4th 919, 929, 22 Cal. Rptr. 2d 839 (2d Dist. 1993).)

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§ 5:54. Exceptions to both medical privileges—Crime or tort exception

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [211\(4\)](#), [214.5](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [341](#) to [346](#), [348](#) to [355](#)

The medical privileges are inapplicable if the services of the physician or psychotherapist were sought or obtained to aid one to commit a crime or a tort or to escape detection or apprehension after committing a crime or tort. ([Evidence Code §§ 997, 1018](#).) This exception is broader than the analogous exception to the lawyer-client privilege ([Evidence Code § 956](#)) in two ways. First, this exception applies to a crime or tort; the other applies to a crime or fraud. Second, unlike [§ 956](#), this exception applies if the services of the physician or therapist are sought to escape detection or apprehension after the commission of the crime or tort. Patients who knowingly or recklessly cause their psychotherapists to file false child abuse reports lose their privilege by operation of [§ 1018](#). In addition, such patients are not entitled to immunity under the child abuse reporting statutes. ([Roe v. Superior Court](#), 229 Cal. App. 3d 832, 844, 280 Cal. Rptr. 380 (2d Dist. 1991).)

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West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 341 to 355](#)

Neither medical privilege exists as to information that the therapist, 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. ([Evidence Code §§ 1006, 1026.](#)) [Penal Code § 11166](#) of the Child Abuse and Neglect Reporting Act requires a physician to report child abuse to a child protection agency. [Penal Code § 11171\(b\)](#) provides: “Neither the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this article in any court proceeding or administrative hearing.” (See [In re Troy D.](#), [215 Cal. App. 3d 889, 901, 263 Cal. Rptr. 869 \(4th Dist. 1989\).](#)) If a therapist has a duty to report sexual abuse, but fails to do so, the patient's communications remain privileged. ([People v. John B.](#), [192 Cal. App. 3d 1073, 1078, 237 Cal. Rptr. 659 \(2d Dist. 1987\).](#))

A therapist is under no duty to report a patient/father's statements that admit the abuse of a patient/child when the child has previously told the therapist of the molestation and the therapist has already disclosed this to the authorities. Since the therapist need not make a second report of the same activity, the father's statements remain privileged. ([People v. Stritzinger](#), [34 Cal. 3d 505, 513, 194 Cal. Rptr. 431, 668 P.2d 738 \(1983\).](#))

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§ 5:56. Exceptions to both medical privileges—Due process exception for criminal defendants

West's Key Number Digest

Wests Key Number Digest, [Witnesses](#) 🔑207, 214.5, 223

Wests Key Number Digest, [Criminal Law](#) 🔑662, 627.8

Legal Encyclopedias

[C.J.S., Criminal Law §§ 663, 693, 663 to 664, 668, 693, 727, 732 to 736, 1515 to 1531, 1535 to 1541, 1636, 1638 to 1639](#)

[C.J.S., Witnesses §§ 341 to 355, 377](#)

In certain criminal cases, the courts have created a due process exception to the medical privileges for criminal defendants. “Where *psychotherapy records* contain evidence of disorders especially probative of the ability of an important prosecution witness to comprehend and accurately relate the subject of his testimony, the *constitutional confrontation clause* has been held to prevail over a statutory privilege.” ([People v. Reber](#), 177 Cal. App. 3d 523, 530, 223 Cal. Rptr. 139 (3d Dist. 1986) (emphasis added).) The defense is entitled to use these records to impeach the patient and the patient's doctor at trial. ([People v. Caplan](#), 193 Cal. App. 3d 543, 558, 238 Cal. Rptr. 478 (4th Dist. 1987).) No such exception exists for the prosecution concerning the defendant's psychotherapy records. ([Menendez v. Superior Court](#), 3 Cal. 4th 435, 457, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (1992).) In [People v. Hammon](#), the California Supreme Court overruled *Reber* to the extent it permitted pretrial discovery of privileged information in the hands of third-party providers. ([People v. Hammon](#), 15 Cal. 4th 1117, 65 Cal. Rptr. 2d 1, 938 P.2d 986 (1997); see the discussion in [§ 3:44](#).)

When considering a defense request to obtain a witness's psychological records, the trial court is required to examine those records in camera, weigh the defendant's need against the statutory privilege, determine which records are essential to the defendant's right of confrontation, and create a record adequate for review of its ruling. ([People v. Reber](#), 177 Cal. App. 3d 523, 532, 223 Cal. Rptr. 139 (3d Dist. 1986).) The defendant's motion to ob-

tain these records must “describe the requested information with reasonable specificity and must be sustained by plausible justification for production of the items requested.” (*People v. Pack*, 201 Cal. App. 3d 679, 685, 248 Cal. Rptr. 240 (2d Dist. 1988).) *Pack* held that evidence that the witness had received treatment for some mental health problem was insufficient to justify an in camera review of the records. In *People v. Boyette*, the court apparently required a lesser showing in a case where the primary prosecution witness was a five-year-old child. (*People v. Boyette*, 201 Cal. App. 3d 1527, 1533, 247 Cal. Rptr. 795 (6th Dist. 1988).)

Although *Reber*, *Pack*, and *Caplan* are all cases involving sexual assaults, this due process exception to the medical privileges is not limited to that kind of charge. (*People v. Boyette*, 201 Cal. App. 3d 1527, 1533, 247 Cal. Rptr. 795 (6th Dist. 1988).) *Boyette* involved a young child who had witnessed a burglary.

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§ 5:57. Exceptions to both medical privileges—Claiming through deceased patient

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [341](#) to [355](#)

There is no medical privilege 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. ([Evidence Code](#) §§ [1000](#), [1019](#).)

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§ 5:58. Exceptions to both medical privileges—Breach of duty

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West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [341](#) to [355](#)

There is no privilege as to a communication relevant to an issue of breach, by the physician (or psychotherapist) or by the patient, of a duty arising out of the physician-patient (or psychotherapist-patient) relationship. ([Evidence Code](#) §§ [1001](#), [1020](#).)

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§ 5:59. Exceptions to both medical privileges—Deceased patients and writings affecting property

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  207, 214.5

Legal Encyclopedias

[C.J.S., Witnesses §§ 341 to 355](#)

There is no medical privilege as to a communication relevant to an issue concerning: (1) 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 ([Evidence Code §§ 1002, 1021](#)); and (2) the validity of such a writing ([Evidence Code §§ 1003, 1022](#)).

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:60. Exceptions to both medical privileges—Proceeding to establish competence

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [341](#) to [355](#)

There is no medical privilege in a proceeding brought by or on behalf of the patient to establish the patient's competence. ([Evidence Code](#) §§ [1005](#), [1025](#).)

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§ 5:61. Exceptions to physician's privilege—Proceeding to recover damages because of patient's conduct

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West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [341](#) to [355](#)

No physician-patient privilege exists as to a communication relevant to the patient's condition in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure is shown. ([Evidence Code § 999](#).) The phrase “conduct of the patient” has been limited to mean “misconduct of the patient.” Conduct that is neither criminal nor wrongful in any legal sense does not justify breach of the privilege even if the conduct causes damage. ([Jones v. Superior Court](#), [119 Cal. App. 3d 534, 544, 174 Cal. Rptr. 148 \(1st Dist. 1981\)](#).) In *Jones*, the court held that a daughter's suit against certain pharmaceutical companies for damages caused to her by her mother's ingestion of DES does not trigger the exception as to the mother's medical records, since the mother's conduct was not wrongful.

The phrase “proceeding to recover damages” has been broadly defined. If a person injured in an automobile accident sues the driver and alleges that a vision defect caused the accident, this exception would apply. This is equally true if a defendant in such a suit cross-complains against plaintiff and makes a similar allegation against plaintiff. In *Slagle v. Superior Court*, the court went even further and found that the exception applies when the defendant alleges comparative negligence because of plaintiff's vision defect, even if defendant seeks no damages from plaintiff. “We interpret this section to include within its scope medical records of a plaintiff where the plaintiff's conduct is ... relevant to the issue of proximate causation” ([Slagle v. Superior Court](#), [211 Cal. App. 3d 1309, 1314, 260 Cal. Rptr. 122 \(1st Dist. 1989\)](#).)

This exception does not apply to the psychotherapist privilege. ([City of Alhambra v. Superior Court](#), [110 Cal. App. 3d 513, 519, 168 Cal. Rptr. 49 \(2d Dist. 1980\)](#).)

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§ 5:62. Exceptions to physician's privilege—Criminal proceedings

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West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 341 to 355](#)

There is no physician-patient privilege in a criminal proceeding. ([Evidence Code § 998](#).) This exception does not apply to the psychotherapist privilege. ([People v. Wharton](#), 53 Cal. 3d 522, 551–552, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).)

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West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 341 to 355](#)

There is no privilege in a proceeding to commit the patient or otherwise place the patient or his or her property, or both, under the control of another because of an alleged mental or physical condition. ([Evidence Code § 1004](#).) Though comparable, the exception to the psychotherapist privilege set forth in § 1024 for patients dangerous to themselves or others is considerably narrower. ([Evidence Code § 1024](#), Comment; [Evidence Code § 1024](#) is discussed in [§ 5:66](#).)

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§ 5:64. Exceptions to physician's privilege—Proceeding to terminate right, license, or privilege**West's Key Number Digest**West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)**Legal Encyclopedias**[C.J.S., Witnesses §§ 341 to 355](#)

There is no physician-patient privilege 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. ([Evidence Code § 1007](#).) There is an exception to the physician-patient privilege in criminal proceedings. ([Evidence Code § 998](#).) [Section 1007](#) extends this exception slightly by providing 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.” ([Evidence Code § 1007](#), Comment.)

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§ 5:65. Exceptions to psychotherapist privilege—Court–appointed psychotherapist

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[C.J.S., Witnesses §§ 341 to 355](#)

There is no privilege if the psychotherapist is appointed by the court to examine the patient. This exception does not apply, however, where the psychotherapist is appointed by the court upon the request of the defendant's lawyer 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 the defendant's mental or emotional condition. ([Evidence Code § 1017\(a\)](#).)

Even if the defendant tenders his or her emotional state by entering an insanity plea or raising a mental defense, the communications between the defendant and the psychotherapist appointed at counsel's request do not lose their privileged status, despite the language of the Comment to [§ 1017](#). The attorney-client privilege still protects such communications. ([People v. Saidi–Tabatabai](#), 7 Cal. App. 3d 981, 987, 86 Cal. Rptr. 866 (2d Dist. 1970).) In [People v. Clark](#), the Supreme Court held that the attorney-client privilege protects communications between the therapist and patient if the patient was seeing the therapist at the direction of the attorney. ([People v. Clark](#), 50 Cal. 3d 583, 620–621, 268 Cal. Rptr. 399, 789 P.2d 127 (1990).) In [People v. Gurule](#), 28 Cal. 4th 557, 594, 123 Cal. Rptr. 2d 345, 51 P.3d 224 (2002), cert. denied, 538 U.S. 964, 123 S. Ct. 1754, 155 L. Ed. 2d 517 (2003), the court appointed a psychotherapist to examine the competence of a co-defendant, Garrison. That therapist had previously been retained by Garrison. When Garrison elected to testify against the defendant, an attempt was made by the defendant to obtain those psychiatric records. The court held that any communications made to the therapist in his capacity as Garrison's expert were privileged under the attorney-client privilege, though communications made during the competency examination were not privileged as therapist-patient communications by virtue of [§ 1017](#). (Accord: [People v. Ledesma](#), 39 Cal. 4th 641, 690, 47 Cal. Rptr. 3d 326, 140

P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007).)

Where a court-ordered psychiatrist interviews the defendant to determine the defendant's competence, and the defendant neither requested the evaluation nor tendered a psychiatric defense, the Fifth Amendment precludes use of the interview during the guilt or penalty phase of the trial unless the psychiatrist obtained a valid *Miranda* waiver. (*Estelle v. Smith*, 451 U.S. 454, 468, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).) But where the psychiatric interview is “reasonably contemporaneous” with a separate interview where a prior knowing and intelligent *Miranda* waiver was obtained, a re-advisement of rights is not required. (*People v. San Nicolas*, 34 Cal. 4th 614, 640, 21 Cal. Rptr. 3d 612, 101 P.3d 509 (2004), cert. denied, 126 S. Ct. 46 (U.S. 2005).)

Court-ordered counseling is not the equivalent of a court-ordered examination of a patient by a psychotherapist under § 1017. Thus, the communications made during the court-ordered counseling are privileged. (*In re Eduardo A.*, 209 Cal. App. 3d 1038, 1041–1042, 261 Cal. Rptr. 68 (2d Dist. 1989).)

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West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [207](#), [214.5](#)

Legal Encyclopedias

[C.J.S., Witnesses §§ 341 to 355](#)

There is no psychotherapist-patient privilege 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 herself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger. ([Evidence Code § 1024](#).)

Recent cases have considered the application of this section when the following occurs: first, a patient makes statements to a psychiatrist that justify disclosure in the nature of a warning to the victim; second, the patient is later prosecuted for a criminal violation; and finally, the therapist is called to testify about the patient's statements. ([People v. Wharton](#), 53 Cal. 3d 522, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).) Certain rules have emerged:

- [Section 1024](#) does not constitute a waiver of the privilege. Rather, “if a certain factual predicate exists ... it merely provides that ‘there is no privilege.’ ” ([People v. Wharton](#), 53 Cal. 3d 522, 560, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).)
- This exception permits the therapist to testify not only to any warning actually given to a threatened individual but also to any communications by the patient/defendant that triggered the warning, that is, any “statements by the defendant himself which [led] to the impressions and diagnosis and ultimate conclusion to communicate with the victim.” However, other statements by the patient that did not trigger the warning are not disclosable. ([People v. Wharton](#), 53 Cal. 3d 522, 554, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).)

- The “ ‘dangerous patient’ exception requires *only* reasonable cause for belief by the psychotherapist in the dangerousness of the patient and the necessity of disclosure It does not demand that the patient be dangerous to a person *other than* the psychotherapist Nor does it demand that the psychotherapist must actually disclose the relevant communication or even issue a warning.” (*Menendez v. Superior Court*, 3 Cal. 4th 435, 451, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (1992).)
- This exception to the privilege applies even if the victim is dead at the time of the trial and no threat of future harm exists. (*People v. Wharton*, 53 Cal. 3d 522, 554–555, 280 Cal. Rptr. 631, 809 P.2d 290 (1991).) It applies even if there is no readily identifiable victim threatened by the patient/defendant. (*In re Kevin F.*, 213 Cal. App. 3d 178, 183, 261 Cal. Rptr. 413 (3d Dist. 1989).)

This exception is distinct from, though closely related to, a common law cause of action for negligent failure to warn given to one injured by a patient who had provided prior threatening statements to a therapist. (See *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976); *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1st Dist. 1980).) The common law tort does not arise unless the patient mentions a specific, identifiable victim. (*In re Kevin F.*, 213 Cal. App. 3d 178, 183–184, 261 Cal. Rptr. 413 (3d Dist. 1989).)

Statements that are not privileged due to § 1024 may nevertheless be protected by the attorney-client privilege if the patient was seeing the therapist at the direction of the patient's attorney to accomplish the purposes of the attorney-client relationship. (*People v. Clark*, 50 Cal. 3d 583, 620–621, 268 Cal. Rptr. 399, 789 P.2d 127 (1990).) Note, however, that since its enactment in 1993, § 956.5 permits the disclosure of communications otherwise protected by the attorney-client privilege when disclosure “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.” (*People v. Roldan*, 35 Cal. 4th 646, 725, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (2005), cert. denied, 126 S. Ct. 570 (U.S. 2005).)

At a hearing to extend the term of a mentally disordered sex offender, statements made to hospital staff in the course of routine therapy that reflect future dangerousness to society are admissible. (*People v. Henderson*, 117 Cal. App. 3d 740, 748, 172 Cal. Rptr. 858 (3d Dist. 1981).)

In a child dependency hearing, a mother's defense of a boyfriend/child molester to her therapist was admissible since it evidenced a threat of danger to the child. Section 1024 was not rendered inapplicable simply because the threat of danger implicated a third person as well as the patient. (*In re Courtney S.*, 130 Cal. App. 3d 567, 575, 181 Cal. Rptr. 843 (1st Dist. 1982).)

In a lawsuit against the operator of a trolley line, this exception justified requiring the operator to disclose any warning it may have received from the psychiatrist treating the trolley engineer prior to the accident about the engineer's psychiatric condition and medical treatment. (*San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 1096–1097, 105 Cal. Rptr. 2d 476 (4th Dist. 2001).)

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F. Medical Privileges: Physician–Patient and Psychotherapist–Patient

§ 5:67. Exceptions to psychotherapist privilege—Patient under 16 is victim of crime

West's Key Number Digest

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[C.J.S., Witnesses §§ 341 to 355](#)

There is no psychotherapist privilege if: (1) the patient is under the age of 16; and (2) the therapist 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. ([Evidence Code § 1027](#); [In re Courtney S.](#), 130 Cal. App. 3d 567, 574, 181 Cal. Rptr. 843 (1st Dist. 1982).) In *People v. Caplan*, a therapist's disclosure led to criminal charges of child molesting. At the trial, the court permitted evidence of the therapist's report but prevented cross-examination of either the child or therapist. The Court of Appeal reversed, concluding that [Evidence Code § 1027](#) not only lifts the privilege to permit a report of the crime but also eliminates the privilege for all purposes once evidence of the report is introduced. ([People v. Caplan](#), 193 Cal. App. 3d 543, 557, 238 Cal. Rptr. 478 (4th Dist. 1987).)

For a discussion of a disclosure made under the Child Abuse Reporting Act and its effect on the privilege, see [§ 5:55](#).

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G. Other Counseling Privileges

§ 5:68. Clergy–penitent privilege

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“Member of the Clergy” means a priest, minister, religious practitioner, or similar functionary of a church, religious denomination, or organization. ([Evidence Code § 1030](#).) “Penitent” means a person who has made a penitential communication to a member of the clergy. ([Evidence Code § 1031](#).) “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 religious organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of the religion, has a duty to keep such communications secret. ([Evidence Code § 1032](#); [Doe 2 v. Superior Court](#), 132 Cal. App. 4th 1504, 1516–1517, 34 Cal. Rptr. 3d 458 (2d Dist. 2005).) There is no requirement that the penitent be a member of the clergy member's faith ([Doe 2](#), 132 Cal.App.4th at 1517) and no requirement that the statement be a “confession.” ([Doe 2](#), 132 Cal.App.4th at 1518–1519.) In [Roman Catholic Archbishop of Los Angeles v. Superior Court](#), 131 Cal. App. 4th 417, 444–446, 32 Cal. Rptr. 3d 209 (2d Dist. 2005), the court held that “intervention interviews” of priests experiencing problems with celibacy, conducted by the Archbishop or his surrogate, were not confidential communications because both sides understood that the communications would be disclosed to third persons.

Not all confidential communications to a member of the clergy are privileged. Thus, where a priest testifies that he believed the “defendant's statements to him were in the nature of a secular request seeking counseling and not absolution,” no penitential communication existed. ([People v. Edwards](#), 203 Cal. App. 3d 1358, 1363, 248 Cal. Rptr. 53 (1st Dist. 1988).)

In deciding if the person who received the confidential communication is a “member of the clergy,” the court must consider the nature of the function being performed by that individual. ([People v. Thompson](#), 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (4th Dist. 1982).) *Thompson* lists several out-of-state authorities discussing whether religious individuals performing certain specific roles qualify. ([People v. Thompson](#), 133 Cal. App. 3d 419, 425–426, 184 Cal. Rptr. 72 (4th Dist. 1982).)

The privilege to refuse to disclose a penitential communication is given both to the penitent ([Evidence Code § 1033](#)) and the member of the clergy ([Evidence Code § 1034](#)). The member of the clergy may claim the privilege even if the penitent has waived it. ([Evidence Code § 1034](#), Comment.) Unlike others who receive privileged communications, the member of the clergy is not required to claim the privilege. (Compare §§ 955 (attorney-client), 995 (physician-patient), and 1015 (psychotherapist-patient).) The penitent, but not the member of the clergy, may prevent eavesdroppers from disclosing penitential communication. ([Evidence Code § 1033](#), Comment.)

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§ 5:69. Sexual assault victim–counselor privilege

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[C.J.S., Witnesses §§ 342, 349](#)

The Evidence Code defines “victim” in § 1035, “sexual assault” in § 1036.2, and “sexual assault victim counselor” in § 1035.2. It further provides that 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 the sexual assault victim counselor if the privilege is claimed by an appropriate person, defined in § 1035.8.

Confidential communications between the sexual assault victim counselor and the victim mean 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 disclosure is reasonably necessary for the transmission of the information or for 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. ([Evidence Code § 1035.4.](#))

The court may compel disclosure of information received by the sexual assault counselor that 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 com-

pelled. The court may also compel disclosure in proceedings related to child abuse upon a determination based on the same balancing test. ([Evidence Code § 1035.4](#).)

When a court is ruling on a claim of sexual assault victim-counselor privilege, 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 others as the claimant is willing to have present. If the judge determines that the information is privileged and must not be related, neither he or she nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was related in the course of the proceedings in chambers. ([Evidence Code § 1035.4](#).)

If the court finds there is a reasonable likelihood that particular information is subject to disclosure, the following procedure is followed:

- (1) The court shall inform the defendant of the nature of the information that may be subject to disclosure.
- (2) The court then conducts a hearing out of the presence of the jury, if any. At the hearing, the sexual assault counselor is questioned regarding the information that the court has determined may be subject to disclosure.
- (3) At the conclusion of the hearing, the court will rule which items of information, if any, are to 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 thereto. Admission of evidence concerning the sexual conduct of the complaining witness is also subject to [Evidence Code §§ 352, 782, and 1103](#). ([Evidence Code § 1035.4](#).)

The sexual assault victim counselor who received or made a communication subject to this privilege shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege. ([Evidence Code § 1036](#).)

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G. Other Counseling Privileges

§ 5:70. Domestic violence victim–counselor privilege and human trafficking victim—Caseworker privilege

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[C.J.S., Witnesses §§ 342, 349](#)

The Evidence Code defines “victim” in § 1037, “domestic violence” in § 1037.7, and “domestic violence counselor” in § 1037.1. It further provides that a victim of domestic violence, 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 the domestic violence counselor, if the privilege is claimed by an appropriate person, defined in § 1037.5.

A confidential communication means information transmitted between the victim of the domestic violence and the counselor in the course of their relationship and in confidence by a means that, 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 disclosure is reasonably necessary for the transmission of the information, or for accomplishment of the purposes for which the domestic violence counselor is consulted. It includes all information regarding the facts and circumstances involving all incidence 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. ([Evidence Code § 1037.2.](#))

The court may compel disclosure of information received by a domestic violence counselor that constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim or another household member 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. The court may also compel disclosure in proceedings related to child abuse upon a determination based on the same balancing test. ([Evidence Code § 1037.2](#).)

When a court rules on a claim of domestic violence victim-counselor privilege, the same procedure is followed as with the sexual assault victim-counselor privilege. ([Evidence Code § 1037.2](#); see [§ 5:69](#) for an outline of this procedure.)

The domestic violence counselor who received or made a communication subject to this privilege 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. ([Evidence Code § 1037.6](#).)

The privilege for communications between a human trafficking victim and a caseworker is set out in §§ 1038, 1038.1 and 1038.2. In most respects, this privilege parallels the domestic violence privilege.

The privilege for domestic violence victims and counselors may not be construed to limit any obligation to report instances of child abuse as required by [Penal Code § 11166](#). ([Evidence Code § 1037.3](#).)

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H. Privileges For Official Information and Informer Identity

§ 5:71. What is “official information”?

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[C.J.S., Criminal Law §§ 757 to 766](#)

[C.J.S., Witnesses §§ 361 to 368, 371](#)

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 is “official information.” ([Evidence Code § 1040\(a\)](#).) For example, the surveillance location from which police officers observe criminal activity is privileged official information. (*People v. Walker*, 230 Cal. App. 3d 230, 235, 282 Cal. Rptr. 12 (2d Dist. 1991).) The formula used to calculate the “check digit” in a vehicle identification number (VIN) (*People v. Marghzar*, 192 Cal. App. 3d 1129, 1135, 239 Cal. Rptr. 130 (2d Dist. 1987)) and the secret location of the VIN (*In re David W.*, 62 Cal. App. 3d 840, 847, 133 Cal. Rptr. 342 (2d Dist. 1976)) are examples of official information. Driver medical information in the possession of the Department of Motor Vehicles is “acquired in confidence” and qualifies under the privilege for official information. (*Department of Motor Vehicles v. Superior Court*, 100 Cal. App. 4th 363, 373–374, 122 Cal. Rptr. 2d 504 (2d Dist. 2002) (In a prosecution for vehicular homicide, the interests of the People and the defendant in the defendant's medical information exceeds the DMV's interest in maintaining its confidentiality and, so, disclosure is appropriate.). *Department of Motor Vehicles*, 100 Cal. App. 4th at 377.) “Evidence gathered by the police as part of an ongoing criminal investigation is by its nature confidential” regardless of whether the information was provided in confidence. (*County of Orange v. Superior Court*, 79 Cal. App. 4th 759, 764, 94 Cal. Rptr. 2d 261 (4th Dist. 2000); *People v. Otte*, 214 Cal. App. 3d 1522, 1532, 263 Cal. Rptr. 393 (2d Dist. 1989).) The State Bar is “akin to a state public body or agency” and its officers can claim the privilege for information received in confidence at the time an attorney applied for admission. (*Chron-*

icle Pub. Co. v. Superior Court In and For City and County of San Francisco, 54 Cal. 2d 548, 565–566, 7 Cal. Rptr. 109, 354 P.2d 637 (1960).) Complaints made to the State Bar that result in disciplinary action are not privileged, however. (Chronicle Pub. Co. v. Superior Court In and For City and County of San Francisco, 54 Cal. 2d 548, 564, 7 Cal. Rptr. 109, 354 P.2d 637 (1960).)

The report of an informant may be protected by the official information privilege. The government, however, cannot prevent an informant from revealing what he or she knows simply because that knowledge was communicated to the governmental entity. ([Evidence Code § 1040](#), Comment.)

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§ 5:72. Who is an “informer”?

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[C.J.S., Criminal Law §§ 757 to 766](#)

[C.J.S., Witnesses §§ 361 to 365](#)

An informer is one who has furnished information purporting to disclose a violation of any law of the United States, the State of California, or a California public entity if the information is furnished in confidence to: (1) a law enforcement officer; (2) a representative of an administrative agency charged with the administration or enforcement of the law violated; or (3) any other person for the purpose of transmittal to one listed in (1) or (2). ([Evidence Code § 1041](#).) A nonparticipating eyewitness to a crime who confidentially conveys information to the police is an “informer,” even though the eyewitness had no ongoing relationship with the police and received no consideration for the report. ([People v. Lanfrey](#), 204 Cal. App. 3d 491, 498, 251 Cal. Rptr. 189 (6th Dist. 1988).) A percipient witness who accompanies the police during a search in which contraband is discovered is not a confidential informant. However, the witness' identity may be confidential and protectible under the privilege for “official information.” ([Torres v. Superior Court](#), 80 Cal. App. 4th 867, 872, 95 Cal. Rptr. 2d 686 (2d Dist. 2000).) A judge's response to an inquiry by the Commission on Judicial Performance is privileged under section 1040 and cannot be obtained by a *Pitchess* motion. ([Commission on Judicial Performance v. Superior Court](#), 156 Cal.App.4th 617, 623–625 (2007).) (*Pitchess* motions are discussed in [Note 5:79](#).)

The “concept of confidentiality” in this statute does not refer to the information communicated (unless it would tend to disclose identity) nor is it based on the subjective intent of the informer. Rather, this statute speaks to the confidentiality of identity for purposes of effective law enforcement. This privilege does not apply

to “most eyewitnesses who simply provide information to authorities upon being interviewed.” ([People v. Otte](#), 214 Cal. App. 3d 1522, 1531, 263 Cal. Rptr. 393 (2d Dist. 1989).)

A person may be an informant even though that person provides the information while a suspect in the incident or in custody. ([People v. Otte](#), 214 Cal. App. 3d 1522, 1534, 263 Cal. Rptr. 393 (2d Dist. 1989).)

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§ 5:73. Is information absolutely privileged?

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[C.J.S., Criminal Law §§ 757 to 766](#)

[C.J.S., Witnesses §§ 361 to 368, 371](#)

Official information or the identity of an informant is absolutely privileged only if disclosure is forbidden by a federal or California statute. For example, in [Richards v. Superior Court for Los Angeles County](#), 258 Cal. App. 2d 635, 65 Cal. Rptr. 917 (2d Dist. 1968), plaintiff sued defendant for injuries suffered in an automobile accident. Plaintiff also applied for disability insurance benefits and took a medical examination as directed by the then Department of Employment. By his suit, plaintiff waived his privilege against disclosure of the medical records. The court held that the department, however, had the absolute right to bar disclosure of those records under [Unemployment Insurance Code §§ 2111 and 2714](#).

[Vehicle Code §§ 20012 and 20013](#) provide for the absolute confidentiality of motor vehicle accident reports. Information gleaned from those reports, not including the identity of the reporting party, is not privileged, however. (See generally [Davies v. Superior Court](#), 36 Cal. 3d 291, 204 Cal. Rptr. 154, 682 P.2d 349 (1984).)

Not all statutory protections of official information are absolute. (See, e.g., [Revenue and Taxation Code § 19282](#) (prohibiting disclosure of tax records; discussed in [King v. Mobile Home Rent Review Bd.](#), 216 Cal. App. 3d 1532, 1536–1537, 265 Cal. Rptr. 624 (2d Dist. 1989); [Welfare and Institutions Code § 10850](#) (provides for confidentiality of public social service records; discussed in [In re Lynna B.](#), 92 Cal. App. 3d 682, 705, 155 Cal. Rptr. 256 (1st Dist. 1979); [California Code Regulations, Title 22, §§ 35049, 35057, 35063](#) (governing con-

fidentiality and release of adoption case records; former versions of regulations discussed in [Terzian v. Superior Court](#), 10 Cal. App. 3d 286, 88 Cal. Rptr. 806 (1st Dist. 1970).)

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§ 5:74. Standard when information is not absolutely privileged

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The court must decide whether disclosure of the official information or the identity of the informer is against the public interest. This is determined by weighing the necessity for preserving confidentiality against the necessity for disclosure in the interest of justice. However, if any person authorized to do so has consented that the information be disclosed in the proceeding, no privilege may be claimed. ([Evidence Code §§ 1040\(b\)\(2\), 1041\(a\)\(2\).](#))

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§ 5:75. Ruling in civil case on government's claim of privilege under Section 1040 or 1041

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[C.J.S., Witnesses §§ 361 to 368, 371, 377](#)

If a party in a civil case seeks production of documents by subpoena duces tecum ([Code of Civil Procedure § 1985](#)) or by a demand for production of documents ([Code of Civil Procedure § 2031](#)) or seeks information by written interrogatories ([Code of Civil Procedure § 2030](#)) and an objection is made based on either § 1040 or 1041, the court should first determine, without respect to the privilege, whether the moving papers comply with the requirements of the Code of Civil Procedure in terms of specificity, materiality, and good cause.

The court should then determine as to each item whether it is “information acquired in confidence.” If not, it should be produced. If so acquired, the court should engage in the weighing process mandated by either § 1040(b)(2) or 1041(a)(2).

The weighing process requires the party seeking disclosure to show its need for the information. The government then presents evidence on its need for confidentiality. This can be done in camera. ([Evidence Code § 915\(b\)](#); compare § 1042(d), which by its terms relates only to criminal proceedings.) The court must make a separate assessment of each factor, balance them, and order disclosure unless the need for confidentiality outweighs the need for disclosure. (See generally [Shepherd v. Superior Court](#), 17 Cal. 3d 107, 124–128, 130 Cal. Rptr. 257, 550 P.2d 161 (1976).) In *Shepherd*, the court held that § 1040(b)(2) “ ‘represents the *exclusive means* by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy.’ ” (at 123) “The trial court [must] consider, with respect to each item of material [sought] ... whether there is a ‘necessity for preserving the confidentiality ... that outweighs the necessity for disclosure.’ ” (at 125–126; see [People v. Montgomery](#), 205 Cal. App. 3d 1011, 1017, 252 Cal. Rptr. 779 (1st Dist. 1988); [Rubin v. City of Los Angeles](#), 190

Cal. App. 3d 560, 584–587, 235 Cal. Rptr. 516 (2d Dist. 1987).)

In *County of Orange v. Superior Court*, 79 Cal. App. 4th 759, 765–769, 94 Cal. Rptr. 2d 261 (4th Dist. 2000), the court held that no item-by-item, in camera inspection was necessary before denying disclosure of the police file in a 4-year-old on-going homicide investigation to a suspect who had filed a defamation action against the public agency. However, in *Michael P. v. Superior Court*, 92 Cal. App. 4th 1036, 1043–1048, 113 Cal. Rptr. 2d 11 (4th Dist. 2001), the court distinguished *County of Orange* and required an in camera review when a party to a dependency action, who was also a suspect in the murder of a child, sought discovery of the 2-month-old murder investigation. The court ruled that, in weighing the relevant interest, “a litigant's interest in prosecuting a civil action for damages pales in comparison to a parent's interest in having custody of his or her child.” (*Michael P.*, 92 Cal. App. 4th at 1044.)

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§ 5:76. Ruling in criminal case on prosecution's claim of privilege under Sections 1040 and 1041

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[C.J.S., Witnesses §§ 361 to 368, 371, 377](#)

If a criminal defendant at a hearing or in pretrial discovery seeks information and an objection is raised under [Evidence Code § 1040](#) or [1041](#), the court should first require the defendant to establish a reasonable possibility that the disclosure of the information might result in the defendant's exoneration. ([People v. Montgomery](#), 205 Cal. App. 3d 1011, 1020–1021, 252 Cal. Rptr. 779 (1st Dist. 1988) (official information); [People v. Garcia](#), 67 Cal. 2d 830, 839, 64 Cal. Rptr. 110, 434 P.2d 366 (1967) (informant identity).)

The defense may not rely on an affidavit of the attorney made on information and belief to constitute the prima facie showing for disclosure. ([People v. Oppel](#), 222 Cal. App. 3d 1146, 1153, 272 Cal. Rptr. 340 (2d Dist. 1990).) The prima facie showing may be made by calling a witness who testifies in open court. ([People v. Gordon](#), 50 Cal. 3d 1223, 1244–1245, 270 Cal. Rptr. 451, 792 P.2d 251 (1990).) In addition, the defendant may satisfy the burden without producing evidence if reasonable inferences from the prosecution's case are sufficient. ([People v. Otte](#), 214 Cal. App. 3d 1522, 1536, 263 Cal. Rptr. 393 (2d Dist. 1989).)

If the defense makes the prima facie showing, then, at the prosecutor's request, an in camera hearing outside the presence of the defense should be held in which the information sought may be disclosed to assist the court in deciding if the privilege should be upheld. ([Evidence Code § 915\(b\)](#); [People v. Montgomery](#), 205 Cal. App. 3d 1011, 1021, 252 Cal. Rptr. 779 (1st Dist. 1988) (official information); [Evidence Code § 1042\(d\)](#) (informant identity).) Prior to the in camera hearing the court should permit the defense to submit questions to be asked at the hearing. ([People v. Montgomery](#), 205 Cal. App. 3d 1011, 1021, 252 Cal. Rptr. 779 (1st Dist. 1988).)

In a motion to disclose an informant's identity, there is no requirement that the informant testify at the in camera hearing. (*People v. Fried*, 214 Cal. App. 3d 1309, 1313, 263 Cal. Rptr. 237 (2d Dist. 1989).) However, if the informant is an eyewitness to the transaction, his or her testimony at the in camera is necessary. (*People v. Ruiz*, 9 Cal. App. 4th 1485, 1489, 12 Cal. Rptr. 2d 234 (3d Dist. 1992).)

In a motion to disclose an informant's identity the court should order disclosure only if there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial by denying the defendant evidence that could be exculpatory. (*Evidence Code* § 1042(d); *People v. Alderrou*, 191 Cal. App. 3d 1074, 1080, 236 Cal. Rptr. 740 (2d Dist. 1987).) The testimony at the in camera hearing may undermine an otherwise strong presumption that disclosure of an informant is warranted. For example, it might show that “there was no reasonable possibility that a particular percipient eyewitness could give evidence ... which might result in a defendant's exoneration.” (*People v. Lanfrey*, 204 Cal. App. 3d 491, 502–503, 251 Cal. Rptr. 189 (6th Dist. 1988).)

In a motion to disclose, if the court concludes that the evidence sought is “official information” and, under § 1040(b)(2), the need for confidentiality outweighs the need for disclosure, the privilege should be upheld.

Comment

In a motion to disclose official information or the identity of an informant, the court should permit the prosecutor and any witness who will provide information to be present at the in camera hearing along with necessary court personnel. Typically, the informant, or the search warrant affiant, or the law enforcement officer who received the confidential information is the witness. The witness should testify under oath and the entire proceeding should be reported. The prosecutor should conduct the questioning, although the court may ask any follow-up questions it deems appropriate. Although there is a general rule against a judge reviewing police reports in a criminal case (*Penal Code* § 1204.5), it seems proper for the judge to prepare for the in camera hearing by reading such reports, as well as any proposed questions submitted by the defense. At the close of the proceeding, the court should make any appropriate findings. If the identity of the informant is to be disclosed, the prosecutor should be directed to do so or, in the alternative, move to dismiss the charges. The court should provide a brief period of time for the prosecutor to decide on the correct alternative.

After the conclusion of the in camera hearing, the court should order the court reporter not to prepare a typed record of the proceeding absent further court order. However, when the in camera hearing occurs in the middle of the preliminary examination, some courts consider it a part of the examination and have the record of it typed and sealed for delivery to the superior court. Any physical evidence presented at the in camera should be ordered sealed.

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Chapter
5. Privileges

H. Privileges For Official Information and Informer Identity

§ 5:77. Adverse finding if information is privileged under Section 1040 or 1041

West's Key Number Digest

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Except where a federal statute bars disclosure, if a court finds information privileged under [Evidence Code § 1040](#) or [1041](#), it must make an appropriate order or finding adverse to the government on any issue to which the privileged information is material. ([Evidence Code § 1042\(a\)](#).) In [In re Sergio M.](#), 13 Cal. App. 4th 809, 814, 16 Cal. Rptr. 2d 701 (6th Dist. 1993), the minor sought the disclosure of a surveillance location from which criminal activity had been observed. The court found that neither disclosure nor an adverse finding was necessary because the minor failed to show that the information was material. In [People v. Garza](#), 32 Cal. App. 4th 148, 154, 38 Cal. Rptr. 2d 11 (6th Dist. 1995), the court held that a surveillance location is material when there are locations in the area from which the view is impaired or obstructed and “there is some reason to believe that the officer was making his observations from such a location. Without some reason so to believe, the existence of obstructed locations is logically irrelevant.” See [People v. Haider](#), 34 Cal. App. 4th 661, 664–669, 40 Cal. Rptr. 2d 369 (2d Dist. 1995) for a detailed discussion of the cases in this area.

Comment

The court should creatively explore the available alternatives to disclosure that could render the privileged information immaterial. Then neither disclosure nor an adverse finding would be required. For example, rather than disclosing a surveillance location or striking the testimony of an officer who used one, a videotape of the crime scene taken from the surveillance location might establish the unobstructed nature of the view and make the exact location immaterial. ([People v. Montgomery](#), 205 Cal. App. 3d 1011, 1022, 252 Cal. Rptr. 779 (1st Dist. 1988); see also [In re David W.](#), 62 Cal. App. 3d 840, 847, 133 Cal. Rptr. 342 (2d Dist. 1976) (the court ap-

pointed a special master who confirmed the secret location of the VIN and made disclosure of that location immaterial); see also *People v. Walker*, 230 Cal. App. 3d 230, 236–238, 282 Cal. Rptr. 12 (2d Dist. 1991).)

In a criminal case in which a search is made pursuant to a warrant valid on its face, the prosecution need not reveal to the defense 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. No adverse finding is to be made as a result. ([Evidence Code § 1042\(b\)](#).)

In any 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 is admissible on the issue of reasonable cause to make an arrest or search, without a warrant, without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based on evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in the judge's discretion does not require such disclosure. No adverse finding is to be made as a result. ([Evidence Code § 1042\(c\)](#); *People v. Lanfrey*, 204 Cal. App. 3d 491, 506, 251 Cal. Rptr. 189 (6th Dist. 1988).)
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H. Privileges For Official Information and Informer Identity

§ 5:78. Sealed affidavits in search warrants

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West's Key Number Digest, [Records](#) 🔑 32

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[C.J.S., Criminal Law §§ 757 to 766](#)

[C.J.S., Records §§ 65, 67 to 75](#)

[C.J.S., Searches and Seizures §§ 198, 303 to 305, 307](#)

To protect the identity of an informant, it may be necessary for the court to permit the prosecution to withhold not only the informant's name but also details of events contained in the informant's statement or affidavit that may reveal the informant's identity. ([People v. Hobbs](#), 7 Cal. 4th 948, 30 Cal. Rptr. 2d 651, 873 P.2d 1246 (1994).) In a search conducted pursuant to a warrant valid on its face, the court may seal the affidavit of an informant offered on the issue of probable cause and may determine the reliability of the informant at an in camera proceeding. ([People v. Flannery](#), 164 Cal. App. 3d 1112, 210 Cal. Rptr. 899 (1st Dist. 1985).)

The only portion of the affidavit that may be sealed is that which would necessarily reveal the informant's identity. ([Swanson v. Superior Court](#), 211 Cal. App. 3d 332, 338, 259 Cal. Rptr. 260 (1st Dist. 1989).) In [People v. Hobbs](#), 7 Cal. 4th 948, 971, 30 Cal. Rptr. 2d 651, 873 P.2d 1246 (1994), the Supreme Court held that if the necessity requirement is met, an entire search warrant affidavit may be sealed.

If all or a portion of the affidavit is sealed and the defense moves to unseal it, the court must first determine if the sealing was proper. If so, the court must then examine the affidavit for possible inconsistencies and inform

the prosecution what materials, including relevant police reports and witnesses, are required for this task. The court may find it appropriate to call and question the affiant and the informant. These proceedings are to be conducted in camera. (*People v. Seibel*, 219 Cal. App. 3d 1279, 1298, 269 Cal. Rptr. 313 (1st Dist. 1990).) In *People v. Hobbs*, 7 Cal. 4th 948, 967, 30 Cal. Rptr. 2d 651, 873 P.2d 1246 (1994), the Supreme Court adopted the *Seibel* procedure. *Hobbs* also sets forth the precise steps to be followed when a defendant seeks to traverse a warrant pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), or challenge the sufficiency of the warrant and the affidavit is sealed, in whole or in part. (*Hobbs*, 7 Cal. 4th at 972, fn. 6.) If the court discovers material misrepresentations or inconsistencies in the sealed affidavit it should order disclosure of them to the defense. (Compare *People v. Luttenberger*, 50 Cal. 3d 1, 24, 265 Cal. Rptr. 690, 784 P.2d 633 (1990).)

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I. Privilege For Peace Or Custodial officer Personnel Records

§ 5:79. What steps must be taken to obtain police personnel records?

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[C.J.S., Discovery §§ 86, 91](#)

[C.J.S., Witnesses §§ 361 to 368, 371](#)

The Supreme Court, in *Pitchess v. Superior Court*, held that a criminal defendant who asserts self-defense to a charge of assault on a peace officer could discover information in police personnel files relevant to that defense. (*Pitchess v. Superior Court*, 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (1974).) In 1979, comprehensive legislation was enacted regulating these so-called *Pitchess* motions in both civil and criminal cases. Only by complying with the precise procedural requirements set forth in the Evidence Code may a party obtain these otherwise privileged records. Requiring a defendant to so comply does not interfere with the constitutional duty imposed by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) to disclose to the defense any favorable evidence that is material on the issue of guilt and punishment. (*City of Los Angeles v. Superior Court*, 29 Cal. 4th 1, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (2002); *People v. Gutierrez*, 112 Cal. App. 4th 1463, 6 Cal. Rptr. 3d 138 (2d Dist. 2003).)

The privilege set out in §§ 1043 to 1045 applies to retired police officers' personnel records compiled while they were on active duty. (*Davis v. City of Sacramento*, 24 Cal. App. 4th 393, 400, 29 Cal. Rptr. 2d 232 (3d

[Dist. 1994](#).) When a former law enforcement officer testifies against a police department in a lawsuit, this privilege does not prevent the law enforcement agency that employed the officer from allowing its lawyer to review the officer's personnel records and evaluate their possible use for impeachment at trial. ([Michael v. Gates](#), 38 Cal. App. 4th 737, 743–745, 45 Cal. Rptr. 2d 163 (2d Dist. 1995).)

[Evidence Code §§ 1043 et seq.](#) sets forth the sole procedure by which a party may obtain these personnel records or the personnel records of custodial officers. Thus, when a party in a civil case sought discovery of such records under [Code of Civil Procedure § 2031](#), and the county failed to assert its privilege in a timely fashion, discovery was denied because the plaintiff was required to follow the specific motion procedure set forth in [§ 1043](#). ([County of Los Angeles v. Superior Court](#), 219 Cal. App. 3d 1605, 1610–1611, 269 Cal. Rptr. 187 (2d Dist. 1990).) A party may not rely on the California Public Records Act, specifically [Government Code § 6254\(f\)](#), to obtain police personnel records. ([County of Los Angeles v. Superior Court](#), 18 Cal. App. 4th 588, 600, 22 Cal. Rptr. 2d 409 (2d Dist. 1993).) In [City of Hemet v. Superior Court](#), 37 Cal. App. 4th 1411, 44 Cal. Rptr. 2d 532 (4th Dist. 1995), the court found that the reports of an internal investigation of a police agency placed in the personnel files of police officers are protected from disclosure under the Public Records Act by subdivision (k) of that act. ([City of Hemet v. Superior Court](#), 37 Cal. App. 4th 1411, 1422–1423, 44 Cal. Rptr. 2d 532 (4th Dist. 1995).)

Comment

[Sections 1043–1045](#) limit the *discovery* of officer personnel records. It remains an open question “whether a party that legitimately obtains personnel records subject to such protection without having first filed a *Pitchess* motion (for example by receiving copies from the involved officer) is nonetheless precluded from offering that information into evidence or using it in cross-examination” ([Zanone v. City of Whittier](#), 162 Cal.App.4th 174, 187, fn. 14.)

[Penal Code section 832.8](#) defines personnel records as those relating to any of a list of enumerated categories of information, including “personnel data, medical history and employee discipline.” ([Zanone v. City of Whittier](#), 162 Cal.App.4th 174, 187–188 (2008).) In [Commission on Police Officer Standards and Training v. Superior Court](#), 42 Cal.4th 278, 293, 64 Cal.Rptr.3d 661, 165 P.3d 462 (2007), the Supreme Court ruled that only information falling into one of the listed categories is a “personnel record” subject to the *Pitchess* procedure. Simply because other information is located in the personnel file does not create a “personnel record” pursuant to the Evidence Code provisions. The conditional privilege protects information in a peace officer's personnel file, including home address, even if the information could be obtained from the officer or elsewhere. ([Hackett v. Superior Court](#), 13 Cal. App. 4th 96, 101, 16 Cal. Rptr. 2d 405 (2d Dist. 1993).) “The statutes which protect personnel records and information from such records also protect the identical information about personnel history which is within the officers' personal recollections. There would be no purpose to protecting such information in the personnel records if it could be obtained by the simple expedient of asking the officers for their disciplinary history orally.” ([City of San Diego v. Superior Court](#), 136 Cal. App. 3d 236, 239, 186 Cal. Rptr. 112 (4th Dist. 1981).)

The party seeking discovery must file a written motion with the appropriate court with notice to the agency (and its legal counsel) with custody and control of the records. ([Evidence Code § 1043\(a\)](#).)

[Evidence Code § 1043\(b\)](#), requires that the motion include:

- Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace officer whose records are sought, the governmental agency that has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard;
- A description of the type of records or information sought; and
- 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 on reasonable belief that the governmental agency identified has either the records or information from them. Allegations by counsel on “information and belief” may establish good cause for discovery under § 1043(b)(3), without a claim of personal knowledge. (*City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 86, 260 Cal. Rptr. 520, 776 P.2d 222 (1989).)

A criminal defense attorney may file a *Pitchess* motion where the declaration is sealed. In *Garcia v. Superior Court*, a defense attorney asserted the declaration contained information protected by the attorney-client and work product privileges and should be sealed. The Supreme Court concluded the trial court may permit sealing if, after following a prescribed procedure, it determines sealing is necessary. (*Garcia*, 42 Cal.4th 63, 73.) Before serving the declaration on the City Attorney, it should be redacted to keep the appropriate material confidential. (*Garcia* at pp. 76–77.)

Comment

Often, though not always, these motions are made in cases where the defendant is charged with a violent assault on a police officer. Counsel then alleges that the officers used excessive force, that their force justified the defendant's conduct, that the officers' records will reveal other examples of such conduct, and that this other conduct will be admissible character evidence under § 1101. (See *City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 79, 260 Cal. Rptr. 520, 776 P.2d 222 (1989), in which similar allegations were found sufficient.) In any case where the party seeking disclosure is alleging excessive force by a peace officer in connection with the arrest of that party, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested. (*Evidence Code* § 1046.)

A defense affidavit that alleges simply that the defendant may contend at trial that the police used excessive force is insufficient. (*People v. Navarro*, 84 Cal. App. 3d 355, 359, 146 Cal. Rptr. 672 (2d Dist. 1978).) *Navarro* involved a case where the defense sought prior complaints of excessive force to help prove that the defendant had been coerced into providing a urine sample, which then served as the evidentiary basis for the criminal prosecution for being under the influence of a controlled substance. (*Health and Safety Code* § 11550.)

A court has found sufficient materiality for discovery of police records in a case in which a murder suspect alleged that his confession was coerced. He sought records of prior complaints of violence against the interrogating officers on the theory that the records would lead to admissible evidence that the officers had a habit or custom of using excessive force to obtain confessions. (*People v. Memro*, 38 Cal. 3d 658, 684, 214 Cal. Rptr. 832, 700 P.2d 446 (1985).) Personnel records that show acts of dishonesty, including a history of misstating or fabricating facts in police reports, are discoverable. (*People v. Husted*, 74 Cal. App. 4th 410, 416, 87 Cal. Rptr. 2d 875 (5th Dist. 1999); accord, *People v. Johnson*, 118 Cal. App. 4th 292, 296–305, 12 Cal. Rptr. 3d 885 (4th Dist. 2004).) In *City of San Jose v. Superior Court*, the Court of Appeal seemed to approve the concept of a criminal

defendant obtaining discovery of police officer records to support a contention that a claimed consensual search was not, in fact, consensual. The defendant sought records relating to complaints of “any instance of relevant conduct, including: illegal search and seizure, improper handling of evidence, failure to follow standard and/or outlined police procedure, neglect of duty, dishonesty or deceit in the performance of duty, false arrest, fabrication of evidence or charges, or untruthfulness in the preparation of offense reports or while testifying under oath.” (*City of San Jose v. Superior Court*, 67 Cal. App. 4th 1135, 1138–1139, 79 Cal. Rptr. 2d 624 (6th Dist. 1998).) The discovery was denied due to the defendant's failure to establish good cause by providing a “‘specific factual scenario’ establishing a ‘plausible factual foundation’ ” for the allegations of police misconduct. (*City of San Jose v. Superior Court*, 67 Cal. App. 4th 1135, 1146–1147, 79 Cal. Rptr. 2d 624 (6th Dist. 1998), citing *City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222 (1989).) In *Warrick v. Superior Court*, 35 Cal. 4th 1011, 29 Cal. Rptr. 3d 2, 112 P.3d 2 (2005), the court noted that this test “requires a defendant seeking Pitchess discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.” (at p. 1021, 29 Cal. Rptr. 3d 2, 112 P.3d 2.) In *Warrick*, the defendant alleged officers falsely accused him of discarding a bag of cocaine. This allegation entitled him to a court review of the “officers' personnel records relating to false arrests, planting evidence, fabricating police reports or probable cause and committing perjury.” (*Warrick*, 35 Cal.4th at p. 1027; *Uybingco v. Superior Court*, 162 Cal.App.4th 1043, 1050–1051 (2008).)

In *California Highway Patrol v. Superior Court (CHP)*, the court noted that only documentation of past officer misconduct which is *similar* to the misconduct alleged by the defendant in the pending litigation is relevant and therefore subject to discovery.” (*California Highway Patrol v. Superior Court*, 84 Cal. App. 4th 1010, 1021, 101 Cal. Rptr. 2d 379 (6th Dist. 2000).) (Emphasis in original.) In *CHP*, the court found that defendant's motion justified the disclosure only of records of excessive force or falsified reports by one particular officer. Personnel records showing other types of misconduct were not discoverable, even if they reflected nonfelony acts of moral turpitude, admissible to impeach a witness under the *Wheeler* case. (*People v. Wheeler*, 4 Cal. 4th 284, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (1992), discussed in § 3:58 of this volume.) Simply alleging that “officer credibility is relevant because all officers are dishonest and are likely to lie about their fellow officers' use of excessive force” is insufficient to justify disclosure of personnel records revealing nonfelony acts of moral turpitude. (*California Highway Patrol v. Superior Court*, 84 Cal. App. 4th 1010, 1025, 101 Cal. Rptr. 2d 379 (6th Dist. 2000).) *Hustead*, *City of San Jose*, and *CHP* applied the standard set forth in *City of Santa Cruz*, but reached different results because of the different declarations filed in each case.

The good cause requirement in § 1043 is a “relatively low threshold for discovery.” *City of Santa Cruz*, 49 Cal. 3d at 83. Establishing a “plausible factual foundation” does not require the defense to show to a reasonable probability that its version of events is true. Instead, “a plausible scenario of officer misconduct is one that might or could have occurred.” (*Warrick v. Superior Court*, 35 Cal. 4th 1011, 1026, 29 Cal. Rptr. 3d 2, 112 P.3d 2 (2005).) The ease of establishing the good cause requirement is balanced by the provisions protecting officer privacy that govern the in camera hearing. (*City of Santa Cruz*, 49 Cal. 3d at 83.) If the court concludes the defendant has complied with the statutory requirements and shown good cause, the custodian of records must produce “all documents ‘potentially relevant’ to the defendant's motion. [Citation.]” (*People v. Mooc*, 26 Cal. 4th 1216, 1226, 27 Cal. 4th 101a, 114 Cal. Rptr. 2d 482, 36 P.3d 21 (2001).) The custodian need not produce the officer's entire personnel record, but only those documents in the file that are “potentially responsive to the defendant's specific request.” (*Mooc*, 26 Cal. 4th at 1230.) “[W]here the custodian of records does not produce the

entire personnel file for the court's review, he or she must establish on the record what documents ... were included in the complete personnel file ... In addition, if it is not readily apparent from the nature of the documents that they are nonresponsive or irrelevant to the discovery request, the custodian must explain his or her decision to withhold them.'” (*People v. Wycoff*, 164 Cal.App.4th 410, 414–415 (2008).) The trial court then reviews the personnel records in chambers, pursuant to [Evidence Code § 915](#) ([Evidence Code § 1045\(b\)](#)), in the presence of the custodian and others approved by the custodian. (*Mooc*, 26 Cal. 4th at 1226.) The trial court should inquire of the custodian if any documents or categories of documents in the personnel file were not produced. (*Mooc*, 26 Cal. 4th at 1229.) The trial court should then make a record of the documents examined. A court reporter should record the statements of the custodian and the trial judge. (*Mooc*, 26 Cal. 4th at 1229.) The transcript is then sealed.

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[C.J.S., Discovery §§ 86, 91](#)

[C.J.S., Witnesses §§ 361 to 368, 371](#)

Pursuant to [Evidence Code § 1045\(b\)](#), the court reviewing the records at an in camera hearing should exclude from disclosure:

- Complaints occurring more than five years prior to the event involved in the subject litigation. (This limitation is not abrogated by the defendant's right to a fair trial. [City of Los Angeles v. Superior Court](#), 29 Cal. 4th 1, 10–17, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (2002);)
- In any criminal proceeding, the “conclusions” of any officer investigating a complaint; and
- Facts “so remote as to make disclosure of little or no practical benefit.”

Discipline imposed as a result of internal police investigations should be disclosed, but not the reasoning process by which the investigating body reached its outcome. ([City of San Jose v. Superior Court](#), 5 Cal. 4th 47, 54–57, 19 Cal. Rptr. 2d 73, 850 P.2d 621 (1993).)

Where the litigation concerns policies or a pattern of conduct of the employing agency, the court must consider whether the information sought might be obtained from other records that would not necessitate the disclosure of individual personnel records. ([Evidence Code § 1045\(c\)](#).)

With any complaint that is to be disclosed, disclosure is limited to the name, address, and phone number of the complainant and witnesses, and the date of the incident. ([City of Azusa v. Superior Court](#), 191 Cal. App. 3d 693, 696–697, 236 Cal. Rptr. 621 (2d Dist. 1987).) Only if the moving party later makes a showing that the witnesses are unavailable for interview or unable to remember the details of the events should the actual complaints be turned over. ([City of Azusa v. Superior Court](#), 191 Cal. App. 3d 693, 697, 236 Cal. Rptr. 621 (2d Dist. 1987).) In addition, the actual complaints should be turned over if the defendant contacts the complaining witness and that witness refuses to cooperate. ([Alvarez v. Superior Court](#), 117 Cal. App. 4th 1107, 1112–1113, 12 Cal. Rptr. 3d 252 (2d Dist. 2004).) The limitations on disclosure of the substance of the complaint apply, however, only when a party seeks to obtain third-party complaints to prove an officer has a history of engaging in misconduct. When a plaintiff in a civil action alleging that an officer used undue force seeks disclosure of the internal affairs' investigation into that very incident, and makes a sufficient showing, the entire report is discoverable, though the investigating officer's conclusions should be redacted. ([Haggerty v. Superior Court](#), 117 Cal. App. 4th 1079, 1088–1091, 12 Cal. Rptr. 3d 467 (4th Dist. 2004).)

When the defense seeks disclosure of statements by psychiatrists or psychologists contained in the personnel files, those records should be evaluated in camera. If the court determines that they are unprivileged (see, e.g., [Evidence Code § 1024](#), discussed [§ 5:66](#)), they may be disclosed. ([People v. Memro](#), 38 Cal. 3d 658, 688–689, 214 Cal. Rptr. 832, 700 P.2d 446 (1985).) The statutory scheme set forth in §§ 1043 to 1047 does not affect the right to access to an officer's medical or mental history where such access would otherwise be available due to the patient-litigant exceptions contained in sections 996 and 1016 (discussed in [§ 5:53](#)). ([Evidence Code § 1044](#).)

Discovery of personnel records of nonvictim officers may also be granted. ([Larry E. v. Superior Court](#), 194 Cal. App. 3d 25, 239 Cal. Rptr. 264 (2d Dist. 1987).) However, records of peace officers, including supervisors who were neither present during the arrest nor had any contact with the party seeking disclosure between arrest and booking, may not be disclosed. ([Evidence Code § 1047](#).) In *Davis v. City of Sacramento*, the court interpreted [§ 1047](#) to apply where a suit results from the fatal shooting of a person during his violent confrontation with the police. Plaintiffs argued the discovery limitation was inapplicable because no arrest or booking had ever occurred. The court rejected this as “absurd”: “Plaintiffs cannot reasonably argue decedent would not have been arrested on one or more charges had his resistance been overcome before he was [fatally] shot Application of [Evidence Code § 1047](#) does not turn on whether a suspect survives a confrontation with police long enough to be arrested.” (*Davis v. City of Sacramento*, 24 Cal. App. 4th 393, 400, 29 Cal. Rptr. 2d 232 (3d Dist. 1994).) In *Alt v. Superior Court*, the court found that [§ 1047](#) did not preclude discovery of personnel records unless “the request for discovery involves an issue concerning an arrest or postarrest/prebooking incident or their functional equivalent.” (*Alt v. Superior Court*, 74 Cal. App. 4th 950, 952, 88 Cal. Rptr. 2d 530 (3d Dist. 1999).) It permitted Alt to seek discovery of the personnel records of a fellow officer who had accused him of insurance fraud. A defendant who files an appropriate *Pitchess* motion is entitled to obtain information about an officer's prior employment by other police agencies during the five-year period. (*Fletcher v. Superior Court*, 100 Cal. App. 4th 386, 123 Cal. Rptr. 2d 99 (1st Dist. 2002).)

Proposition 115 did not repeal the discovery provisions of §§ 1043 to 1045. (*Albritton v. Superior Court*, 225 Cal. App. 3d 961, 275 Cal. Rptr. 314 (1st Dist. 1990).)

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I. Privilege For Peace Or Custodial officer Personnel Records

§ 5:81. Protective orders**West's Key Number Digest**Wests Key Number Digest, [Pretrial Procedure](#) 🔑 41, 413Wests Key Number Digest, [Criminal Law](#) 🔑 627.5**Legal Encyclopedias**[C.J.S., Criminal Law §§ 434, 487 to 492, 596 to 597, 663 to 680, 682, 686 to 688, 691 to 697, 700 to 716, 720 to 733, 736, 1636, 1638 to 1639](#)[C.J.S., Discovery §§ 12, 47, 77, 106 to 108](#)

The court may make any order that justice requires to protect the officer or agency from unnecessary annoyance, embarrassment, or oppression. ([Evidence Code § 1045\(d\)](#).) Whenever disclosure of these records is ordered, the court shall order that the records may not be used for any purpose other than a court proceeding pursuant to applicable law. ([Evidence Code § 1045\(e\)](#).) In [Alford v. Superior Court](#), 29 Cal. 4th 1033, 1039–1043, 130 Cal. Rptr. 2d 672, 63 P.3d 228 (2003), the Supreme Court held that such a protective order precludes use of the disclosed information for any purpose beyond the court proceeding in which disclosure was ordered. However, “[w]hen complainant information has been ordered disclosed to counsel who when later representing a different defendant succeeds under *Pitchess* in discovering the same complainant information relating to the same officer, counsel may then refer to the derivative information uncovered as part of the earlier followup investigation.” ([Chambers v. Superior Court](#), 42 Cal.4th 673, 681 (2007).)

Alford also held that the information ordered produced should not be provided to the prosecution unless it filed its own *Pitchess* motion. (29 Cal. 4th at 1045–1046, 130 Cal. Rptr. 2d 672, 63 P.3d 228.) In [Becerrada v. Superior Court](#), 131 Cal. App. 4th 409, 414–415, 31 Cal. Rptr. 3d 735 (2d Dist. 2005), the court held that it was permissible for the trial court to provide an individual officer with the information ordered disclosed from that officer's personnel file.

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J. Miscellaneous Privileges

§ 5:82. Privilege to protect secrecy of vote

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West's Key Number Digest, [Elections](#)  28

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[C.J.S., Elections § 201\(1\)](#)

A person has a privilege to refuse to disclose the tenor of his or her vote at a public election where the voting is by secret ballot unless the person voted illegally or previously made an unprivileged disclosure of the tenor of his or her vote. ([Evidence Code § 1050](#); compare [California Const., art. II, § 7](#): “Voting shall be secret.”)

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§ 5:83. Privilege to protect trade secrets

West's Key Number Digest

West's Key Number Digest, [Pretrial Procedure](#) 🔑 33

Legal Encyclopedias

[C.J.S., Discovery § 29](#)

If the owner, owner's 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. ([Evidence Code § 1060](#).)

Disclosure of otherwise privileged matters may be necessary to uncover unfair competition, fraud, or revelation of the improper use of dangerous materials. ([Evidence Code § 1060](#), Comment.)

There is no duty imposed on an employee or other party to a trade secret to claim the owner's privilege against disclosure. Thus, the statutory protection would be “nugatory” unless an employer is permitted to contractually require an employee to assert the employer's privilege. ([ITT Telecom Products Corp. v. Dooley](#), 214 Cal. App. 3d 307, 320, 262 Cal. Rptr. 773 (6th Dist. 1989).)

Copyright and patent laws provide adequate protection for many matters that might otherwise be classified as trade secrets. Granting the privilege to these items would not further protect the owner but would hinder the truth-finding function of the court. Thus, these items are not covered. ([Evidence Code § 1060](#), Comment.)

Comment

When a party seeks discovery of an alleged trade secret, the following occurs. First, the party claiming the privilege has the burden of establishing its existence. Second, “the party seeking discovery must make a prima facie, particularized showing that the information sought is necessary or relevant to the proof of, or defense against, a

material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit.” Third, the holder of the privilege must demonstrate any disadvantages of a protective order. The court must then consider any proposed less intrusive alternatives to disclosure of the trade secret. The burden, however, is on the trade secret holder to show that an alternative to disclosure “will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure.” ([Bridgestone/Firestone, Inc. v. Superior Court](#), 7 Cal. App. 4th 1384, 1393, 9 Cal. Rptr. 2d 709 (1st Dist. 1992).)

[Evidence Code § 1061](#) sets forth the procedure for asserting the trade secret privilege in a criminal proceeding. Section 1062 sets forth the procedure for excluding the public from a criminal proceeding to prevent disclosure of a trade secret. Section 1063 sets forth the procedure for sealing articles covered by a protective order entered under [§ 1060](#) or [§ 1061](#). [Sections 1061, 1062, and 1063](#) were enacted in 1990; so far no appellate cases have considered them.

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§ 5:84. Immunity of newsperson from contempt

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [196.1](#), [21](#)

Legal Encyclopedias

[C.J.S.](#), [Witnesses](#) §§ [2](#), [53](#) to [56](#), [59](#) to [61](#), [358](#), [370](#) to [371](#)

Comment

[Evidence Code § 1070](#) has often been referred to as the newsperson's privilege. In fact, it is not a privilege but an immunity from contempt. Thus, it does not protect against other sanctions. ([Delaney v. Superior Court](#), 50 Cal. 3d 785, 797, 268 Cal. Rptr. 753, 789 P.2d 934 (1990).)

Moreover, it applies in not one but two situations. First, it states that a newsperson cannot be held in contempt for refusing to disclose the source of information. Second, it states that a newsperson cannot be held in contempt for refusing to disclose unpublished information, which is information not disseminated to the public by the newsperson whether or not any related information has been disseminated. Unpublished information includes, but is not limited to, 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 on or related to such material has been disseminated. ([Evidence Code § 1070\(a\)](#) and (c).)

“Unpublished information” includes a newsperson's unpublished, non-confidential eyewitness observations of an occurrence in a public place if the observation is made while acting as a newsperson. ([Delaney v. Superior Court](#), 50 Cal. 3d 785, 797, 268 Cal. Rptr. 753, 789 P.2d 934 (1990).) There is no requirement that the unpublished information be acquired in confidence. ([Delaney v. Superior Court](#), 50 Cal. 3d 785, 797, 268 Cal. Rptr. 753, 789 P.2d 934 (1990).) In *Delaney*, the unpublished information consisted of the observations of two report-

ers who were accompanying members of a police task force when the police searched Mr. Delaney and seized contraband from him.

A newsperson is “[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.” ([Evidence Code § 1070\(a\)](#).) It also includes “a radio or television news reporter or other person connected with or employed by a radio or television station.” ([Evidence Code § 1070\(b\)](#).) A freelance journalist qualifies for protection as a newsperson. ([People v. Von Villas](#), 10 Cal. App. 4th 201, 231–232, 13 Cal. Rptr. 2d 62 (2d Dist. 1992).)

In [O'Grady v. Superior Court](#), 139 Cal. App. 4th 1423, 1456–1480, 44 Cal. Rptr. 3d 72 (6th Dist. 2006), the court applied the shield law to the publishers of web sites that had allegedly published trade secrets belonging to Apple Computer. The court rejected Apple's request that it find the publication did not occur while engaged in “legitimate journalistic purposes” because, Apple argued, the publication of a verbatim confidential document involved no exercise of “judgmental discretion.” ([O'Grady](#), 139 Cal. App. 4th at 1457.) Because the web site engaged in an “open and deliberate publication on a news-oriented web site of news gathered for that purpose by the site's operator,” the persons involved were covered by the shield law. ([O'Grady](#), 139 Cal. App. 4th at 1459–1460.) The “publications” were covered by the law either because they were a “magazine” ([O'Grady](#), 139 Cal. App. 4th at 1460–1461) or “other periodical publication.” ([O'Grady](#), 139 Cal. App. 4th at 1461–1466.)

The protection of this shield law yields to a criminal defendant who shows that nondisclosure would deprive the defendant of the federal constitutional right to a fair trial. ([Delaney v. Superior Court](#), 50 Cal. 3d 785, 805, 268 Cal. Rptr. 753, 789 P.2d 934 (1990).)

Delaney requires the court in a criminal case to engage in a balancing test ([Delaney v. Superior Court](#), 50 Cal. 3d 785, 797, 809–811, 268 Cal. Rptr. 753, 789 P.2d 934 (1990)):

- The defendant has the initial burden of showing a reasonable possibility that the information will materially assist the defense. “One example in capital cases where we have recognized the evidence might meet the threshold test and is necessary to a defendant's constitutional right to a fair trial, is his ability to ‘establish mitigating circumstances relevant to the penalty determination.’ ” ([People v. Ramos](#), 34 Cal. 4th 494, 526, 21 Cal. Rptr. 3d 575, 101 P.3d 478 (2004), cert. denied, 126 S. Ct. 91 (U.S. 2005).) The showing need not be detailed or specific, but it may not be based on mere speculation. See [People v. Sanchez](#), 12 Cal. 4th 1, 48–57, 47 Cal. Rptr. 2d 843, 906 P.2d 1129 (1995); [People v. Vasco](#), 131 Cal. App. 4th 137, 153–156, 31 Cal. Rptr. 3d 643 (4th Dist. 2005). Both *Sanchez* and *Vasco* found defendant's threshold showing inadequate because it was too speculative.
- Once the criminal defendant has made this showing, the court then considers the importance of protecting the information. The factors to be considered are:
 - Whether the unpublished information is confidential or sensitive,
 - The interests protected by the statutory immunity,
 - The importance of the information to the criminal defendant, and

- Whether an alternative source exists for the unpublished information. Where the defendant is the source relied on by the newsperson in the published story, many of the reasons for upholding the immunity disappear. (See *People v. Vasco*, 131 Cal. App. 4th 137, 152–153, 31 Cal. Rptr. 3d 643 (4th Dist. 2005).) *Delaney* held this factor may only be considered in the balancing stage (*Delaney*, 50 Cal. 3d at 810), but *Sanchez* declined to address “whether the fact the defendant himself was the source of the information rendered it outside the protection of the shield law.” (*Sanchez*, 12 Cal. 4th at 56 n.3.)

An in camera hearing will be necessary if the information is confidential or sensitive.

In *Miller v. Superior Court*, the Supreme Court turned aside the attempt to create a parallel limitation for the prosecution. The court rejected the contention that state due process (guaranteed to the prosecution by *California Const., art. I, § 29*) overrode the shield law and justified holding a newsperson in contempt for refusing to surrender unpublished information. (*Miller v. Superior Court*, 21 Cal. 4th 883, 89 Cal. Rptr. 2d 834, 986 P.2d 170 (1999).) While *Delaney* concerns a newsperson who refused to testify for the defense, and *Miller* one who refused to testify for the prosecution, *Fost v. Superior Court* involved something of a hybrid. (*Fost v. Superior Court*, 80 Cal. App. 4th 724, 95 Cal. Rptr. 2d 620 (1st Dist. 2000).) In *Fost*, a newsperson was called by the defense and testified about “published information.” On cross-examination by the prosecution, the witness invoked the privilege and refused to answer certain questions about “unpublished information.” Normally the refusal to submit to cross-examination would require the striking of the direct testimony. (See the discussion in § 3:22.) In *Fost*, however, the Court of Appeal ruled that a trial judge should not grant such a request without permitting the defense to show that striking the newsperson's testimony would violate the right to a fair trial. “The requisite judicial inquiry is that set forth in *Delaney* ... except that the threshold question relates to the importance to the defense of the ‘published information’ elicited ... by the defendant that would be excluded or stricken if the ‘unpublished information’ sought by the People were not disclosed.” (*Fost v. Superior Court*, 80 Cal. App. 4th 724, 738, 95 Cal. Rptr. 2d 620 (1st Dist. 2000).)

In a civil case, the immunity from contempt is absolute when a newsperson refuses to turn over unpublished information. (*New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 461–462, 273 Cal. Rptr. 98, 796 P.2d 811 (1990).)

Since the shield law is not a privilege but an immunity from contempt, the newsperson may be subject to other sanctions for a failure to disclose unpublished information. For a newsperson who is a party and refuses to disclose, numerous sanctions exist, including entry of judgment against the party. (*Mitchell v. Superior Court*, 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (1984).) Even a nonparty newsperson is subject to noncontempt sanctions for the failure to disclose. (See, e.g., *Code of Civil Procedure § 1992*, penalizing disobedience to a subpoena; *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 462–464, 273 Cal. Rptr. 98, 796 P.2d 811 (1990).)

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Chapter

6. Evidence Affected Or Excluded By Extrinsic Policies

A. Restrictions On Using Character evidence In Civil Cases

§ 6:1. Limitations on using character evidence to prove conduct in civil case

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  106, 129 to 141, 152

Legal Encyclopedias

[C.J.S.](#), [Evidence](#) §§ 495 to 505, 760 to 773, 783 to 788

Three kinds of evidence may be used to prove a person's character: (1) opinion evidence; (2) reputation evidence; and (3) evidence of specific instances of the person's conduct. ([Evidence Code § 1100](#).) Reputation evidence is distinguished from opinion evidence as a matter of perspective: reputation is the community's view of the person; opinion is the witness's view. Reputation evidence is, of course, hearsay, but a statutory exception exists for it. ([Evidence Code § 1324](#).) Character evidence is relevant in three situations ([Evidence Code § 1100](#), Comment):

- To establish witness credibility or the lack thereof. The use of character to prove credibility is limited by [Evidence Code §§ 780 to 790](#), which are discussed in §§ [3:42](#) to [3:53](#).
- To show, circumstantially, conduct in conformity with character. The use of character to prove conduct is limited by [Evidence Code §§ 1101 to 1109](#) and is discussed in this chapter.
- When character is an ultimate fact in dispute. In this situation, any otherwise admissible evidence may be introduced to prove it, without restriction. ([Evidence Code § 1100](#), Comment.) Libel and slander cases are examples where a party's character may, itself, be an issue. In wrongful discharge suits as well, the plaintiff's character or personality in the workplace may become an issue. (See, e.g., [Pugh v. See's Candies, Inc.](#), 203 Cal. App. 3d 743, 757, 250 Cal. Rptr. 195 (1st Dist. 1988).)

Subject to certain significant exceptions, in a civil case, character evidence cannot be used to prove conduct

on a specified occasion. ([Evidence Code § 1101\(a\)](#).) “While [section 1101](#) usually arises in criminal cases, the statute applies in civil cases as well.” ([Holdgrafer v. Unocal Corp.](#), 160 Cal.App.4th 907, 928 fn. 10 (2008).) Thus, in a wrongful death case, the plaintiff could not prove that the defendant driver had negligently caused several other accidents in order to prove that he was negligent in the present case. ([Allen v. Toledo](#), 109 Cal. App. 3d 415, 419, 167 Cal. Rptr. 270 (4th Dist. 1980).) However, the exclusion provided for in [§ 1101\(a\)](#) is subject to numerous exceptions. For example, in *Allen*, the evidence of past negligence was admissible to prove that the driver's father was liable under a negligent entrustment theory. A discussion of certain other exceptions to [Evidence Code § 1101\(a\)](#), are discussed in §§ [6:2](#) to [6:7](#).

In a civil case, evidence of a person's character with respect to care or skill is inadmissible to prove the quality of the individual's conduct on a specific occasion. ([Evidence Code § 1104](#).) Thus, evidence that a person is a competent or skilled physician (or the reverse) is inadmissible to prove that he or she was (or was not) negligent on a particular occasion. ([Hinson v. Clairemont Community Hospital](#), 218 Cal. App. 3d 1110, 1118–1122, 267 Cal. Rptr. 503 (4th Dist. 1990); [Bowen v. Ryan](#), 163 Cal.App.4th 916, 924 (2008).) Under [§ 1104](#), if an employer admits vicarious liability for the tort (if any) committed by its employee, evidence that the employee had been involved in prior accidents introduced to show negligent entrustment should be excluded. ([Jeld-Wen, Inc. v. Superior Court](#), 131 Cal. App. 4th 853, 869–870, 32 Cal. Rptr. 3d 351 (4th Dist. 2005).)

The purpose of the rules limiting character evidence is to prevent collateral issues from: (1) distracting the jury from what was actually done on the particular occasion; and (2) consuming undue time. ([Evidence Code §§ 1100 and 1104](#), Comments.)

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6. Evidence Affected Or Excluded By Extrinsic Policies

A. Restrictions On Using Character evidence In Civil Cases

§ 6:2. Introducing evidence of party's misconduct in civil case to prove any fact in issue—In general

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West's Key Number Digest, [Evidence](#)  [106](#), [129](#) to [141](#), [152](#)

Legal Encyclopedias

[C.J.S., Evidence §§ 495 to 505, 760 to 773, 783 to 788](#)

Evidence that a person committed a crime, civil wrong, or other act, when relevant to prove a fact in dispute in the matter other than his or her disposition to commit such an act, is admissible in a civil case. ([Evidence Code § 1101\(b\)](#).)

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A. Restrictions On Using Character evidence In Civil Cases

§ 6:3. Introducing evidence of party's misconduct in civil case to prove any fact in issue—To contradict claim of mistake or accident

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 106, 129 to 141, 152

Legal Encyclopedias

[C.J.S., Evidence §§ 495 to 505, 760 to 773, 783 to 788](#)

Prior misconduct can be introduced to contradict a claim of mistake or accident. In a suit for injuries allegedly suffered as a result of improper police conduct, the plaintiff was entitled to show prior misconduct by the officer involved, insofar as it was relevant to the officer's intent and insofar as it disproved the officer's contention that the injury was inflicted inadvertently. ([Andrews v. City and County of San Francisco](#), 205 Cal. App. 3d 938, 945, 252 Cal. Rptr. 716 (1st Dist. 1988).)

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A. Restrictions On Using Character evidence In Civil Cases

§ 6:4. Introducing evidence of party's misconduct in civil case to prove any fact in issue—To show state of mind

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 129 to 141

Legal Encyclopedias

[C.J.S., Evidence §§ 760 to 773, 783 to 788](#)

When fraud is alleged, evidence of other frauds or fraudulent misrepresentations of like character, committed by the same parties at or near the same time, is admissible to prove intent. ([Wright v. Rogers](#), 172 Cal. App. 2d 349, 363, 342 P.2d 447 (2d Dist. 1959).)

Evidence that on a former occasion a defendant committed similar misconduct can also be admitted to prove liability for punitive damages. In *Weeks v. Baker & McKenzie*, the individual defendant, Greenstein, was accused of sexual harassment. Evidence of his misconduct with other female employees “and that he had been warned or reprimanded as a result of that conduct, tended to prove that he was fully aware that similar conduct would cause injury, and acted either with the intent to cause injury or with a willful and conscious disregard of Week's rights.” ([Weeks v. Baker & McKenzie](#), 63 Cal. App. 4th 1128, 1162–1163, 74 Cal. Rptr. 2d 510 (1st Dist. 1998).)

In addition, prior misconduct can be proved to establish bad faith on the part of a party. Courts have frequently upheld the admissibility of other acts of misconduct by insurance companies as circumstantial evidence of bad faith or fraudulent behavior in the instant case. ([Colonial Life & Accident Ins. Co. v. Superior Court](#), 31 Cal. 3d 785, 792, 183 Cal. Rptr. 810, 647 P.2d 86 (1982); [Neal v. Farmers Ins. Exchange](#), 21 Cal. 3d 910, 923, 148 Cal. Rptr. 389, 582 P.2d 980 (1978); [Moore v. American United Life Ins. Co.](#), 150 Cal. App. 3d 610, 624–625, 197 Cal. Rptr. 878 (3d Dist. 1984).)

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A. Restrictions On Using Character evidence In Civil Cases**§ 6:5. Introducing evidence of party's misconduct in civil case to prove any fact in issue—To show knowledge or plan****West's Key Number Digest**West's Key Number Digest, [Evidence](#) 🔑 129 to 141**Legal Encyclopedias**[C.J.S., Evidence §§ 760 to 773, 783 to 788](#)

Prior acts on the part of a person can be introduced to show knowledge or a plan. In *Estate of Zalud*, the beneficiary of a will denied that he had any knowledge of, or involvement in, the drafting of the will. The court properly admitted two other wills, where the same beneficiary was named, which had strikingly similar provisions to disprove these contentions. One of the wills appeared to have been typed on the beneficiary's typewriter and in all three wills the testatrix was an elderly woman who was unrelated to the beneficiary. ([Estate of Zalud](#), 27 Cal. App. 3d 945, 104 Cal. Rptr. 329 (2d Dist. 1972).) The similarity of the prior misconduct meant that it was not simply predisposition evidence.

In [Bowen v. Ryan](#), 163 Cal.App.4th 916 (2008) a minor patient sued a dentist, who treated children with behavioral problems, for choking him and shoving him against a wall during a dental appointment. Bowen reversed a plaintiff's verdict because the trial court incorrectly admitted evidence of nine other incidents where the dentist used violence while treating his patients, to show a common design or plan. (at 924.) Bowen relied upon [People v. Ewoldt](#), 7 Cal.4th 380, 402–403 (1994) to conclude the nine other incidents were insufficiently similar to justify admission under section 1101. (at 924.) The court was obviously impressed with the fact that the dentist had treated 45,000 patients in his career, and it may also be appropriate to conclude the uncharged incidents were spontaneous, unrelated acts, rather than acts occurring as part of a common design or plan. (at 925.)

For a discussion of the use of uncharged acts of sexual misconduct committed by a person who is a party in a sexual harassment suit to show a plan or scheme, see [§ 6:8](#).

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6. Evidence Affected Or Excluded By Extrinsic Policies

A. Restrictions On Using Character evidence In Civil Cases

§ 6:6. Introducing evidence of party's misconduct in civil case to prove any fact in issue—To show negligence

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 129 to 141

West's Key Number Digest, [Negligence](#) 🔑 1635

Legal Encyclopedias

[C.J.S., Evidence §§ 760 to 773, 783 to 788](#)

[C.J.S., Negligence §§ 782, 787 to 789, 791, 793, 798](#)

In civil cases, evidence that a party was negligent on another occasion is inadmissible to prove the party was negligent in the current case. (See the discussion of [Evidence Code § 1104](#) in [§ 6:1](#).) Closely related, but distinguishable from this rule is: (1) the rule admitting evidence of habit and custom (see the discussion in [§ 6:7](#)); and (2) the rule admitting evidence of other similar accidents to show a defective or dangerous condition, knowledge, or notice, or to establish the cause of the accident (see discussion in [§ 1:11](#)).

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6. Evidence Affected Or Excluded By Extrinsic Policies

A. Restrictions On Using Character evidence In Civil Cases

§ 6:7. Evidence of habit or custom

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  138, 139

Legal Encyclopedias

[C.J.S., Evidence §§ 763 to 765, 767 to 769, 785](#)

In a civil case, any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specific occasion in conformity with the habit or custom. ([Evidence Code § 1105](#).) Unlike character evidence, evidence of habit or custom shows a regular response to a repeated, specific situation. ([Evidence Code § 1105](#), Comment.) In negligence cases, where evidence of character with respect to care is inadmissible ([Evidence Code § 1104](#)), evidence of habit or custom is limited to “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.” (McCormick on Evidence, pp. 340–341, as cited in [Webb v. Van Noort](#), 239 Cal. App. 2d 472, 478, 48 Cal. Rptr. 823 (5th Dist. 1966); [Bowen v. Ryan](#), 163 Cal.App.4th 916, 926 (2008).) In *Webb*, a personal injury case, plaintiff was asked the following question about the person who was driving the car she rode in: “As far as you could observe when you rode with her, how did she drive?” This was held to be a general question about character, not a specific question about custom and habit, and the answer was properly excluded. ([Webb v. Van Noort](#), 239 Cal. App. 2d 472, 478, 48 Cal. Rptr. 823 (5th Dist. 1966).) If, however, a witness testifies that on numerous occasions he or she had been a passenger who rode in the driver's vehicle at the time the driver approached a particular railroad crossing, it would be permissible to ask, “Did the driver have any particular habit or custom that she would follow when she arrived at that intersection?”

In a habeas corpus case, when a petitioner alleges incompetence of counsel, the general rule prohibits use of prior allegations or findings of incompetence against the same attorney in other cases. ([In re Vargas](#), 83 Cal. App. 4th 1125, 1134, 100 Cal. Rptr. 2d 265 (2d Dist. 2000).) In *Vargas*, however, the court noted that “repeated and severe accusations of misfeasance on the part of [counsel] have been recognized by many courts as having

substance worthy of investigation.” For that reason, the trial court was directed “to determine whether these and other cases are relevant to establishing a pattern ... of rendering inept legal services and whether such pattern is relevant to prove the issues presented by petitioner.” (*In re Vargas*, 83 Cal. App. 4th 1125, 1134–1136, 100 Cal. Rptr. 2d 265 (2d Dist. 2000).)

Comment

The distinction between inadmissible evidence of character to prove conduct under § 1104 and admissible evidence of habit and custom under § 1105 is often difficult to discern. For example, in *Dincau v. Tamayose*, the court upheld the admission of evidence in a medical malpractice case of the “habit and custom of the doctor and his staff as to their habitual response to telephone calls” about certain specific minors' conditions related by their parents. (*Dincau v. Tamayose*, 131 Cal. App. 3d 780, 793–796, 182 Cal. Rptr. 855 (2d Dist. 1982).)

Some examples of the use of habit and custom evidence follow:

- In non-negligence cases, evidence of habit and custom has been admitted to prove that notice, as required by a contract, was properly given. (*Preis v. American Indemnity Co.*, 220 Cal. App. 3d 752, 760, 269 Cal. Rptr. 617 (2d Dist. 1990) (notice of cancellation of insurance policy); *Jenkins v. Tuneup Masters*, 190 Cal. App. 3d 1, 11–14, 235 Cal. Rptr. 214 (3d Dist. 1987) (notice of extension of lease).)
- In *Tillery v. Richland*, plaintiff contended that the defendant-doctor performed unnecessary surgery simply to collect a fee. The court took a broad view of habit and custom and allowed the doctor to refute the charge by introducing evidence that he did not know whether his patients paid bills and treated patients without regard for their ability to pay. (*Tillery v. Richland*, 158 Cal. App. 3d 957, 968–969, 205 Cal. Rptr. 191 (2d Dist. 1984).)
- Habit and custom may be introduced to establish a foundational requirement in the business records exception to the hearsay rule. In *Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc.*, the court held that the proponent of a business record had failed to establish that the record was made “at or near the time of the event.” The court noted that this could have been proved by evidence of habit and custom. (*Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc.*, 10 Cal. App. 3d 219, 224, 88 Cal. Rptr. 778 (2d Dist. 1970).)

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Chapter
6. Evidence Affected Or Excluded By Extrinsic Policies
A. Restrictions On Using Character evidence In Civil Cases

§ 6:8. Civil cases alleging sexual harassment

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[C.J.S., Evidence §§ 496, 502](#)

Generally, the defendant in a civil action alleging sexual harassment, sexual assault, or sexual battery may not introduce evidence of opinion, reputation, or specific instances of the plaintiff's sexual conduct to prove consent by the plaintiff or the absence of injury to plaintiff unless plaintiff seeks recovery for the loss of consortium. ([Evidence Code § 1106\(a\)](#).) In [Rieger v. Arnold](#), 104 Cal. App. 4th 451, 462, 128 Cal. Rptr. 2d 295 (3d Dist. 2002), the court defined "sexual conduct" broadly to "include all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity." Thus, testimony about the plaintiff's "racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits were all 'sexual conduct' under [section 1106](#) and subject to exclusion."

Such evidence is, however, admissible to attack the plaintiff's credibility under [Evidence Code § 783](#). ([Evidence Code § 1106\(d\)](#); see the discussion in [§ 3:53](#) of this volume.) In addition, if the plaintiff testifies about his or her sexual history or introduces other evidence or testimony about it, the defendant may cross-examine that witness and produce other evidence limited specifically to the rebuttal of that evidence. ([Evidence Code § 1106\(c\)](#).)

The general exclusion in [Evidence Code § 1106\(a\)](#), does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator. ([Evidence Code § 1106\(b\)](#).) In [Rieger v. Arnold](#), 104 Cal. App. 4th 451, 464–465, 128 Cal. Rptr. 2d 295 (3d Dist. 2002), the court determined that the term "perpetrator" in [Evidence Code § 1106](#) was broader than the term "defendant" in § 1103 and includes "not only the named defendants but

also any other actor whose conduct the plaintiff seeks to ascribe to the employment entity.” In *Rieger*, the court admitted evidence about plaintiff's prior sexual conduct with “the individual defendants, or others whose conduct the plaintiff ascribed to the employer, regardless of whether it occurred within or outside the workplace.” In addition, § 1106 does not protect a plaintiff who has sued her psychologist for damages suffered from sexual contact with him, when the causes of action pleaded are for medical negligence and infliction of emotional distress. (*Patricia C. v. Mark D.*, 12 Cal. App. 4th 1211, 1216–1218, 16 Cal. Rptr. 2d 71 (1st Dist. 1993).)

If a defendant in a sexual harassment suit denies that the alleged acts occurred and there are uncharged acts of harassment committed by the same party, two criminal cases provide a basis for introducing evidence of such acts as proof of a “plan or scheme” under § 1101(b). In *People v. Ewoldt* and *People v. Balcom*, the California Supreme Court substantially expanded the “common plan or scheme” exception contained in § 1101(b). Even where identity and intent are not in issue, “evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan.” (*People v. Ewoldt*, 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994); *People v. Balcom*, 7 Cal. 4th 414, 27 Cal. Rptr. 2d 666, 867 P.2d 777 (1994); see the discussion in § 6:13.)

For example, if a female waitress complains that she was the subject of whistles and catcalls by the kitchen staff, evidence of prior similar acts directed against a different waitress may be introduced to establish a hostile work environment or counter the defendant's contention that no such misconduct occurred. Of course this admissibility is subject to the restrictions of § 352. (See *Brown v. Smith*, 55 Cal. App. 4th 767, 788–796, 64 Cal. Rptr. 2d 301 (4th Dist. 1997), which contains an excellent discussion of the use of *Ewoldt* and *Balcom* in sexual harassment cases and the role of Evidence Code § 352. But see *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 518, 76 Cal. Rptr. 2d 547 (2d Dist. 1998).)

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Chapter
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B. Restrictions On Prosecution's Use Of Character Evidence To Prove Conduct In Criminal Cases

§ 6:9. An overview of limitations on using character evidence to prove conduct in criminal case

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 369 to 374, 375

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[C.J.S., Criminal Law §§ 596 to 597, 1105 to 1112, 1114 to 1125](#)

[Evidence Code § 1101\(a\)](#), sets forth the general rule excluding predisposition evidence, as well as the exceptions to that rule. It provides, “Except as provided in this section and in §§ 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 to prove his or her conduct on a specified occasion.” ([Section 1101\(a\)](#).) Preliminarily, it is worth noting that this subdivision sets out the three different methods of proving character: evidence of opinion, reputation and specific acts. When a party introduces such evidence, it seeks to persuade the jury to infer that the subject has a predisposition to act in that manner, and, then, to further infer that the subject acted consistently with that trait in the current lawsuit. After a brief discussion of the general rule (in [§ 6:9](#) of this volume) the exceptions provided in [§ 1101\(b\)](#) ([§§ 6:10 to 6:13](#) and [§§ 6:15 to 6:18](#)) and (c) ([§ 6:19](#)) and [§§ 1102](#) ([§§ 6:22](#) and [6:24](#)) [1103](#)([§§ 6:20, 6:25](#) and [6:26](#)) [1108](#) and [1109](#) ([§ 6:14](#)) will be discussed.

The Comment to [Evidence Code § 1101](#) notes that, subject to certain exceptions, character evidence cannot be used to prove conduct in criminal cases. For example, in a prosecution for forgery, the prosecution may not introduce evidence that on other occasions the defendant had forged documents or opinion or reputation evidence that the defendant was known as a thief or forger, in order to prove that the defendant had a character trait for stealing or forging documents and that the defendant had acted consistently with that trait in forging the particular documents alleged.

Subject to certain exceptions, evidence of uncharged misconduct (other crimes or “collateral bad acts”) is

inadmissible to prove that the defendant had a predisposition to commit the alleged offense. (*People v. Malone*, 47 Cal. 3d 1, 17, 252 Cal. Rptr. 525, 762 P.2d 1249 (1988); *People v. Alcala*, 36 Cal. 3d 604, 631, 205 Cal. Rptr. 775, 685 P.2d 1126 (1984).) Evidence of misconduct cannot be used to prove that the defendant had a particular character trait and acted in conformity with that trait on a particular occasion. (*People v. Bergschneider*, 211 Cal. App. 3d 144, 160, 259 Cal. Rptr. 219 (4th Dist. 1989).) Exclusion of this evidence is based on the concern that it is highly prejudicial. Exclusion occurs not because the evidence has too little probative value, but because it has too much. (*People v. Bergschneider*, 211 Cal. App. 3d 144, 161–162, 259 Cal. Rptr. 219 (4th Dist. 1989).)

Evidence that the defendants supplied drugs to two minors in 1985 is inadmissible to prove that they provided drugs to the same minors in 1986. The court rejected the prosecution argument that the earlier misconduct showed knowledge and opportunity to commit the later offense. (*People v. Bergschneider*, 211 Cal. App. 3d 144, 162, 259 Cal. Rptr. 219 (4th Dist. 1989).)

Before the enactment of § 1108 (discussed in § 6:14), courts had refused to admit evidence of a defendant's prior sexual assaults to rebut the defendant's contention that the victim had consented. A different rule applied, however, when the defendant placed his state of mind in issue by raising a mistaken consent defense under *People v. Mayberry*, 15 Cal. 3d 143, 125 Cal. Rptr. 745, 542 P.2d 1337 (1975); see *People v. Bruce*, 208 Cal. App. 3d 1099, 1105–1106, 256 Cal. Rptr. 647 (1st Dist. 1989). Evidence of prior sexual offenses involving other victims had been held to be inadmissible to corroborate the testimony of the named victims. (*People v. Ogunmola*, 39 Cal. 3d 120, 123, 215 Cal. Rptr. 855, 701 P.2d 1173 (1985) (overruled by, *People v. Ewoldt*, 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)); *People v. Pitts*, 223 Cal. App. 3d 606, 835, 273 Cal. Rptr. 757 (5th Dist. 1990).) See the discussion of Evidence Code § 1108, which greatly expands the admissibility of prior sexual offenses committed by a defendant in a sexual offense case, in § 6:14.

“ ‘Profile evidence’ ... is not a ground for excluding evidence; such evidence is inadmissible only if it is either irrelevant, lacks a foundation, or more prejudicial than probative. [Citation.] ... 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*, 35 Cal. 4th 334, 357–358, 25 Cal. Rptr. 3d 554, 107 P.3d 229 (2005), cert. denied, 126 S. Ct. 550 (U.S. 2005) [Admitting the challenged evidence]; See *People v. Robbie*, 92 Cal. App. 4th 1075, 1082–1085, 112 Cal. Rptr. 2d 479 (1st Dist. 2001) [Excluding profile evidence].) Robbie distinguished expert evidence that no profile exists for particular offenders. (*People v. McAlpin*, 53 Cal. 3d 1289, 1302–1303, 283 Cal. Rptr. 382, 812 P.2d 563 (1991).) Such testimony is admissible because it can clarify common juror misconceptions. (*Robbie*, 92 Cal. App. 4th at 1086.) Courts have rejected evidence of drug courier profiles (*Reid v. Georgia*, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980)); drug dealer profiles (*People v. Castaneda*, 55 Cal. App. 4th 1067, 64 Cal. Rptr. 2d 395 (4th Dist. 1997); and testimony about the operations of auto theft rings (*People v. Martinez*, 10 Cal. App. 4th 1001, 1006, 12 Cal. Rptr. 2d 838 (4th Dist. 1992).).

In a case where identity was in dispute, it was error for the trial court to permit the prosecution to prove that the same two defendants had committed a different robbery than the one charged, where the two crimes bore no other distinctive marks in common. (*People v. Felix*, 14 Cal. App. 4th 997, 1004–1007, 18 Cal. Rptr. 2d 113 (1st Dist. 1993).)

The evidentiary limitations of §§ 1100 to 1104 have not been abrogated by Proposition 8. (*People v. Lankford*, 210 Cal. App. 3d 227, 237–239, 258 Cal. Rptr. 322 (1st Dist. 1989).)

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B. Restrictions On Prosecution's Use Of Character Evidence To Prove Conduct In Criminal Cases

§ 6:10. Admissibility of evidence under Section 1101(b)**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#)  369 to 374**Legal Encyclopedias**[C.J.S., Criminal Law §§ 596 to 597, 115 to 1125](#)

[Evidence Code § 1101\(b\)](#) provides that evidence of uncharged misconduct is admissible if it helps prove the crime by proving a relevant fact, other than the disposition to commit the crime, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or that a defendant in a prosecution for an unlawful sex act did not reasonably and in good faith believe that the victim consented ([Evidence Code § 1101\(b\)](#); [People v. Bergschneider](#), 211 Cal. App. 3d 144, 160, 259 Cal. Rptr. 219 (4th Dist. 1989).) Subdivision (b) is more accurately viewed as an elaboration, not an exception to the general rule excluding character evidence in subdivision (a). Subdivision (b) simply notes that the evidence is admissible so long as it is relevant to proving some fact other than disposition. Since the fact proved must be relevant, it must relate to an issue in dispute. ([Evidence Code § 210](#), discussed in [§ 1:4](#) of this volume.) Therefore, if an issue is not in dispute, no evidence of uncharged misconduct is admissible to prove it. In addition, a defendant may take an issue out of dispute by offering to stipulate to it. ([People v. Guzman](#), 47 Cal. App. 3d 380, 389, 121 Cal. Rptr. 69 (2d Dist. 1975).) But see, [People v. Steele](#), 27 Cal. 4th 1230, 1246, 120 Cal. Rptr. 2d 432, 47 P.3d 225 (2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 874, 154 L. Ed. 2d 791 (2003) (California Supreme Court stated, in dicta, that a defendant's concession on an issue might not preclude proof of it. "The trial court should consider whether the party objecting to the evidence actually disputes the fact for which it is offered in weighing the probative value against the prejudicial effect. But [in this capital case] intent was so critical to the question of guilt that the court could, in its discretion, conclude the prosecution was entitled to prove it fully. Moreover, as noted, premeditation was strongly disputed and the prior killing was highly probative on that issue.") For a discussion of certain limitations on a party's right to stipulate away an issue see the discussion in [§§ 1:5](#) and [1:6](#).

Admissibility of uncharged misconduct depends on: (a) the materiality of the fact sought to be proved; (b) the tendency of the evidence logically to prove or disprove the material fact; and (c) extrinsic rules (such as those contained in [Evidence Code § 352](#)) requiring exclusion of relevant evidence. ([People v. Daniels](#), 52 Cal. 3d 815, 856, 277 Cal. Rptr. 122, 802 P.2d 906 (1991); [People v. Nible](#), 200 Cal. App. 3d 838, 845–850, 247 Cal. Rptr. 396 (3d Dist. 1988) (which contains an excellent discussion of each factor).)

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B. Restrictions On Prosecution's Use Of Character Evidence To Prove Conduct In Criminal Cases

§ 6:11. Admitting prosecution evidence of defendant's uncharged misconduct—To prove identity

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West's Key Number Digest, [Criminal Law](#) 🔑 369.15

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[C.J.S., Criminal Law §§ 1115 to 1117, 1121](#)

When identity is disputed, evidence of uncharged offenses committed by the defendant is admissible if the marks common to the charged and uncharged offenses are sufficiently similar as to set them apart from other offenses of the same general variety. (*People v. Sully*, 53 Cal. 3d 1195, 1224–1225, 283 Cal. Rptr. 144, 812 P.2d 163 (1991); see also *People v. Diaz*, 3 Cal. 4th 495, 562, 11 Cal. Rptr. 2d 353, 834 P.2d 1171 (1992).) In each of the charged and uncharged offenses in *Sully*, the defendant bound or caused the bondage of prostitutes against their will in his warehouse while using cocaine. The rear section of the warehouse was the site of all the murders. Illicit sex, cocaine, and the abuse of prostitutes were common to each of the defendant's crimes. See also *People v. Malone*, 47 Cal. 3d 1, 21, 252 Cal. Rptr. 525, 762 P.2d 1249 (1988), where, in both the charged and uncharged offenses, arson was used to destroy evidence, each victim was an elderly woman, the murders occurred in isolated desert areas, items of personal property were taken in both and later found in the defendant's possession, defendant's weapon was used in both, and in each case the victim was placed in the car trunk. Compare *People v. Alcala*, 36 Cal. 3d 604, 632–633, 205 Cal. Rptr. 775, 685 P.2d 1126 (1984), which rejected such evidence because the common marks failed to “support the strong inference that the current crime bears the defendant's signature.” *People v. Barnwell*, 41 Cal.4th 1038, 1055–1057 (2007) held the trial court erred in admitting evidence in a murder case that the defendant had previously possessed a handgun similar to the murder weapon. The evidence was introduced to prove identity, and *Barnwell* concluded the prior possession “is not so distinctive on these facts as to serve as a signature or fingerprint”

Typically the fact that a person charged with robbery at a particular site, committed an earlier robbery at the same type of establishment is insufficient to justify admission of the uncharged offense to prove identity. For ex-

ample, evidence that a defendant charged with robbing a grocery store had previously robbed a different grocery store would not justify admitting the prior offense. In *People v. Roldan*, 35 Cal. 4th 646, 706, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (2005), cert. denied, 126 S. Ct. 570 (U.S. 2005), however, the defendant was charged with robbing a swap meet and the court approved the admission of evidence of his involvement in a prior robbery in part because it also involved a swap meet: “We disagree with defendant’s characterization of a swap meet as just another generic location where money can be found Swap meets are distinctive”

Evidence of crimes occurring frequently in areas where the defendant lived and ceasing when she left were admissible to establish her identity as the perpetrator of the current crime in *People v. Erving*. In *Erving*, the defendant was charged with arson. Evidence was properly admitted that before the charged fire she had “lived in four different, geographically distant neighborhoods. Arson fires regularly occurred either at her home, or within easy walking distance of it. The fires were set during her residency and stopped when she moved. In one neighborhood, appellant was seen attempting to set a fire The doctrine of chances tells us it is extremely unlikely that, through bad luck or coincidence, an innocent person would live near so many arson fires, occurring so frequently, in so many different neighborhoods.” (*People v. Erving*, 63 Cal. App. 4th 652, 663, 73 Cal. Rptr. 2d 815 (2d Dist. 1998).)

When a defendant is charged with a violent crime and has had a prior relationship with the victim, prior assaults on the same victim are admissible on any issue in dispute, including identity, solely due to the identical perpetrator and victim, without any requirement of distinctive similarities. (*People v. Linkenauger*, 32 Cal. App. 4th 1603, 1610–1613, 38 Cal. Rptr. 2d 868 (2d Dist. 1995); *Rufo v. Simpson*, 86 Cal. App. 4th 573, 584–587, 103 Cal. Rptr. 2d 492 (2d Dist. 2001); *People v. Zack*, 184 Cal. App. 3d 409, 413–415, 229 Cal. Rptr. 317 (2d Dist. 1986).) “[E]vidence of threats or violence by an accused against the victim of an offense of violence is proof of the identity of the offender.” (*People v. Daniels*, 16 Cal. App. 3d 36, 46, 93 Cal. Rptr. 628 (4th Dist. 1971).) See the discussion of [Evidence Code § 1109](#), which greatly expands the admissibility of prior acts of domestic violence by a defendant, in [§ 6:14](#).)

Evidence of a prior crime cannot be introduced to prove identity unless that issue is in dispute. Where the defendant does not dispute identity but simply contends that the charged crime did not occur, such evidence is inadmissible. (*People v. Pitts*, 223 Cal. App. 3d 606, 833, 273 Cal. Rptr. 757 (5th Dist. 1990).)

Courts have often admitted evidence of uncharged offenses because it discloses a “distinctive modus operandi” or a “common design or plan” when nothing more is meant than that the offenses share sufficient distinctive marks with the charged offense that they are admissible to prove identity. (See, e.g., *People v. Green*, 146 Cal. App. 3d 369, 376, 194 Cal. Rptr. 128 (2d Dist. 1983).) For a general discussion of plan or scheme evidence, see [§ 6:13](#).

Warning

When a prosecutor seeks to introduce evidence of a similar uncharged offense committed by the defendant to prove the identity of the perpetrator of the current offense, the courts have required proof of a high degree of similarity in the offenses. When less similarity exists, the courts have rejected the proffered evidence as merely proof of predisposition. However, counsel should not lose sight of the fact that completely dissimilar uncharged offenses may be introduced on the identity issue. For example, evidence that several days before the charged murder the defendant stole the gun used in the killing would be admissible as circumstantial

evidence that the defendant was the killer. (*People v. Williams*, 44 Cal. 3d 883, 907, 245 Cal. Rptr. 336, 751 P.2d 395 (1988).) Evidence that soon after two victims were murdered and their car stolen the defendant used the car to commit a bank robbery is admissible to help establish that the defendant was the killer. (*People v. Harris*, 28 Cal. 3d 935, 171 Cal. Rptr. 679, 623 P.2d 240 (1981).) In such cases evidence of the theft of the gun and the bank robbery raise no risk of showing a predisposition for murder. The evidence helps establish the identity of the killer by linking the defendant to a key piece of evidence tied to the homicide.

In *People v. Bell*, the same principle permitted evidence of an uncharged, dissimilar murder to be introduced against the defendant in a murder prosecution. In *Bell*, a witness's ability to identify the defendant was based on the defendant's participation in another crime. Just before a robbery-murder, two witnesses saw the defendant. One told the other "the defendant was the man who killed your father." The witness then said she was going to get a good look at him and left the car. The reference to this prior murder was properly admitted largely because it helped bolster the strength of the identification. (*People v. Bell*, 49 Cal. 3d 502, 516, 262 Cal. Rptr. 1, 778 P.2d 129 (1989).)

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§ 6:12. Admitting prosecution evidence of defendant's uncharged misconduct—To prove intent

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Evidence of uncharged misconduct is admissible to prove that the defendant committed the charged offense with the requisite intent only if intent is in dispute. Thus in a robbery prosecution if the evidence is undisputed that the perpetrator came into a store held a gun on a clerk and threatened to shoot if he was not given money, intent is not likely in dispute and evidence of prior misconduct is inadmissible to prove it. When intent is disputed, a sufficiently similar prior act is admissible. (*People v. Robbins*, 45 Cal. 3d 867, 879, 248 Cal. Rptr. 172, 755 P.2d 355 (1988); *People v. Denis*, 224 Cal. App. 3d 563, 568, 273 Cal. Rptr. 724 (2d Dist. 1990).) “The least degree of similarity between the crimes is needed to prove intent. [Citation.] As we explained in *Carpenter* and *Robbins*, the doctrine of chances that the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous. Specifically, the more often one kills, especially under similar circumstances, the more reasonable the inference the killing was intended and premeditated.” (*People v. Steele*, 27 Cal. 4th 1230, 1244, 120 Cal. Rptr. 2d 432, 47 P.3d 225 (2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 874, 154 L. Ed. 2d 791 (2003); *People v. Carpenter*, 15 Cal. 4th 312, 379–380, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997).) In *Steele*, the court approved admitting the prior murder to prove premeditation, though the prior conviction was for second degree murder, a killing without premeditation. (*People v. Steele*, 27 Cal. 4th 1230, 1244–1245, 120 Cal. Rptr. 2d 432, 47 P.3d 225 (2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 874, 154 L. Ed. 2d 791 (2003).)

In *Denis*, whether defendant intended to rob the murder victim was the central issue in dispute. Defendant specifically denied that he was a participant in the codefendant's robbery plan. Evidence of prior robberies that the two had committed together, at the same location against other potential drug purchasers, was admissible to

prove the defendant's intent though no one had been shot in the earlier incidents. (*People v. Denis*, 224 Cal. App. 3d 563, 567–568, 273 Cal. Rptr. 724 (2d Dist. 1990).) In addition, prior incidents of violence against a person can be used in a stalking case (*Penal Code* § 649(a)) to prove that the defendant's current threats against the same person were made with the intent to place her in fear for her safety. (*People v. McCray*, 58 Cal. App. 4th 159, 172, 67 Cal. Rptr. 2d 872 (1st Dist. 1997).) *McCray* admitted the same evidence to prove that the victim's fear of the defendant in a case alleging terrorist threats (*Penal Code* § 422) was reasonable. (*People v. McCray*, 58 Cal. App. 4th 159, 171–173, 67 Cal. Rptr. 2d 872 (1st Dist. 1997); *People v. Zavala*, 130 Cal. App. 4th 758, 770, 30 Cal. Rptr. 3d 398 (4th Dist. 2005).)

Where the defendant claims that intoxication has negated the requisite intent, proof of uncharged similar offenses is admissible. (*People v. Yeoman*, 31 Cal. 4th 93, 121–122, 2 Cal. Rptr. 3d 186, 72 P.3d 1166 (2003), cert. denied, 541 U.S. 991, 124 S. Ct. 2018, 158 L. Ed. 2d 497 (2004); *People v. Wilson*, 227 Cal. App. 3d 1210, 1211, 278 Cal. Rptr. 319 (2d Dist. 1991); *People v. Nible*, 200 Cal. App. 3d 838, 847–848, 247 Cal. Rptr. 396 (3d Dist. 1988).) In *Nible*, the court admitted the prior misconduct, though the defendant never testified that he had been intoxicated, because his intoxication was brought out by defense counsel in the cross-examination of a police officer.

Although the uncharged offense must be similar to that charged to be admissible on intent, it need not have the same degree of distinctiveness, “the striking similarities,” required when the issue in dispute is identity. (*People v. Carter*, 19 Cal. App. 4th 1236, 1246, 23 Cal. Rptr. 2d 888 (1st Dist. 1993); *People v. Nible*, 200 Cal. App. 3d 838, 848, 247 Cal. Rptr. 396 (3d Dist. 1988).)

In addition to intent, uncharged offenses may be introduced to show premeditation and deliberation (*People v. Robbins*, 45 Cal. 3d 867, 248 Cal. Rptr. 172, 755 P.2d 355 (1988)) and malice in a drunk-driving murder case. (*People v. Watson*, 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279 (1981); *People v. Murray*, 225 Cal. App. 3d 734, 275 Cal. Rptr. 498 (2d Dist. 1990).) In *Robbins*, evidence of defendant's prior commission of a sexual offense involving a child was admitted to prove his intent to engage in lewd and lascivious conduct with the murder victim and to prove that the homicide was intentional, not accidental, and the product of premeditation and deliberation. (*People v. Robbins*, 45 Cal. 3d 867, 878–879, 248 Cal. Rptr. 172, 755 P.2d 355 (1988).) In *Murray*, the court properly admitted evidence that following the defendant's prior drunk-driving convictions, he had completed mandatory education programs on the dangers of drunk driving, which helped prove his awareness of the life-threatening risks of the crime. (*People v. Murray*, 225 Cal. App. 3d 734, 744–745, 275 Cal. Rptr. 498 (2d Dist. 1990); see also *People v. Garcia*, 41 Cal. App. 4th 1832, 50 Cal. Rptr. 2d 127 (5th Dist. 1995).) In *People v. Ortiz*, 109 Cal. App. 4th 104, 110–116, 134 Cal. Rptr. 2d 467 (1st Dist. 2003), the appellate court extended *Watson* and permitted evidence of defendant's prior drunk driving convictions (and attendance at a post-conviction DUI school) to prove the subjective awareness of risk in a vehicular murder case, though the prosecutor conceded no alcohol or other intoxicants were involved in the fatal collision.

In *People v. Quartermain*, the defendant put in question the sincerity of his admitted agreement to kill. “Evidence that defendant had in the past conspired to kill someone was relevant to show that defendant's agreement to the conspiracy to kill was genuine and not feigned ... it was [more] likely his intent was genuine.” (*People v. Quartermain*, 16 Cal. 4th 600, 626, 66 Cal. Rptr. 2d 609, 941 P.2d 788 (1997).)

When the defendant disputes both identity and intent, the prosecution may introduce evidence of prior

crimes committed by the defendant to prove intent, even if there are insufficient similarities to justify admission of these crimes to prove identity. The jury must be given a proper limiting instruction in this circumstance. ([People v. Brandon, 32 Cal. App. 4th 1033, 1051, 38 Cal. Rptr. 2d 751 \(4th Dist. 1995\).](#))

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[C.J.S., Criminal Law § 1125](#)

Even if neither identity nor intent is in issue, evidence of other crimes directed at the same victim may be introduced to show the defendant's design or plan to commit the charged offense against the victim. ([People v. Bunyard](#), 45 Cal. 3d 1189, 1207, 249 Cal. Rptr. 71, 756 P.2d 795 (1988).) In *Bunyard*, the court held that the defendant's prior solicitation of X to kill the victim was evidence of his own plan to murder her. However, proof of contemporaneous crimes of the same class (for example, theft) against other victims is not admissible as a plan or design if identity and intent are not in dispute, unless the prosecution proves that the other crimes are, in fact, part of a “single conception or plot” and not simply “a series of random crimes ... committed whenever financial necessity dictated.” ([People v. Williams](#), 44 Cal. 3d 883, 909, 245 Cal. Rptr. 336, 751 P.2d 395 (1988).)

In [People v. Ewoldt](#), 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994), the California Supreme Court substantially expanded the “common plan or scheme” exception. Even where identity and intent are not in issue, “evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan.” ([People v. Ewoldt](#), 7 Cal. 4th 380, 401, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994).) The degree of similarity necessary to establish a common plan or scheme was found to be more than that required to admit an uncharged offense to prove intent, though less than that necessary to prove identity. ([People v. Ewoldt](#), 7 Cal. 4th 380, 402–403, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994).) In *Ewoldt*, the defendant was charged with molesting one of his stepdaughters and testimony by another stepdaughter that she had been molested by the defendant years earlier was properly admitted. “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.' ” (*People v. Ewoldt*, 7 Cal. 4th 380, 402, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994), citing 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 304, p. 249.) The court cautioned that there must be more than the proof of “similar spontaneous acts,” which may leave *Williams* intact. However, the plan need not be distinctive or unusual. (See also *People v. Balcom*, 7 Cal. 4th 414, 27 Cal. Rptr. 2d 666, 867 P.2d 777 (1994), which allowed evidence of a subsequent rape to be introduced against a defendant charged with rape, where neither identity nor intent were at issue.) In *People v. Shea*, the court found the prosecution could introduce evidence of a prior rape against a defendant charged with rape because in both cases “appellant was in a bar, drank with the victim, took her to a private place, violently struck her, ripped her clothes off, and raped her. In both the victim fled, naked, to a nearby residence.” (*People v. Shea*, 39 Cal. App. 4th 1257, 1268–1269, 46 Cal. Rptr. 2d 388 (2d Dist. 1995).)

In *People v. Catlin*, while upholding the denial of a severance, the Supreme Court ruled that the charged homicides would have been cross-admissible. “Paraquat poisoning is rare, and its occurrence with respect to two close relatives of one person is unlikely to be a matter of chance or to be the result of spontaneous impulse. When evidence of a third instance of the same type of poisoning is introduced, as it properly was in the instant case, the inference regarding a common design or plan becomes very strong. [Citation.]” (*People v. Catlin*, 26 Cal. 4th 81, 110–112, 120–123, 26 Cal. 4th 1060c, 109 Cal. Rptr. 2d 31, 26 P.3d 357 (2001).)

Ewoldt and *Balcom* note that § 352 continues to play a significant role in determining the admissibility of plan evidence. In considering the probative value of such evidence the court should look at: (1) the tendency of the evidence to show a common design or plan; and (2) the extent to which the source of the evidence is independent of the evidence of the charged offense. If the uncharged offense did not result in the defendant's conviction for a crime, the prejudicial effect of the evidence is increased because the jury might be inclined to convict the defendant for the uncharged crime. (Compare *People v. Kelley*, 52 Cal. App. 4th 568, 579, 60 Cal. Rptr. 2d 653 (4th Dist. 1997), where use of the conviction for the prior offense reduced the undue prejudice to the defendant.) Also increased is the likelihood of “confusing the issues” because the jury has to determine whether the uncharged offense occurred. In *Balcom*, the defendant had been convicted of the uncharged crime and the jury was aware of this because the defendant testified and was impeached with the conviction. If the defendant does not testify, presumably the jury will not know that a conviction has occurred. In such circumstance, in undertaking the weighing required by § 352, it makes sense to treat the situation as if there had been no conviction, since the jury will be unaware of it. In evaluating § 352, the court should also consider how remote the evidence of the uncharged misconduct is (in *Ewoldt* it had occurred 12 years prior to trial) and whether the evidence is cumulative.

Both *Ewoldt* and *Balcom* involved charges of sexual assault, and their rule seems more applicable to such cases than to theft cases, for example. Following the decisions in *Ewoldt* and *Balcom*, the Legislature enacted § 1108, discussed in § 6:14. Section 1108 expands the admissibility of uncharged acts of sexual misconduct by a criminal defendant charged with a sexual offense beyond the *Ewoldt-Balcom* rule.

In sex offenses, similar sexual acts committed by the defendant against the same victim have been held admissible as showing a lewd disposition toward the victim or as circumstantial evidence that the defendant would act to fulfill his desire on the date of the charged offense. (*People v. Moon*, 165 Cal. App. 3d 1074, 1079, 212 Cal. Rptr. 101 (1st Dist. 1985).) Even when the evidence of these acts is provided by the victim and is uncorroborated, it may still be admissible if its probative value outweighs undue prejudice. In *People v. Ewoldt*, the court

admitted such testimony where it helped to establish when the pattern of molesting began and was no more inflammatory than the victim's testimony concerning the charged offenses. (*People v. Ewoldt*, 7 Cal. 4th 380, 407–408, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994).)

In *People v. Robinson*, the defendant was charged with the murder of a woman from Oxnard, whose body had been dumped in Los Angeles. Shortly thereafter, the defendant and his girlfriend were in a car in Oxnard and he told her that if something happened to her he would dump her body in Los Angeles. (*People v. Robinson*, 85 Cal. App. 4th 434, 442, 102 Cal. Rptr. 2d 179 (2d Dist. 2000).) The appellate court ruled that the statement had been properly admitted, as an admission of the defendant, which need not be tested by the limitations imposed by § 1101(b). It is submitted that a better analysis would find that, since the statement was an admission, hearsay was not a barrier to its introduction. However, the evidence should still be tested by § 1101, and the plan or scheme exception seems to apply.

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Simons California Evidence Manual

Justice Mark B. Simons

Chapter
6. Evidence Affected Or Excluded By Extrinsic Policies

B. Restrictions On Prosecution's Use Of Character Evidence To Prove Conduct In Criminal Cases

§ 6:14. Admitting prosecution evidence of defendant's uncharged misconduct—To prove predisposition in sexual offense, domestic violence and elder abuse prosecutions

West's Key Number Digest

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Legal Encyclopedias

[C.J.S., Criminal Law §§ 596 to 597, 115 to 1125](#)

In [Evidence Code §§ 1108 and 1109](#), the Legislature has carved out three exceptions to the long-standing rule excluding predisposition evidence. [Section 1108](#) provides in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense is not made inadmissible by § 1101, if the evidence is not inadmissible pursuant to § 352. [Section 1109\(a\)\(1\)](#) sets forth the same rule, with one variation relating to the age of the uncharged offense, for admission of uncharged domestic violence offenses in cases where the defendant is accused of domestic violence. Domestic violence is defined in [§ 1109\(d\)](#) to include a “dating relationship,” which is further defined in [Family Code § 6210](#) and [Penal Code § 243\(f\)\(10\)](#). (See [People v. Rucker](#), 126 Cal. App. 4th 1107, 1114–1117, 25 Cal. Rptr. 3d 62 (4th Dist. 2005).) [Section 1109\(a\)\(2\)](#) sets forth the same rules for the admissibility of uncharged offenses of abuse of an elder or dependent adult in cases where the defendant is charged with such abuse as subdivision (a)(1) does for domestic violence. However in these abuse cases, evidence of the findings of administrative agencies regulating the conduct of licensed health facilities is inadmissible under [§ 1109](#). ([Section 1109\(f\)](#).) Finally, [§ 1109 \(a\)\(3\)](#) admits uncharged evidence of child abuse in a child abuse prosecution subject to the same conditions set out in [§ 1109\(a\)\(1\)](#) and (2). “Child abuse” means an act proscribed by [§ 273d of the Penal Code](#).

[Section 1108](#) admits the prior offenses for “any relevant purpose” ([People v. James](#), 81 Cal. App. 4th 1343, 1353, 96 Cal. Rptr. 2d 823 (1st Dist. 2000)) including identity. ([People v. Britt](#), 104 Cal. App. 4th 500, 505, 128 Cal. Rptr. 2d 290 (3d Dist. 2002).) Sexual assaults that occur after the charged offense are also admissible under [section 1108](#). ([People v. Medina](#), 114 Cal. App. 4th 897, 903, 8 Cal. Rptr. 3d 158 (4th Dist. 2003).) However,

where multiple sexual assaults are alleged in a charging document, the jury may not be instructed that it may consider each of them as evidence that the defendant has a propensity to commit sexual assaults; [section 1108](#) does not apply to charged offenses. (*People v. Quintanilla*, 132 Cal. App. 4th 572, 33 Cal. Rptr. 3d 782 (1st Dist. 2005); but see *People v. Wilson*, 166 Cal. App. 4th 1034, 1052, 83 Cal. Rptr. 3d 326 (6th Dist. 2008), which disagreed with Quintanilla.). Because [section 1108](#) does not apply to the admissibility of evidence regarding *charged* offenses, a properly qualified expert may testify that “certain features that appear in all the charged crimes are comparatively rare, and therefore suggest in the expert's opinion that the crimes were committed by the same person.” (*People v. Prince*, 40 Cal. 4th 1179, 1223, 57 Cal. Rptr. 3d 543, 156 P.3d 1015 (2007)).) Compare *People v. McFarland*, 78 Cal. App. 4th 489, 491, 92 Cal. Rptr. 2d 884 (2d Dist. 2000) which held that [section 1108](#) does not authorize the prosecution to present expert testimony on the defendant's sexual proclivities.

[Section 1108](#) (a) authorizes admission of prior sexual offenses in a criminal action in which the defendant is accused of a sexual offense. “Sexual offense” is defined to include not only certain enumerated Penal Code provisions, but also, in subdivision (d)(1)(E), crimes that involve deriving “sexual pleasure or gratification from the infliction of death, bodily injury or physical pain on another person.” In *People v. Walker*, 139 Cal. App. 4th 782, 800, 43 Cal. Rptr. 3d 257 (2d Dist. 2006), in deciding if the crime charged against the defendant was a “sexual offense,” the court limited the application of subdivision (d)(1)(E) “to crimes in which deriving sexual pleasure or gratification through inflicting physical [injury or] pain is an element of the charge (or applicable enhancement or aggravating factor) and not simply a circumstance of the crime's commission.” Unadjudicated sexual offenses are admissible under [section 1108](#). (*People v. Britt*, 104 Cal.App.4th 500, 505–506 (2002).) And, in determining if the uncharged prior offense is a “sexual offense,” the prosecution may introduce evidence of past sexual misconduct even if the misconduct is subsequently adjudicated and the defendant is convicted of a non-sexual offense. (*People v. Lopez*, 156 Cal.App.4th 1291, 1298–1299 (2007).) In *People v. Story*, 2008 WL 135023 (Cal. App. 6th Dist. 2008), rev. grtd. 4-21-08, the California Supreme Court will decide whether the prosecution may introduce evidence of a defendant's prior sexual offenses, in a murder case, where the target offense (rape) for the prosecutor's felony murder theory is an offense listed in [section 1108](#).

Note that [§ 1108](#) does not authorize the prosecution to call an expert in its case-in-chief to provide an opinion about the defendant's sexual propensities. Pursuant to [§ 1102](#), “opinion evidence about a defendant's character is inadmissible unless the defendant first places his character in issue.” (*People v. McFarland*, 78 Cal. App. 4th 489, 491, 92 Cal. Rptr. 2d 884 (2d Dist. 2000).) In *People v. Wesson*, 138 Cal. App. 4th 959, 967–969, 41 Cal. Rptr. 3d 883 (6th Dist. 2006), the court affirmed the trial court's admission in a prosecution for sodomy of an abstract of judgment of the defendant's prior forcible oral copulation conviction, despite the defendant's objection that only live testimony requiring the prior crime could be introduced. The defendant argued that the jury would be unable to evaluate his propensity to commit the charged offense without knowing the details of the prior conviction. *Wesson* found that the trial court had reviewed a transcript of the preliminary hearing in the earlier case before admitting the abstract of judgment and held the admission of the prior was not an abuse of discretion.

The ruling in *Wesson* is troubling. The current charge involved the defendant's sexual assault of a domestic partner, while the victim in the prior offense was a stranger. The court dismissed defendant's concern that the jury was left uninformed regarding this dissimilarity: “had defendant wanted to emphasize that the prior offenses were dissimilar because they involved a stranger, he was free to subpoena [the first victim] to present such evi-

ence.” (*Wesson*, 138 Cal. App. 4th at 969.) One problem with shifting that burden to a defendant was manifest in *Wesson* where the prosecutor had informed the court that the first victim was unavailable. (*Wesson*, 138 Cal. App. 4th at 965.) It is unclear why the jury was not provided with the transcript of that victim's preliminary hearing testimony, reviewed by the trial court. If she was legally unavailable, the transcript would almost certainly have been hearsay, admissible under § 1291, prior testimony, (see the discussion in § 2:73) and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (discussed in § 2:111 to 2:114.)

The constitutionality of § 1108 has been upheld. (*People v. Falsetta*, 21 Cal. 4th 903, 912–922, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999); *People v. Fitch*, 55 Cal. App. 4th 172, 63 Cal. Rptr. 2d 753 (3d Dist. 1997).) The constitutionality of § 1109(a)(1) has also been confirmed. (*People v. Cabrera*, 152 Cal.App.4th 695, 703, 61 Cal.Rptr.3d 373 (2007); *People v. Johnson*, 77 Cal. App. 4th 410, 419, 91 Cal. Rptr. 2d 596 (3d Dist. 2000); *People v. Hoover*, 77 Cal. App. 4th 1020, 92 Cal. Rptr. 2d 208 (4th Dist. 2000); *People v. Poplar*, 70 Cal. App. 4th 1129, 83 Cal. Rptr. 2d 320 (3d Dist. 1999).) In *Poplar*, the court upheld the admission of prior acts of domestic violence committed by the defendant in a prosecution against him for the rape of a different domestic partner. (*People v. Poplar*, 70 Cal. App. 4th 1129, 83 Cal. Rptr. 2d 320 (3d Dist. 1999).) The court rejected the defendant's contention that rape was not a crime of domestic violence covered by § 1109. In *People v. Williams*, 159 Cal.App.4th 141, 147 (2008) the court upheld the validity of section 1109 (a)(2), which admits evidence of uncharged acts of elder abuse. The defendant had argued that this provision was “overly broad” because it defines “abuse of an elder” in an “all-encompassing” fashion. Williams ruled “the procedural safeguards present in section 1108 are likewise present in section 1109. The evidence of uncharged acts admissible under subdivision (a)(2) are limited to those taken against elderly persons and the trial court has the same discretion under section 352 to exclude evidence”

When uncharged misconduct is introduced under § 1101(b), the Supreme Court has ruled that the prosecution must prove these acts by a preponderance of the evidence. (See the discussion in § 6:21.) *Falsetta* impliedly reached the same result as to misconduct admitted under § 1108 in its discussion of the 1999 revision to CALJIC No. 2.50.01. (*People v. Falsetta*, 21 Cal. 4th 903, 923, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999).)

Prior to the enactment of these two sections, if a prosecutor sought to introduce evidence of prior misconduct in a sexual offense or domestic violence prosecution, § 1101 required the court to exclude it if its only relevance was to establish a predisposition on the defendant's part to commit such acts. In addition, even if § 1101 did not preclude admission, in deciding a challenge to the evidence under § 352, the court could not consider the extent to which the evidence established such a predisposition as part of its probative value. Sections 1108 and 1109 change both of those rules. Evidence of other sexual misconduct by the defendant can be introduced in a sexual offense prosecution even if it has no other relevance than to show predisposition, if its probative value (including proof of predisposition) is not substantially outweighed by the factors enumerated in § 352. (See the discussion of § 352 in Chapter 1.) The same rule applies to evidence of other acts of domestic violence or the abuse of an elder or dependent adult by a defendant in such prosecutions.

When the prosecution has introduced evidence of uncharged sexual assaults by a defendant, how may the defendant rebut such evidence? Under Evidence Code § 1102 (discussed in § 6:24), opinion or reputation evidence may be introduced by a defendant to show a character trait inconsistent with guilt. Thus either lay or expert opinion evidence may be introduced to prove a defendant is not “a person of lustful or lewd conduct with children.” (*People v. McAlpin*, 53 Cal. 3d 1289, 1305–1310, 283 Cal. Rptr. 382, 812 P.2d 563 (1991); *People v.*

[Stoll](#), 49 Cal. 3d 1136, 1153, 265 Cal. Rptr. 111, 783 P.2d 698 (1989).) In addition, a defendant may rebut predisposition evidence introduced under § 1108 with evidence that on specific occasions in the past, similar to the incident introduced by the prosecution, no sexual assault occurred. Such evidence reduces the likelihood that the defendant has such a predisposition or that he acted pursuant to that predisposition in the charged incident. ([People v. Callahan](#), 74 Cal. App. 4th 356, 372–379, 87 Cal. Rptr. 2d 838 (5th Dist. 1999).)

Following the enactment of [Evidence Code §§ 1108 and 1109](#), what limits remain on the admission of propensity evidence in the three types of prosecutions specified in those code sections? It would appear that the most significant factors are “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. Falsetta](#), 21 Cal. 4th 903, 917, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999); [People v. Soto](#), 64 Cal. App. 4th 966, 989–990, 75 Cal. Rptr. 2d 605 (5th Dist. 1998).) A discussion of certain of these factors follows. (See generally [People v. Yovanov](#), 69 Cal. App. 4th 392, 405–406, 81 Cal. Rptr. 2d 586 (4th Dist. 1999) (§ 1108); and [People v. Brown](#), 77 Cal. App. 4th 1324, 1337–1338, 92 Cal. Rptr. 2d 433 (1st Dist. 2000); and [People v. Poplar](#), 70 Cal. App. 4th 1129, 83 Cal. Rptr. 2d 320 (3d Dist. 1999) (§ 1109).)

Similarity.

Traditionally the primary battle ground in deciding to admit evidence of past misconduct under [Evidence Code § 1101\(b\)](#), has been similarity. See the discussions in §§ 6:11 (proving identity), 6:12 (proving intent), and 6:13 (proving plan and scheme). As *Falsetta* demonstrates, this concern will continue, perhaps at a reduced level, when the prosecution wishes to introduce such evidence to prove predisposition under [Evidence Code §§ 1108 and 1109](#). Because this issue is somewhat more complex in sexual offenses, the discussion will focus on that area, but the same general principles apply to offenses covered by § 1109.

First, only sexual offenses of a similar type are likely to be admissible to prove predisposition. For example, a court should not commonly admit evidence of a prior child molest, which does not involve an attempt at intercourse, to prove a predisposition to commit a current rape of an adult. The logic of this is reinforced by one aspect of the statutory history. California's statute was based on the 1994 amendment to the Federal Rules of Evidence admitting predisposition evidence in sexual offense cases. The Federal Rules of Evidence enacted two sections, while California enacted only one. The first rule permits evidence of past sexual assaults in a sexual assault prosecution ([Federal Rules of Evidence, rule 413](#)), while the second has a parallel provision for prosecutions of child molestation ([Federal Rules of Evidence, rule 414](#)). Despite California's decision to place these two categories in one statutory provision, trial courts should continue to maintain the distinction. This approach cannot be applied mechanically. In some factual contexts, the defendant's commission of the rape of an adult will be probative of the defendant's disposition in a child molest prosecution. For example, in [People v. Crompt](#), 153 Cal.App.4th 476, 480 (2007) the court approved admission of evidence in a prosecution for child molesting, that the defendant had a prior rape conviction. “We disagree that the prior rape of a developmentally disabled woman and the current offenses were dissimilar The fact that defendant committed a sexual offense on a particularly vulnerable victim in the past logically tends to prove he did so again with respect to the current offenses.” However, it must be recognized that every uncharged sexual offense is not probative of a predisposition to com-

mit all charged sexual offenses, whatever their nature.

Second, even within a “type,” significant dissimilarities may lead to exclusion. For example, there may be sufficient differences in the facts of a prior unadjudicated date or spousal rape and a current charge of stranger rape to justify exclusion as irrelevant (since not probative of predisposition) or under [Evidence Code § 352](#). In sum, the chief difference in the admissibility of past offenses created by enactment of [Evidence Code § 1108](#) (or [Evidence Code § 1109](#)) may be simply a reversal in focus. Previously, admission was denied absent proof of sufficient similarity between the two offenses. Post-1108 (or 1109), it may be that the evidence is admissible unless a sufficient level of dissimilarity is established by the opponent. It is also important to keep in mind that the degree of similarity directly affects the calculation of probative value of the evidence that, when weighed against undue prejudice, may determine admissibility under [§ 352](#). Thus, while [§§ 1108](#) and [1109](#) admit uncharged crimes that would not qualify as sufficiently similar under [§ 1101\(b\)](#) ([People v. Frazier](#), 89 Cal. App. 4th 30, 40–41, 107 Cal. Rptr. 2d 100 (2d Dist. 2001); [People v. Soto](#), 64 Cal. App. 4th 966, 983–984, 75 Cal. Rptr. 2d 605 (5th Dist. 1998)) these two sections do not eliminate the concern for similarity between the charged and the uncharged offenses.

Remoteness.

More recent acts of misconduct are obviously more relevant to predisposition than ones that occurred many years ago, particularly if the defendant was relatively young at the time the act was committed. This is less so, of course, if the defendant has spent much of the intervening time in custody. In addition a remote prior act becomes more relevant if the defendant has periodically reoffended in the interim. In [People v. Waples](#), the court upheld the admission of an uncharged series of child molestations against a different victim, which had occurred from 18–25 years before the charged offense, in part because “the similarities between the prior and current acts ... balanced out the remoteness.” ([People v. Waples](#), 79 Cal. App. 4th 1389, 1395, 95 Cal. Rptr. 2d 45 (4th Dist. 2000); see [People v. Branch](#), 91 Cal. App. 4th 274, 284–285, 109 Cal. Rptr. 2d 870 (1st Dist. 2001).)

It is noteworthy that [Evidence Code § 1109](#) has a remoteness provision in subdivision (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.” Does this effectively eliminate a remoteness objection to more recent evidence of domestic violence or the abuse of an elder or dependent adult? No. It should, however, reduce the likelihood of exclusion on this ground alone. It is equally noteworthy that [Evidence Code § 1108](#) has no similar remoteness provision. Given the parallel nature of the statutes in other respects, this omission will undoubtedly be given significant weight by the appellate courts. The distinction between the two statutes seems to suggest a legislative conclusion that old acts of sexual misconduct are more probative than equally old acts of domestic violence.

Multiple uncharged acts.

If the court is presented with more than one uncharged act under [§§ 1108](#) or [1109](#), it must weigh the probative value of each additional act against the undue prejudice and the consumption of time that could result from its admission. In making this evaluation, the court should avoid presenting a false picture to the jury. For example, if a defendant has six uncharged acts otherwise admissible under [Evidence Code § 1108](#) or [1109](#), admitting only one of them might well suggest to the jury that the defendant has led a relatively blameless life. In addition, unlike evidence of prior felony convictions to impeach (discussed in [§ 3:54](#)), the greater the number of

acts of sexual misconduct, domestic violence, or the abuse of an elder or dependent adult, the greater the likelihood of a predisposition to commit such crimes. While a court may choose to exclude one or more of these acts because of the time that will be consumed in proving them, it should be more cautious in relying on “undue prejudice” as a basis for exclusion.

Unadjudicated acts.

[Evidence Code §§ 1108](#) and [1109](#) admit unadjudicated as well as adjudicated acts of uncharged misconduct. (*People v. Britt*, 104 Cal.App.4th 500, 505–506, 128 Cal.Rptr.2d 290 (2002).) Thus substantial time may be consumed in proving the defendant committed the unadjudicated act, unless there is evidence the defendant admitted participation. Under [Evidence Code § 352](#), the court may well decide that a mini-trial on the uncharged offense will “necessitate undue consumption of time.” In addition, *Falsetta*, *Ewoldt*, and *Balcom* teach us that a defendant may be unduly prejudiced when an unadjudicated offense is admitted because the jury may be inclined to punish the defendant for that offense. Finally, these cases note that juror confusion may result from having to determine whether the uncharged offense occurred. Under [Evidence Code § 352](#) each of these factors may lead to exclusion of the evidence. (See the discussion below.) Weighed against these exclusionary factors will be the probative value of the uncharged offense. This, in turn, may depend on the similarity of the uncharged and charged offenses (see the discussion above) and whether other acts of misconduct exist that can be more easily established.

Comment

Even if the prior misconduct resulted in a conviction, the same concerns regarding undue prejudice and juror confusion exist if the jury is not informed of the conviction. When evidence of an uncharged sexual assault is admitted under [§ 1108](#), a non-testifying defendant will normally be able to successfully resist introduction of the conviction. However when the defendant makes the tactical decision to so object, the defendant may not also contend that he or she was unduly prejudiced because the jury was not informed of the conviction and “was therefore inclined to punish appellant” for the uncharged misconduct. (*People v. Callahan*, 74 Cal. App. 4th 356, 371, 87 Cal. Rptr. 2d 838 (5th Dist. 1999).)

No published decision states that unadjudicated priors are inadmissible. In fact, in *Ewoldt*, unadjudicated prior child molestations were admitted against the defendant. (*People v. Ewoldt*, 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994).) It would, however, be unwise to ignore the emphasis in the *Falsetta* decision on the fact that the prior misconduct resulted in a conviction. (*People v. Falsetta*, 21 Cal. 4th 903, 916, 917, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999).)

Undue prejudice.

In making its determination under [Evidence Code § 352](#), the trial court must be aware of the substantial prejudice that results to a defendant from proof of a prior offense admitted under [§§ 1108](#) or [1109](#). Whether this prejudice is “undue” and thereby a basis for exclusion will depend in large part on a comparison of the inflammatory nature of the uncharged and the charged offenses. Undue prejudice will most likely be found if the uncharged offense involves far more inflammatory conduct than the one charged. (See the discussion in [§ 1:30](#).) In *People v. Harris*, the court found that the trial court erroneously admitted a prior, extremely violent sexual assault in a case where a defendant was charged with sexually assaulting women whose lack of consent was based

on their mental incapacity; no violence was alleged in the current case. (*People v. Harris*, 60 Cal. App. 4th 727, 736–737, 70 Cal. Rptr. 2d 689 (3d Dist. 1998).) In *People v. Soto*, on the other hand, the trial court properly refused to exclude a prior sexual offense, rejecting the defense argument that it was inflammatory under *Harris*. (*People v. Soto*, 64 Cal. App. 4th 966, 75 Cal. Rptr. 2d 605 (5th Dist. 1998).) “The court concluded the prior offense was not comparable to the ‘brutal, inflammatory conduct found prejudicial’ in *Harris* ... [rather] was similar in character to the charged offense, was not unduly remote and was ‘extremely probative of appellant’s sexual misconduct when left alone with young female relatives.’ ” (*People v. Falsetta*, 21 Cal. 4th 903, 919, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999), citing *People v. Soto*, 64 Cal. App. 4th 966, 991, 75 Cal. Rptr. 2d 605 (5th Dist. 1998).)

Comment

Harris sharply criticized the trial court’s effort to reduce the inflammatory nature of the prior conviction by excluding certain highly prejudicial details from the jury. “[T]his process of rewriting the facts, although it is at times necessary to further justice is itself troubling To the extent possible, jurors must be *told* the truth if they are to *find* the truth.” (*People v. Harris*, 60 Cal. App. 4th 727, 733, 70 Cal. Rptr. 2d 689 (3d Dist. 1998) (emphasis in original).) *Falsetta*, however, confirms the propriety of redacting “irrelevant though inflammatory details surrounding the offense.” (*People v. Falsetta*, 21 Cal. 4th 903, 917, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999).)

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In a prosecution for the murder of two police officers, the prosecution was permitted to prove that two years earlier the defendant robbed a bank and during his flight an exchange of gunfire with police left him a paraplegic. The earlier incident established a motive for the charged offense. (*People v. Daniels*, 52 Cal. 3d 815, 857, 277 Cal. Rptr. 122, 802 P.2d 906 (1991).) “Evidence of motive makes the crime more understandable and renders the inferences regarding intent more reasonable.” (*People v. Rogers*, 39 Cal. 4th 826, 862, 48 Cal. Rptr. 3d 1, 141 P.3d 135 (2006), cert. denied, 127 S. Ct. 2129, 167 L. Ed. 2d 866 (U.S. 2007).) However, evidence of a defendant's past criminal record to show the defendant murdered a victim he had assaulted because the defendant “was worried about the implications of his past criminal record” if the victim revealed the assault is speculative and impermissible. (*People v. Rogers*, 39 Cal. 4th 826, 864, 48 Cal. Rptr. 3d 1, 141 P.3d 135 (2006), cert. denied, 127 S. Ct. 2129, 167 L. Ed. 2d 866 (U.S. 2007), citing *People v. Alcala*, 36 Cal. 3d 604, 635, 205 Cal. Rptr. 775, 685 P.2d 1126 (1984) (In *Rogers*, the Supreme Court distinguished *Alcala* and admitted the evidence).)

Generalized threats (for example, “I’ll waste any mother that screws with me”) are admissible to show intent and motive. (*People v. Lang*, 49 Cal. 3d 991, 1013–1015, 264 Cal. Rptr. 386, 782 P.2d 627 (1989); *People v. Rodriguez*, 42 Cal. 3d 730, 757, 230 Cal. Rptr. 667, 726 P.2d 113 (1986); see *People v. Gutierrez*, 28 Cal. 4th 1083, 1138, 124 Cal. Rptr. 2d 373, 52 P.3d 572 (2002), cert. denied, 538 U.S. 1001, 123 S. Ct. 1899, 155 L. Ed. 2d 829 (2003).)

Evidence that defendant had been imprisoned on a prior rape conviction was properly admitted in a case

where the defendant was charged with murdering the woman who was prepared to testify that he had raped her. The evidence helped establish his motive for the murder: to avoid a return to prison. (*People v. Heishman*, 45 Cal. 3d 147, 168, 246 Cal. Rptr. 673, 753 P.2d 629 (1988).) In *People v. Ledesma*, 39 Cal. 4th 641, 706–707, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 127 S. Ct. 1910, 167 L. Ed. 2d 569 (U.S. 2007), evidence that the defendant had been told that a robbery victim (Flores) had identified him in a photographic lineup was admissible, without regard to its truth, to show the defendant's motive for killing Flores. In a prosecution for stalking, the prosecution must prove the defendant intended to cause the victim to fear for his or her safety. Evidence of the defendant's prior conviction for molesting the same victim and evidence he believed she had perjured herself in the earlier case helped establish a motive for the defendant to intentionally cause the victim to fear him and was admissible. (*People v. Kelley*, 52 Cal. App. 4th 568, 578–579, 60 Cal. Rptr. 2d 653 (4th Dist. 1997).)

Evidence of prior gang membership or prior drug use as a motive for murder or theft may be admissible. (See the discussion in §§ 1:31 and 1:32; *People v. Valentine*, 207 Cal. App. 3d 697, 703, 254 Cal. Rptr. 822 (4th Dist. 1988).)

As these cases demonstrate, highly similar and distinctive “common marks are not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one.” (*People v. Zambrano*, 41 Cal.4th 1082, 1129–1130; *People v. Scheer*, 68 Cal. App. 4th 1009, 1018, 80 Cal. Rptr. 2d 676 (2d Dist. 1998).)

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Evidence that on an earlier occasion the defendant received items of stolen property and removed their serial numbers was admissible to show defendant's knowledge of the stolen character of the charged property. ([People v. Harris](#), 71 Cal. App. 3d 959, 964–965, 139 Cal. Rptr. 778 (5th Dist. 1977).)

In a prosecution for possession of child pornography, evidence that the defendant had a number of other images of possible child pornography in different places on his computer are admissible under section 1101(b) to prove his knowledge of the existence of the charged photographs on his computer and “to establish the diminishing likelihood that the images presence on his computer was inadvertent.” ([People v. Garelick](#), 161 Cal.App.4th 1107, 1116 (2008).)

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§ 6:17. Admitting prosecution evidence of defendant's uncharged misconduct—To prove the absence of mistake or accident

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Prior sex acts with children can be introduced to counter the defendant's claim that any improper touching was accidental or innocuous. ([People v. Callan](#), 174 Cal. App. 3d 1101, 1108–1109, 220 Cal. Rptr. 339 (4th Dist. 1985).) In [People v. Whisenhunt](#), 44 Cal.4th 174, 203–204 (2008), a capital case, the trial court properly admitted evidence the defendant had physically abused other children to show the physical abuse of the murder victim was nonaccidental. (See [People v. Evers](#), 10 Cal.App.4th 588, 598, 12 Cal.Rptr.2d 637 (4th Dist. 1992).) In [Whisenhunt](#), the Supreme Court held this evidence admissible though the defendant had not introduced accident as a defense. (at p. 204.) Like evidence of uncharged offenses admitted to prove intent, evidence of such offenses offered to negate accident or mistake requires the least degree of similarity with the charged offense. ([People v. Burnett](#), 110 Cal. App. 4th 868, 881, 2 Cal. Rptr. 3d 120 (6th Dist. 2003).)

When a defendant in a rape prosecution relies on the defense that he mistakenly believed the victim had consented (see [People v. Mayberry](#), 15 Cal. 3d 143, 125 Cal. Rptr. 745, 542 P.2d 1337 (1975)), the prosecution may rebut with evidence of prior sexual assaults by the defendant. ([People v. Bruce](#), 208 Cal. App. 3d 1099, 1106, 256 Cal. Rptr. 647 (1st Dist. 1989); [People v. Key](#), 153 Cal. App. 3d 888, 895, 203 Cal. Rptr. 144 (4th Dist. 1984).)

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§ 6:18. Admitting prosecution evidence of defendant's uncharged misconduct—To prove consciousness of guilt

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Evidence of a pretrial escape plan can be introduced to show consciousness of guilt, even if the actual escape was never attempted. ([People v. Williams](#), 44 Cal. 3d 1127, 1143–1144, 245 Cal. Rptr. 635, 751 P.2d 901 (1988).) In addition, evidence that the defendant solicited another inmate to kill a witness is admissible as consciousness of guilt. ([People v. Edelbacher](#), 47 Cal. 3d 983, 1007, 254 Cal. Rptr. 586, 766 P.2d 1 (1989).)

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§ 6:19. Admitting prosecution evidence of defendant's uncharged misconduct—To challenge or support credibility

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[C.J.S., Witnesses §§ 587, 589 to 590, 593, 596 to 603, 605](#)

Section 1101(c) provides that the general rule of exclusion contained in subdivision (a) does not affect “the admissibility of evidence offered to support or attack the credibility of a witness.” Subject to certain limitations contained in [Evidence Code §§ 782 to 790](#) (discussed in §§ [3:50 to 3:67](#) of this volume), any fact testified to by a witness (including the defendant) may be contradicted in order to impeach, subject to [Evidence Code § 352](#). ([Evidence Code § 780\(i\)](#).) This may permit admission of prior misconduct committed by the defendant. This uncharged misconduct may raise a question about the defendant's credibility (see §§ [3:54 to 3:67](#) of this volume, and below) or defendant's prior misconduct may bolster the credibility of another. For example, if defendant's prior knowledge of and association with the codefendant is a question in the trial and defendant has denied such knowledge and association, proof that the two of them had committed an earlier offense together is admissible. ([People v. Benson](#), 130 Cal. App. 3d 1000, 1005, 180 Cal. Rptr. 921 (1st Dist. 1982). Compare [People v. Felix](#), 14 Cal. App. 4th 997, 1004–1007, 18 Cal. Rptr. 2d 113 (1st Dist. 1993).) If a defendant denies that he or she ever possessed a handgun, proof of a prior arrest or conviction for such an offense is admissible. ([People v. Cooks](#), 141 Cal. App. 3d 224, 324, 190 Cal. Rptr. 211 (1st Dist. 1983).) In addition, evidence of other homicides committed by the defendant may be used to impeach an expert who testifies that the defendant has a mental defense to the homicide charged. ([People v. Hendricks](#), 44 Cal. 3d 635, 642, 244 Cal. Rptr. 181, 749 P.2d 836 (1988).)

Similarly, a defendant's explanation of criminal conduct can be impeached with evidence that the same innocent explanation has been offered by him to justify other misconduct. Thus, in *People v. Millwee*, a defendant

accused of murdering his mother explained the shooting resulted from a sudden jolt to his leg. A second shooting by the defendant 48 hours later, which he also explained as the result of a sudden distraction, was properly admitted to show that “defendant's versions of the two shootings were suspiciously ‘similar.’ ” (*People v. Millwee*, 18 Cal. 4th 96, 129–131, 74 Cal. Rptr. 2d 418, 954 P.2d 990 (1998).)

In addition, accomplices of the defendant who testify for the prosecution may be permitted to bolster their credibility by relating statements made to them by the defendant that he was a “member of the ... Mafia, and the CIA and had been engaged in drug activity” to explain why they had cooperated with the defendant. (*People v. Hayes*, 21 Cal. 4th 1211, 1262–1263, 91 Cal. Rptr. 2d 211, 989 P.2d 645 (1999).) In *People v. Stern*, 111 Cal. App. 4th 283, 3, 3 Cal. Rptr. 3d 479 (2d Dist. 2003), the defendant was charged with threatening the victim and attempting to dissuade his testimony. The victim testified that during the subject conversation, the defendant “bragg[ed] that he stabbed somebody in the throat just a couple of nights earlier” The prosecution was entitled to introduce evidence that the defendant had, in fact, stabbed another person several nights earlier to enhance the credibility of the victim. The evidence was relevant and not subject to the restrictions on character evidence contained in § 1101(a) and (b). (*Stern*, 111 Cal. App. 4th at 296.)

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§ 6:20. Admitting prosecution evidence of defendant's uncharged misconduct—Prior violent acts

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The prosecution can introduce opinion and reputation evidence and evidence of specific instances of conduct to prove that the defendant has a character trait for violence and in the charged offense acted in conformity with that trait if the defendant has first introduced evidence that the victim had a character trait for violence. ([Evidence Code § 1103\(b\)](#).) The constitutionality of this section was upheld in [People v. Blanco](#), 10 Cal. App. 4th 1167, 1173–1176, 13 Cal. Rptr. 2d 176 (1st Dist. 1992). See a general discussion of this subdivision in § 6:25.

Comment

In addition to introducing evidence of the defendant's propensity for violence, the prosecution may rebut defense evidence that the victim has a character trait for violence with evidence that the victim has the opposite character. ([Evidence Code § 1103\(a\)\(2\)](#).)

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§ 6:21. Introducing evidence of uncharged misconduct

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A prior act need not be a criminal offense to be admissible under [Evidence Code § 1101\(b\)](#). (*People v. Wills–Watkins*, 99 Cal. App. 3d 451, 160 Cal. Rptr. 289 (2d Dist. 1979).) In *Wills–Watkins*, the prosecution in a rape-kidnap case was permitted to prove that on another occasion the defendant had attempted to coerce a different woman to come up to his apartment under conditions similar to the crime charged. (*People v. Wills–Watkins*, 99 Cal. App. 3d 451, 456, 160 Cal. Rptr. 289 (2d Dist. 1979).)

Uncharged misconduct may be proven even though it did not result in a conviction. For example, in *People v. Garcia*, defendant was charged with murder for causing the death of another in a driving under the influence accident. The prosecution was permitted to show evidence of the circumstances of two prior driving under the influence arrests, to prove the knowledge element of implied malice, though neither had resulted in a conviction. (*People v. Garcia*, 41 Cal. App. 4th 1832, 50 Cal. Rptr. 2d 127 (5th Dist. 1995); see also *People v. Singh*, 37 Cal. App. 4th 1343, 44 Cal. Rptr. 2d 644 (1st Dist. 1995).) In fact, even if the defendant was acquitted of the uncharged offense, it may still be admitted in the current case. (*People v. Griffin*, 66 Cal. 2d 459, 58 Cal. Rptr. 107, 426 P.2d 507 (1967); *Matthews v. Superior Court*, 201 Cal. App. 3d 385, 390, 247 Cal. Rptr. 226 (2d Dist. 1988).) In such a situation, it is error to exclude defense evidence of the acquittal. (*People v. Griffin*, 66 Cal. 2d 459, 465, 58 Cal. Rptr. 107, 426 P.2d 507 (1967); *People v. Mullens*, 119 Cal. App. 4th 648, 666–670, 14 Cal. Rptr. 3d 534 (4th Dist. 2004) [If propensity evidence is admitted under § 1108, it is error to exclude defense evidence that the defendant had been acquitted of that offense.].) In *People v. Escobar*, the defendant was prosecuted for the murder of his wife in 1997. Evidence of a 1992 violent incident between the two was properly admitted into evidence, though, at the time of that investigation, the defendant claimed he had acted in self-

defense and no prosecution occurred. (*People v. Escobar*, 82 Cal. App. 4th 1085, 1096, 98 Cal. Rptr. 2d 696 (1st Dist. 2000).)

Does the mere entry of a plea of not guilty by a criminal defendant put in issue each element of the crime charged so as to permit evidence of collateral misconduct? At one time the law seemed clear that it did not. (*People v. Thompson*, 27 Cal. 3d 303, 315, 165 Cal. Rptr. 289, 611 P.2d 883 (1980).) Under *Thompson*, prosecutors were rarely permitted to introduce evidence of the uncharged offense in the case in chief; depending on the defense case, the evidence was introduced in rebuttal. (*People v. Perkins*, 159 Cal. App. 3d 646, 652, 205 Cal. Rptr. 625 (2d Dist. 1984); but see *People v. Williams*, 44 Cal. 3d 883, 907, 245 Cal. Rptr. 336, 751 P.2d 395 (1988), which permitted such evidence in the case in chief if it was clear that the issue would be raised or if the judge believed the evidence necessary to establish an element of the offense and avoid a directed verdict of acquittal.) However, it is now clear that *Thompson* is no longer the law. In *People v. Rowland*, the court held that “a fact—like defendant's intent—generally becomes ‘disputed’ when it is raised by a plea of not guilty or a denial of an allegation.” (*People v. Rowland*, 4 Cal. 4th 238, 260, 14 Cal. Rptr. 2d 377, 841 P.2d 897 (1992).)

An uncharged offense need not be proved beyond a reasonable doubt to be admitted. (*People v. Hendricks*, 44 Cal. 3d 635, 648, 244 Cal. Rptr. 181, 749 P.2d 836 (1988).) In *People v. Carpenter*, the court held that the preponderance of the evidence standard applies. (*People v. Carpenter*, 15 Cal. 4th 312, 380–382, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997).) The uncorroborated testimony of an accomplice is sufficient to establish an uncharged offense. (*People v. Williams*, 44 Cal. 3d 883, 911, 245 Cal. Rptr. 336, 751 P.2d 395 (1988).)

When the prosecution seeks to introduce evidence of an uncharged offense under § 1101(b), the defendant is not entitled to move to suppress that evidence under Penal Code § 1538.5, absent proof of a sufficiently close nexus between the two incidents. (*People v. Beuer*, 77 Cal. App. 4th 1433, 92 Cal. Rptr. 2d 572 (2d Dist. 2000).) One example of this nexus, referred to in *Beuer*, occurs when there is a showing of collusion between the officers in the two incidents. (*People v. Beuer*, 77 Cal. App. 4th 1433, 1439–1440, 92 Cal. Rptr. 2d 572 (2d Dist. 2000).)

In *People v. Catlin*, the defendant had previously been convicted of murder [of Glenda], but in that case the court had found not true a special circumstances allegation of murder for financial gain. In the current case, evidence of Glenda's murder was admitted, as well as evidence that the defendant received insurance proceeds following her death. The defendant objected to the insurance proceeds evidence on collateral estoppel grounds, but the Supreme Court upheld admissibility: “Because in the subsequent trial the prosecution was not required to establish beyond a reasonable doubt the defendant's [motive] in the uncharged crime involved in the prior trial, collateral estoppel principles did not bar introduction of that evidence in the subsequent unrelated trial.” (*People v. Catlin*, 26 Cal. 4th 81, 124, 129, 26 Cal. 4th 1060c, 109 Cal. Rptr. 2d 31, 26 P.3d 357 (2001).)

Warning

It is unclear whether the corpus delicti rule applies to evidence of uncharged offenses. Several Supreme Court decisions have said that it does. (*People v. Williams*, 44 Cal. 3d 883, 910, 245 Cal. Rptr. 336, 751 P.2d 395 (1988); *People v. Robertson*, 33 Cal. 3d 21, 41, 188 Cal. Rptr. 77, 655 P.2d 279 (1982).) A more recent Court of Appeal decision, however, found the question unresolved and refused to extend the rule to uncharged crimes. (*People v. Denis*, 224 Cal. App. 3d 563, 570, 273 Cal. Rptr. 724 (2d Dist. 1990).) In *People v. Clark*, the Supreme Court agreed with *Denis* that the question is unresolved. (*People v. Clark*, 3

Cal. 4th 41, 124, 10 Cal. Rptr. 2d 554, 833 P.2d 561 (1992).) In *People v. Alvarez*, 27 Cal. 4th 1161, 119 Cal. Rptr. 2d 903, 46 P.3d 372 (2002), the Supreme Court restricted the use of the corpus delicti rule. (See the discussion in § 5:20.)

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§ 6:22. Opinion or reputation evidence by prosecution**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 🔑 375**Legal Encyclopedias**[C.J.S., Criminal Law §§ 1105 to 1112, 1114](#)

When can the prosecution introduce opinion or reputation evidence to prove that the defendant has a particular character trait and acted in conformity with it? [Evidence Code § 1101\(a\)](#) states the general rule that such evidence is inadmissible. However, if a defendant introduces opinion or reputation evidence of a good character trait to prove his or her conduct in conformity with that trait, then the prosecution may rebut such evidence with reputation or opinion evidence about the defendant. ([Evidence Code § 1102\(b\)](#).)

Where a defendant has testified at length about his or her background, family, business, and civic activities, the provisions of [§ 1102\(b\)](#) are triggered, but only opinion and reputation evidence may be introduced by the prosecution, not evidence of specific acts of misconduct. ([People v. Wagner](#), 13 Cal. 3d 612, 617–619, 119 Cal. Rptr. 457, 532 P.2d 105 (1975).) In *People v. Lankford*, the defendant on direct admitted a prior felony conviction and then volunteered: “I didn't have no incidents yet since I've been out.” The court ruled that this comment triggered [Evidence Code § 1102\(b\)](#), permitting prosecution rebuttal, but left open the question of whether Proposition 8 had eliminated the limitation contained in this subdivision against use of specific acts of misconduct to rebut a defendant's evidence of good character. ([People v. Lankford](#), 210 Cal. App. 3d 227, 235–240, 258 Cal. Rptr. 322 (1st Dist. 1989).) In *People v. Felix*, the court ruled that Proposition 8 had not eliminated the limitation of [Evidence Code § 1102\(b\)](#), against use of specific acts of misconduct to rebut defendant's evidence of good character. ([People v. Felix](#), 70 Cal. App. 4th 426, 82 Cal. Rptr. 2d 701 (4th Dist. 1999).)

If a defendant introduces evidence under [Evidence Code § 1103\(a\)\(1\)](#), to prove that the victim had a character trait for violence and that the victim acted in conformity with that trait, then the prosecution may introduce

opinion or reputation evidence of the defendant's character for violence to prove conduct in conformity with that trait. ([Evidence Code § 1103\(b\)](#).) See the discussion in [§ 6:25](#) of the prosecutor's right to rebut under [§ 1103\(b\)](#) if the defendant introduces evidence of the victim's trait for violence for some other purpose, for example to show that the defendant had an honest though unreasonable belief in the need for self-defense. (See [People v. Flannel](#), 25 Cal. 3d 668, 160 Cal. Rptr. 84, 603 P.2d 1 (1979).)

If the defendant offers evidence that the victim has a particular character trait to prove that the victim acted in conformity with that trait, the prosecution can introduce opinion or reputation evidence about the victim to rebut it. ([Evidence Code § 1103\(a\)\(2\)](#).)

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Habit and custom evidence has been admitted to enable the prosecution to establish the validity of a guilty plea in a prior conviction. ([Curl v. Superior Court](#), 51 Cal. 3d 1292, 1297, 276 Cal. Rptr. 49, 801 P.2d 292 (1990).) The prosecution may introduce habit and custom evidence to show that a burglary victim had in fact locked the car doors on the date of the incident ([In re Charles G.](#), 95 Cal. App. 3d 62, 66, 156 Cal. Rptr. 832 (5th Dist. 1979)) and that the victim was carrying money at the time of the murder ([People v. Webb](#), 6 Cal. 4th 494, 529, 24 Cal. Rptr. 2d 779, 862 P.2d 779 (1993); [People v. McPeters](#), 2 Cal. 4th 1148, 1178, 9 Cal. Rptr. 2d 834, 832 P.2d 146 (1992).)

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C. Restrictions On Defense's Use Of Character Evidence To Prove Conduct In Criminal Case

§ 6:24. Defense evidence of own character to prove own conduct

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[C.J.S., Criminal Law §§ 1105 to 1112, 1114](#)

[C.J.S., Witnesses §§ 461 to 462](#)

The defendant may introduce opinion or reputation evidence of his or her own character to prove conduct in conformity therewith when such evidence is relevant to a defense. ([Evidence Code § 1102\(a\)](#).) Thus, in a homicide case, a defendant may introduce an expert opinion that he is nonviolent, ([People v. Guerra](#), 37 Cal. 4th 1067, 1118–1119, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006)) and, in a theft case, opinion or reputation evidence that the defendant is honest is admissible. ([People v. McAlpin](#), 53 Cal. 3d 1289, 1305, 283 Cal. Rptr. 382, 812 P.2d 563 (1991).) The opinion evidence may be presented by an expert witness. Thus, in *People v. Stoll*, the court found that § 1102 permits a defendant to present expert opinion evidence that he was not a sexual deviant, because it would show a nondisposition to commit the charged sex offense. ([People v. Stoll](#), 49 Cal. 3d 1136, 1153, 265 Cal. Rptr. 111, 783 P.2d 698 (1989).) The opinion evidence may also be provided by a lay person. In *McAlpin*, the court held that a character witness for the defendant could opine that the defendant was not “a person of lustful or lewd conduct with children,” so long as the opinion was based on relevant observations by the witness of the defendant's interactions with children. ([People v. McAlpin](#), 53 Cal. 3d 1289, 1305–1310, 283 Cal. Rptr. 382, 812 P.2d 563 (1991).)

Witnesses who provide either reputation or opinion evidence for the defense may be cross-examined about conduct of the defendant inconsistent with their testimony in the “Have you heard ...?” form. The rules limiting such cross-examination of a reputation or an opinion witness are different, however, and are discussed in detail

in *People v. Hempstead*. With reputation evidence, cross-examination about particular incidents is appropriate but, in limine, the prosecution must establish that it has a *good faith* belief that the acts occurred and that the questions will receive an affirmative response. (*People v. Hempstead*, 148 Cal. App. 3d 949, 952, 196 Cal. Rptr. 412 (1st Dist. 1983).)

“ ‘When a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony. [Citation]’ ” The People must have a good faith belief that the acts or conduct inquired of actually occurred. The same principles apply when the witness gives character testimony. (*People v. Ramos*, 15 Cal. 4th 1133, 1173, 64 Cal. Rptr. 2d 892, 938 P.2d 950 (1997).) In *Ramos*, the prosecution was entitled to question a witness who testified to the defendant's post-incarceration religious commitment about the defendant's possession of handmade knives while in custody. With opinion evidence, the prosecutor, in limine, must show only a good faith belief that the incident occurred. “The prosecution must have the opportunity to let the jury test the validity of the opinion ... by asking whether the holder ... has knowledge of events or acts which indisputably occurred.” The right to ask such questions is subject to the provisions of [Evidence Code § 352](#). (*People v. Hempstead*, 148 Cal. App. 3d 949, 954, 196 Cal. Rptr. 412 (1st Dist. 1983).) “Act or event” can include mere allegations. Thus, in *People v. Clair*, the prosecutor was permitted to ask the defendant's character witness: “In regards to the opinion and the character traits you have testified about, have you heard that Mr. Clair has been charged in the state of Louisiana ... with the crime of rape ...?” At the time of trial, the Louisiana charge had not yet been adjudicated. (*People v. Clair*, 2 Cal. 4th 629, 682–685, 7 Cal. Rptr. 2d 564, 828 P.2d 705 (1992).)

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C. Restrictions On Defense's Use Of Character Evidence To Prove Conduct In Criminal Case

§ 6:25. Defense evidence of victim's character or misconduct to show victim's conduct—Self-defense cases**West's Key Number Digest**Wests Key Number Digest, [Assault and Battery](#) 🔑83(3)Wests Key Number Digest, [Homicide](#) 🔑994, 1051**Legal Encyclopedias**[C.J.S., Assault § 138](#)

The defendant may introduce opinion or reputation evidence or proof of specific acts of the victim to establish a character trait of the victim in order to show that the victim acted in conformity with that trait. ([Evidence Code § 1103\(a\)\(1\)](#).) Thus in *People v. Wright*, the defense in a murder case was permitted to introduce evidence of the victim's prior violent assault on a police officer to help support its claim of self-defense. ([People v. Wright](#), 39 Cal. 3d 576, 587, 217 Cal. Rptr. 212, 703 P.2d 1106 (1985).) When a police officer is the victim of an alleged assault, evidence that the officer had used excessive force on prior occasions is admissible to support the defendant's claim of self-defense. ([Pitchess v. Superior Court](#), 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (1974).) In advance of trial, the defense is entitled to discover complaints of such conduct filed with the police department pursuant to [Evidence Code § 1043](#), which is discussed in §§ 5:79 to 5:81.

When self-defense becomes an issue in a case, the defendant's state of mind is the primary focus. Thus to justify an act of self-defense the defendant must have had an honest and reasonable belief that bodily injury will be inflicted imminently. Both the use of force by the accused and the extent of such force must be reasonable to be excused. “[A]lthough the test is objective, reasonableness is determined from the point of view of a reasonable person in the defendant's position. The jury must consider all the facts and circumstances it might ‘expect’ to operate on [defendant's] mind.” ([People v. Minifie](#), 13 Cal. 4th 1055, 1065, 56 Cal. Rptr. 2d 133, 920 P.2d 1337 (1996).) For this reason, defense evidence of prior violence by the victim, which the defendant was aware of, is admissible; it is a “fact and circumstance” operating on the defendant's mind. In addition, defense evidence of prior violence by the victim that establishes a character trait of the victim, submitted under [Evidence Code §](#)

[1103\(a\)\(1\)](#), is relevant if it helps confirm the defendant's assertion the victim was the aggressor, even if the defendant was unaware of the prior violence at the time of the alleged offense.

Other alleged misconduct of the victim that, strictly speaking, is not admitted as character evidence under [Evidence Code § 1103\(a\)\(1\)](#), may also be admitted as a “fact and circumstance” operating on the defendant's mind. For example, prior threats by the victim against the defendant, which the defendant is aware of, are admissible without any contention that they establish a relevant character trait. ([People v. Minifie](#), 13 Cal. 4th 1055, 1065, 56 Cal. Rptr. 2d 133, 920 P.2d 1337 (1996); see also [People v. Aris](#), 215 Cal. App. 3d 1178, 1188, 264 Cal. Rptr. 167 (4th Dist. 1989).)

It is reasonable for one who has been previously threatened by another to take that threat into account when evaluating the current necessity for defensive action against that person. ([People v. Spencer](#), 51 Cal. App. 4th 1208, 1219, 59 Cal. Rptr. 2d 627 (1st Dist. 1996).) Similarly, evidence that third parties have made threats against the defendant, which he is aware of, is admissible, if the defendant reasonably associates these third parties with the victim. “The defendant's perceptions are at issue, and threats from a family and its friends may color a person's perceptions of that group no less than threats from an individual may color that person's perceptions of that individual.” ([People v. Minifie](#), 13 Cal. 4th 1055, 1065–1066, 56 Cal. Rptr. 2d 133, 920 P.2d 1337 (1996).) Note that evidence of third party threats is admissible “only if other evidence shows fear of imminent harm.” ([People v. Minifie](#), 13 Cal. 4th 1055, 1070, 56 Cal. Rptr. 2d 133, 920 P.2d 1337 (1996).)

In a case decided the same day as *Minifie*, the Supreme Court provided another example of the type of evidence that is relevant to understanding the defendant's state of mind and may cast the victim in a bad light. In *People v. Humphrey*, the court considered expert testimony concerning battered women's syndrome offered by a wife charged with murdering her husband. In part, the expert testified a battered woman can become increasingly sensitive to an abuser's behavior. In reversing the conviction, the court found it was error to preclude the defense from introducing this expert testimony on the issue of the objective reasonableness of the defendant's conclusion that the threat to her life was imminent. ([People v. Humphrey](#), 13 Cal. 4th 1073, 1086, 56 Cal. Rptr. 2d 142, 921 P.2d 1 (1996) (trial court properly admitted the defendant's testimony concerning the abuse inflicted); see discussion of battered women's syndrome in [§ 4:17](#).) However, the court did not permit use of the evidence to redefine the “reasonable person” standard. “[W]e are not changing the standard from objective to subjective, or replacing the reasonable ‘person’ standard with a reasonable ‘battered woman’ standard [or] ‘reasonable gang member’ standard.” ([Humphrey](#), 13 Cal. 4th at 1087; see [People v. Jefferson](#), 119 Cal. App. 4th 508, 518–520, 14 Cal. Rptr. 3d 473 (3d Dist. 2004) [Trial court properly rejected defendant's evidence of his mental illness, designed to establish his “reasonable person” standard in support of his defense of self-defense.]

Comment

Unlike other syndromes, such as rape trauma syndrome, battered women's syndrome is specifically made admissible by [Evidence Code § 1107](#), without compliance with the *Kelly* requirements.

If the defendant introduces evidence of the victim's character trait under [Evidence Code § 1103\(a\)\(1\)](#), the prosecution may rebut with contrary evidence concerning the victim. ([Evidence Code § 1103\(a\)\(2\)](#).) If the defendant introduces evidence the victim had a violent character, the prosecution may also introduce evidence of the defendant's violent character under [Evidence Code § 1103\(b\)](#). ([People v. Koontz](#), 27 Cal. 4th 1041, 1083–1084, 119 Cal. Rptr. 2d 859, 46 P.3d 335 (2002), cert. denied, 537 U.S. 1117, 123 S. Ct. 881, 154 L. Ed.

2d 794 (2003).) However, [section 1103\(a\)\(2\)](#) is not triggered by evidence that the victim acted violently at the time of the charged offense. “[Evidence Code, section 1103](#) contemplates that character evidence comprises something other than evidence of conduct at the time in question because character evidence is used to show the person acted ‘in conformity’ with his or her character.” ([People v. Myers](#), 148 Cal. App. 4th 546, 56 Cal. Rptr. 3d 27 (4th Dist. 2007).)

What right to rebut does the prosecution have if the evidence concerning the victim (for example, prior threats) is not introduced to establish a character trait? The following four examples help illustrate the nature of this problem without covering every possible factual context in which it arises:

- The defendant wishes to introduce evidence that the victim committed a violent assault against another and the defendant was unaware of this prior to the charged incident. Such evidence is admissible only under [Evidence Code § 1103\(a\)\(1\)](#), and is subject to the prosecution's right to rebut under [Evidence Code §§ 1103\(a\)\(2\) and 1103\(b\)](#).
- The defendant wishes to introduce evidence that the victim had made earlier threats against the defendant and the defendant was aware of these threats prior to the incident in question. This evidence would not appear to be admissible under [Evidence Code § 1103\(a\)\(1\)](#), because, at most, it would establish a character trait of making threats, not being violent. Therefore it would not seem to be subject to the prosecution's right to rebut under either [§ 1103\(a\)\(2\)](#) or (b). The evidence is admissible, however, to illuminate the reasonableness of defendant's actions, as discussed above.
- The defendant wishes to introduce evidence of threats by the victim against the defendant that the defendant was unaware of. This evidence is not “character evidence”: it does not prove a character trait relevant to the defense. Rather it is introduced to prove the victim acted in conformity with the threat and was the aggressor. (See the discussion of [Evidence Code § 1250\(a\)\(2\)](#) in [§ 2:51](#).)
- The defendant wishes to introduce evidence the victim had engaged in prior acts of violence, each of which the defendant was aware of before the charged incident. This evidence is admissible to show a character trait of the victim under [Evidence Code § 1103\(a\)\(1\)](#), and to show a heightened concern on the part of the defendant. If admitted under [§ 1103\(a\)\(1\)](#), it will trigger the prosecution's right to rebut. Should the defendant be able to admit it only on the second basis, accept a limiting instruction to the jury, and eliminate the prosecutor's right to rebut? No. Though limiting instructions are often condoned, they arise in the context of evidence that is admissible for only some among many purposes. The instruction permits more relevant evidence to come before the jury by reducing the likelihood it will be considered for an inadmissible purpose. Though there is a risk the limiting instruction will be ignored, it is offset by increasing the relevant evidence provided the jury. There is no authority for use of a limiting instruction when evidence is fully admissible, simply to avoid the negative effect of admission on the proponent. Permitting the defendant to accomplish this would have the effect of incurring the risk the jury would ignore the instruction in order to reduce the relevant evidence presented. (Compare [People v. Walton](#), 42 Cal. App. 4th 1004, 1015, 49 Cal. Rptr. 2d 917 (2d Dist. 1996), which reached this result without discussing its reasoning.) Federal law may be to the contrary. In its note to the 2000 Amendment to [Federal Rule of Evidence, Rule 404](#), the Advisory Committee discusses the Federal Rules equivalent to [Evidence Code § 1103\(b\)](#) and states that this provision does not permit proof of the accused's character if the accused merely uses evidence of the victim's violent

past “for a purpose other than to prove the alleged victim's propensity to act in a certain way.” As an example, the comment cites “evidence of the alleged victim's violent character when known by the accused ... ‘on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm’.”

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Chapter
6. Evidence Affected Or Excluded By Extrinsic Policies

C. Restrictions On Defense's Use Of Character Evidence To Prove Conduct In Criminal Case

§ 6:26. Defense evidence of victim's character or misconduct to show victim's conduct—Sexual offense cases**West's Key Number Digest**West's Key Number Digest, [Rape](#) 🔑40**Legal Encyclopedias**[C.J.S., Rape §§ 1, 62, 86 to 89](#)

The defendant may introduce opinion or reputation evidence or proof of specific acts of the victim to show a character trait of the victim in order to show that the victim acted in conformity with that trait. ([Evidence Code § 1103\(a\)\(1\)](#).) A defendant charged with rape may be entitled to introduce evidence of prior false accusations of rape by the victim under [Evidence Code § 1103\(a\)](#). ([People v. Burrell–Hart](#), 192 Cal. App. 3d 593, 237 Cal. Rptr. 654 (2d Dist. 1987).) However, [Evidence Code § 352](#) may require exclusion of such evidence as too time-consuming. That is, if such evidence provokes a minitrial on the other accusation, much time would be required to decide if the accusation was true or false. ([People v. Tidwell](#), 163 Cal.App.4th 1447, 1456–1458 (2008).) On the other hand, if a witness can testify to hearing the alleged victim recant the prior accusation, the time problem would be much reduced. Under the Federal Rules, as well, proof of prior false accusations of sexual assault are not barred by the rule against prohibiting evidence of a victim's past sexual behavior. ([Federal Rules of Evidence, Rule 412](#), Advisory Committee's Note to 1994 Amendment.)

Generally, the defendant in a sexual assault case ([Penal Code § 261](#), [264.1](#), [286](#), [288a](#), or [289](#), or assault with intent to commit, attempt, or conspire to commit a crime defined in those sections) may not introduce evidence of opinion, reputation, or specific instances of the victim's sexual conduct to prove the victim consented to the sex act. ([Evidence Code § 1103\(c\)\(1\)](#).) Such evidence is admissible to attack the credibility of the complaining witness if the procedures provided for in [Evidence Code § 782](#) are followed. (See the discussion in [§ 3:30](#).) Logically, evidence of the victim's prior sexual background could be relevant to prove consent and to establish that the victim lied in denying consent. (See the discussion in [People v. Steele](#), 210 Cal. App. 3d 67, 75, 257

Cal. Rptr. 687 (1st Dist. 1989); see also *People v. Randle*, 130 Cal. App. 3d 286, 181 Cal. Rptr. 745 (1st Dist. 1982).) Though inadmissible on the first basis, it may be introduced under [Evidence Code § 782](#) to establish credibility, unless the court excludes it under [§ 352](#). One Court of Appeal has noted that trial judges have narrowly exercised the discretion conferred in [Evidence Code § 782](#) so as not to allow “the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history [T]he credibility exception has been utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution.” (*People v. Chandler*, 56 Cal. App. 4th 703, 708, 65 Cal. Rptr. 2d 687 (1st Dist. 1997).)

The general exclusion of [Evidence Code § 1103\(c\)\(1\)](#), does not apply in a sexual assault case allegedly occurring in a local detention facility or state prison ([Evidence Code § 1103\(c\)\(1\)](#)), and does not apply to evidence of the victim's sexual conduct with the defendant. ([Evidence Code § 1103\(c\)\(3\)](#).) However, evidence of the manner in which the victim was dressed at the time of the commission of the offense is not admissible when offered by either party on the issue of consent in any prosecution for an offense specified in [§ 1103\(c\)\(1\)](#), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence must make an offer of proof outside the presence of the jury. The court then makes its determination and, at that time, states the reason for its ruling on the record. “Manner of dress” does not include the condition of the victim's clothing before, during, or after the commission of the offense. ([Evidence Code § 1103\(c\)\(2\)](#).) If the victim testifies about his or her sexual history or the prosecution introduces any evidence of the victim's sexual history, the defendant may cross-examine that witness and produce other evidence limited specifically to rebuttal. ([Evidence Code § 1103\(c\)\(4\)](#).)

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§ 6:27. Habit and custom evidence introduced by defendant

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[C.J.S., Criminal Law §§ 972 to 982, 985, 990, 997, 1113 to 1114](#)

In a motion to suppress a confession, the defendant may show, through the prior acts of the interrogating officers, that they had a habit and custom of obtaining confessions by excessive force. ([People v. Memro](#), 38 Cal. 3d 658, 681, 214 Cal. Rptr. 832, 700 P.2d 446 (1985).) For a discussion of the use of habit and custom evidence by a petitioner in a habeas corpus case, see the discussion in [§ 6:7](#) of this volume.

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§ 6:28. Defense evidence of character of third party or codefendant**West's Key Number Digest**West's Key Number Digest, [Criminal Law](#) 🔑359West's Key Number Digest, [Homicide](#) 🔑1033**Legal Encyclopedias**[C.J.S., Criminal Law § 994](#)

In certain cases, the defendant is permitted to prove that a third party is responsible for the crime (see the discussion in [§ 1:34](#)). The defendant's ability to introduce evidence of other crimes committed by the third party is limited by § 1101. In *People v. Davis*, the Supreme Court rejected the defendant's contention that "section 1101 should apply only to exclude inculpatory evidence of other crimes committed by a defendant, not evidence concerning a third party's culpability." (*People v. Davis*, 10 Cal. 4th 463, 500, 41 Cal. Rptr. 2d 826, 896 P.2d 119 (1995).) In *People v. Tackett*, 144 Cal. App. 4th 445, 50 Cal. Rptr. 3d 449 (3d Dist. 2006), the court refused to permit the defendant in a prosecution for driving under the influence causing injury to his passenger (and the deaths of two persons in a different car) to introduce evidence that the passenger-victim had had two prior incidents of driving under the influence. The court rejected the defendant's contention that the evidence was admissible under section 1101(b), concluding the passenger's prior acts were not sufficiently distinctive or unique. (*People v. Tackett*, 144 Cal. App. 4th 445, 456–459, 50 Cal. Rptr. 3d 449 (3d Dist. 2006).) The court also rejected the defendant's argument that the evidence of the passenger-victim's prior misconduct was admissible under section 1103. "[I]n enacting section 1103, subdivision (a)(1), the Legislature did not employ the word 'victim' in the broad sense of anyone who could be said to have been injured by the defendant's conduct; instead it intended to use the word in the limited sense of a person at whom the defendant's conduct was directed and whose own conduct could serve to explain, justify, or excuse the defendant's conduct toward that person." (*People v. Tackett*, 144 Cal. App. 4th 445, 455, 50 Cal. Rptr. 3d 449 (3d Dist. 2006).)

A defendant is permitted to introduce evidence of prior bad acts by a codefendant if relevant for some pur-

pose other than to show disposition to commit such acts. In *People v. Escobar*, the defendant contended that he had assisted the codefendant in a kidnap and murder because he was afraid of him. For this reason, he was permitted to introduce evidence from a witness who had seen the codefendant carrying a firearm on two occasions prior to the crime at the same location as the crime occurred. (*People v. Escobar*, 48 Cal. App. 4th 999, 1023–1024, 55 Cal. Rptr. 2d 883 (2d Dist. 1996).) *Escobar* relied on *People v. Gallego*, which permitted introduction of evidence against the defendant by the prosecution that he had previously beaten his wife, who was an accomplice in the charged homicides, testifying for the prosecution. The court admitted the evidence because it helped explain the wife had cooperated with the defendant out of fear. (*People v. Gallego*, 52 Cal. 3d 115, 174, 276 Cal. Rptr. 679, 802 P.2d 169 (1990).)

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§ 6:29. When is juror declaration or testimony admissible to challenge verdict?

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[C.J.S., New Trial § 203](#)

[C.J.S., Trial §§ 818, 846, 921 to 926](#)

In a motion for a new trial, any otherwise admissible evidence of statements, conduct, conditions, or events is admissible to test the verdict, except no evidence is admissible to show the effect of such statement, conduct, condition, or event on a juror's verdict or on the mental processes by which it was determined. ([Evidence Code § 1150](#).) After determining the admissibility of the evidence challenging the jurors' conduct during deliberations, the court must then determine if the acts establish misconduct. If it so concludes, the court must determine whether the misconduct was prejudicial. ([People v. Hord](#), 15 Cal. App. 4th 711, 724, 19 Cal. Rptr. 2d 55 (5th Dist. 1993); see the discussion of burden of proof in [§ 6:31](#).)

[Section 1150](#) makes a “distinction between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved.” The former is admissible, the latter is not. “This limitation prevents one juror from upsetting a verdict ... by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent.” ([People v. Cox](#), 53 Cal. 3d 618, 694, 280 Cal. Rptr. 692, 809 P.2d 351 (1991) (citing the *Hutchinson* rule); [People v. Hutchinson](#), 71 Cal. 2d 342, 349–350, 78 Cal. Rptr. 196, 455 P.2d 132 (1969).) Thus, a juror affidavit on the effect of smoking on

deliberations was rejected in *People v. Cox*, 53 Cal. 3d 618, 695, 280 Cal. Rptr. 692, 809 P.2d 351 (1991). Affidavits stating that the juror was confused by the jury instructions have been routinely rejected. (*People v. Beardslee*, 53 Cal. 3d 68, 114, 53 Cal. 3d 1179a, 279 Cal. Rptr. 276, 806 P.2d 1311 (1991); *People v. Morris*, 53 Cal. 3d 152, 231, 279 Cal. Rptr. 720, 807 P.2d 949 (1991); *Ford v. Bennacka*, 226 Cal. App. 3d 330, 336, 276 Cal. Rptr. 513 (4th Dist. 1990).) Declarations stating that the juror's vote was a compromise have also been rejected. (*Sanchez-Corea v. Bank of America*, 38 Cal. 3d 892, 910, 215 Cal. Rptr. 679, 701 P.2d 826 (1985).) In *People v. Tafoya*, 42 Cal.4th 147, 195 (2007), the trial court sustained an objection to a defense question to a juror about a statement made to the juror by the juror's employer, that not all death row inmates are executed. This ruling was proper because the question sought to establish that this comment relieved the juror of responsibility when voting for death.

Examples of admissible juror declarations include the following:

- One juror relied on his police experience to provide the others with an erroneous statement of the law regarding the elements of robbery (*In re Stankewitz*, 40 Cal. 3d 391, 396, 220 Cal. Rptr. 382, 708 P.2d 1260 (1985).)
- A juror consulted with an outside attorney for advice on the law regarding involuntary manslaughter and diminished capacity (*People v. Honeycutt*, 20 Cal. 3d 150, 154–158, 141 Cal. Rptr. 698, 570 P.2d 1050 (1977).)
- A bilingual juror gave her own version of defendant's Spanish-language testimony (*People v. Cabrera*, 230 Cal. App. 3d 300, 303, 281 Cal. Rptr. 238 (2d Dist. 1991).)
- A juror related her own experience with the medical condition at issue in the malpractice case and another juror had consulted a reference to define terms (*Jones v. Sieve*, 203 Cal. App. 3d 359, 366, 249 Cal. Rptr. 821 (2d Dist. 1988).)
- A juror read a news story during the trial and learned that the defendant was on parole for an assault charge (*People v. Holloway*, 50 Cal. 3d 1098, 269 Cal. Rptr. 530, 790 P.2d 1327 (1990).)
- A juror had read a dictionary to better understand the court's instruction on “mitigating” a death sentence and that a juror had looked in the library for books by a defense expert (*People v. Karis*, 46 Cal. 3d 612, 250 Cal. Rptr. 659, 758 P.2d 1189 (1988).)
- A juror discussed a criminal defendant's failure to testify (*People v. Perez*, 4 Cal. App. 4th 893, 908, 6 Cal. Rptr. 2d 141 (4th Dist. 1992).)
- The verdict on economic damages was a quotient verdict (*Chronakis v. Windsor*, 14 Cal. App. 4th 1058, 18 Cal. Rptr. 2d 106 (2d Dist. 1993).)
- A juror provided false answers on voir dire or was mentally incompetent to serve (*Evidence Code* § 1150, Comment.)

Juror experiments have led to reversal of the verdict when they are not carried out within the bounds of the evidence produced. In *Wagner v. Douulton*, a juror drew a diagram of the accident scene. Since it was based

solely on information presented in the trial, there was no misconduct found. (*Wagner v. Doulton*, 112 Cal. App. 3d 945, 169 Cal. Rptr. 550 (2d Dist. 1980).) In *Locksley v. Ungureanu*, the driver of an automobile involved in an accident was blind in one eye. An experiment conducted by two jurors who drove with one eye closed was found to be misconduct, but not prejudicial. (*Locksley v. Ungureanu*, 178 Cal. App. 3d 457, 223 Cal. Rptr. 737 (2d Dist. 1986).) On the other hand, in *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.*, a juror conducted an experiment to demonstrate how concrete is poured, which had no basis in the evidence. The verdict was overturned. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.*, 234 Cal. App. 3d 1724, 1744, 286 Cal. Rptr. 435 (4th Dist. 1991).)

In *People v. Steele*, 27 Cal. 4th 1230, 1263–1265, 120 Cal. Rptr. 2d 432, 47 P.3d 225 (2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 874, 154 L. Ed. 2d 791 (2003), the Supreme Court held that the evidentiary restrictions of § 1150 were not abrogated by Proposition 8.

People v. Cleveland determined the manner in which a trial judge should consider discharging a juror during deliberations for failing to deliberate and prejudging the case. “Although the provisions of Evidence Code § 1150 apply only to the postverdict situation and not to an inquiry conducted during jury deliberations, the numerous decisions [under section 1150] nonetheless support our conclusion that a trial court’s inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible to avoid intruding unnecessarily upon the sanctity of the jury’s deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations.” (*People v. Cleveland*, 25 Cal. 4th 466, 485, 106 Cal. Rptr. 2d 313, 21 P.3d 1225 (2001).)

Warning

Evidence Code § 1150 not only imposes the evidentiary limitations discussed above; it also requires that the evidence be “otherwise admissible.” The most frequent error in this regard relates to hearsay. Not uncommonly, counsel will file a declaration from an investigator that purports to relate the statement of a juror. This is inadmissible. (*Burns v. 20th Century Ins. Co.*, 9 Cal. App. 4th 1666, 12 Cal. Rptr. 2d 462 (2d Dist. 1992).) “A jury verdict may not be impeached by hearsay affidavits.” (*People v. Williams*, 45 Cal. 3d 1268, 1318, 248 Cal. Rptr. 834, 756 P.2d 221 (1988).) Note, however, declarations of jurors restating remarks of other jurors reflecting an impermissible bias are not offered for the truth of the matter and, therefore, are not hearsay. (*Enyart v. City of Los Angeles*, 76 Cal. App. 4th 499, 508, 90 Cal. Rptr. 2d 502 (2d Dist. 1999).)

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§ 6:30. Holding evidentiary hearing

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[C.J.S.](#), [New Trial](#) §§ 193, 235, 240 to 252

“When allegations of juror misconduct made in a criminal trial raise a presumption of prejudice, the court is not limited, as it would be in a civil case, to consideration of evidence presented by affidavit or declaration to resolve whether a new trial motion should be granted. The court may conduct an evidentiary hearing, at which jurors may testify, to determine the truth of the allegations if the court concludes this is necessary to resolve material, disputed issues of fact.” ([People v. Hayes](#), 21 Cal. 4th 1211, 1255, 91 Cal. Rptr. 2d 211, 989 P.2d 645 (1999).) In *Hayes*, the Supreme Court found there was no abuse of discretion in the trial court's failure to conduct an evidentiary hearing. When juror affidavits are in conflict, yet raise a strong possibility of misconduct, an evidentiary hearing should be held to determine if a new trial is to be granted. ([People v. Hedgecock](#), 51 Cal. 3d 395, 418–419, 272 Cal. Rptr. 803, 795 P.2d 1260 (1990).) An evidentiary hearing need not be held in every instance of alleged juror misconduct. It should be held only when a party has carried its burden of demonstrating prejudicial misconduct. ([People v. Hord](#), 15 Cal. App. 4th 711, 722–723, 19 Cal. Rptr. 2d 55 (5th Dist. 1993).) However, when a party is unable to obtain sworn affidavits and subsequently subpoenas jurors to appear at the new trial motion, no hearing need be held, unless the inability to obtain juror affidavits results from impermissible interference by the prosecutor. ([People v. Cox](#), 53 Cal. 3d 618, 698–699, 280 Cal. Rptr. 692, 809 P.2d 351 (1991).)

To obtain juror information from the court, which permits a party to contact jurors and obtain declarations, a preliminary showing of misconduct must be made by that party. ([People v. Rhodes](#), 212 Cal. App. 3d 541, 554, 261 Cal. Rptr. 1 (3d Dist. 1989) cited with approval in [People v. Jones](#), 17 Cal. 4th 279, 317, 70 Cal. Rptr. 2d

[793, 949 P.2d 890 \(1998\)](#).) Certain limitations are imposed postverdict in criminal cases on the ability to obtain personal juror information. (See [Code of Civil Procedure §§ 206, 237](#).)

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§ 6:31. Burden of proof

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[C.J.S., Appeal and Error § 965](#)

[C.J.S., Criminal Law §§ 1848 to 1853, 2399](#)

[C.J.S., New Trial § 203](#)

A judgment adverse to a criminal defendant is to be reversed:

[W]henever ... the court finds a *substantial likelihood* that the vote of one or more jurors was influenced by exposure to prejudicial matter ... that was not part of the trial record The ultimate issue of influence on the juror is resolved by reference to the substantial likelihood test, *an objective standard*. In effect, the court must examine the extrajudicial material and then judge whether it is *inherently likely* to have influenced the juror. (American Bar Association Standards for Criminal Justice, 2 A.B.A. Standards for Criminal Justice, Std. 8-3.7 (2d ed. 1980) p. 8.57, adopted for California in [People v. Marshall](#), 50 Cal. 3d 907, 950, 269 Cal. Rptr. 269, 790 P.2d 676 (1990).)

Under this standard, the court should focus on the nature and extent of the alleged misconduct. Thus, “regardless of evidence that one or more jurors changed their votes after receiving extrajudicial information, our concern is with the misconduct itself and whether it is ‘inherently likely’ to have influenced a reasonable juror.” ([People v. Hill](#), 3 Cal. App. 4th 16, 35, 4 Cal. Rptr. 2d 258 (3d Dist. 1992).)

Juror misconduct is presumed prejudicial. (*People v. Marshall*, 50 Cal. 3d 907, 949, 269 Cal. Rptr. 269, 790 P.2d 676 (1990); *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 416, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982).) However, this presumption may be rebutted or a reviewing court's examination of the entire record may reflect no reasonable probability of actual harm from the misconduct. (*Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 417, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982); *Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1232, 45 Cal. Rptr. 3d 265 (2d Dist. 2006).) When a party has produced affidavits that show juror misconduct, a presumption of prejudice arises. If the other side fails to rebut the presumption by attacking the strength of the evidence of misconduct, the nature and seriousness of the misconduct, or the probability of actual prejudice a new trial should be granted. (*Lankster v. Alpha Beta Co.*, 15 Cal. App. 4th 678, 683, 18 Cal. Rptr. 2d 923 (2d Dist. 1993), where the affidavits alleged that a juror had conducted an experiment.)

When jurors receive information from outside sources that have an aura of authoritativeness or from other jurors trained in the law, the danger of prejudice is greater than when information is received from jurors who have no specialized training. Thus, a verdict need not be overturned simply because, during deliberations, one juror said that a criminal defendant would receive only a short jail sentence if convicted (*People v. Hill*, 3 Cal. App. 4th 16, 4 Cal. Rptr. 2d 258 (3d Dist. 1992)) or because, during deliberations, the jurors discussed whether the defendant had medical malpractice insurance that would pay any judgment. (*Gorman v. Leftwich*, 218 Cal. App. 3d 141, 147, 266 Cal. Rptr. 671 (6th Dist. 1990).) Discussions during deliberations of the amount of the recovery that would go to plaintiff's attorney are insufficient to cause reversal, unless the juror declarations establish “ ‘an express agreement by the jurors to include such fees in their verdict, or extensive discussion evidencing an implied agreement to that effect.’ ” (*Krouse v. Graham*, 19 Cal. 3d 59, 81, 137 Cal. Rptr. 863, 562 P.2d 1022 (1977); *Moore v. Preventive Medicine Medical Group, Inc.*, 178 Cal. App. 3d 728, 740, 223 Cal. Rptr. 859 (2d Dist. 1986).) See *People v. Danks*, 32 Cal. 4th 269, 302–311, 8 Cal. Rptr. 3d 767, 82 P.3d 1249 (2004), cert. denied, 125 S. Ct. 441, 160 L. Ed. 2d 326 (U.S. 2004) [Juror consulted with pastor on propriety of death penalty and juror then shared Bible passages with other jurors. Held to be juror misconduct, but not prejudicial.].

In *Vomaska v. City of San Diego*, the court admitted a juror declaration that stated that the jury had decided the case without any discussion of the evidence or issues. It found, however, there was nothing impermissible in simply taking a vote and rendering a verdict. (*Vomaska v. City of San Diego*, 55 Cal. App. 4th 905, 64 Cal. Rptr. 2d 492 (4th Dist. 1997).)

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§ 6:32. Excluding evidence of subsequent remedial conduct

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Where the only reason evidence of subsequent repairs is introduced is to prove negligence or culpable conduct in connection with an event, such evidence is inadmissible. ([Evidence Code § 1151](#).) Historically, this exclusion was premised on the notion that such repairs were irrelevant to the negligence issue. ([Ault v. International Harvester Co.](#), 13 Cal. 3d 113, 119, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974).) As a matter of public policy, this exclusion also promotes remedial conduct. ([Evidence Code § 1151](#), Comment.) The statute has been applied to exclude evidence of subsequent revisions of an exclusionary clause in an insurance policy. ([State Farm Fire & Casualty Co. v. Eddy](#), 218 Cal. App. 3d 958, 972, 267 Cal. Rptr. 379 (6th Dist. 1990).)

Numerous exceptions to this exclusionary policy exist. For example, if the repairs are performed closely in time to the event, they may illustrate the feasibility of the improvement at the time of the accident, an element in the calculation of negligence. ([Ault v. International Harvester Co.](#), 13 Cal. 3d 113, 119, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974).) Evidence of subsequent repairs can be used to impeach a witness. ([Evidence Code § 1151](#), Comment.) Thus, if a witness testifies that a particular structure was safe on the date of the accident, evidence that the same witness subsequently ordered additional safety measures performed is admissible. This is true even if the original testimony concerning safety is elicited on cross-examination. Nevertheless, if the subsequent repairs were performed at the order of someone other than the witness, the policy underlying [§ 1151](#) will prevent the impeachment. ([Sanchez v. Bagues and Sons Mortuaries](#), 271 Cal. App. 2d 188, 76 Cal. Rptr. 372 (2d Dist. 1969).)

Evidence that defendant, an adjacent landowner, constructed a fence around property owned by another

after an accident occurred on that property is admissible to establish that the defendant exercised control over the property and should not be excluded as evidence of a subsequent repair. (*Alcaraz v. Vece*, 14 Cal. 4th 1149, 1166–1170, 60 Cal. Rptr. 2d 448, 929 P.2d 1239 (1997).) *Alcaraz* relied on the decision in *Ault*: “ [Evidence Code] [s]ection 1151 by its own terms excludes evidence of subsequent remedial or precautionary measure *only when such evidence is offered to prove negligence or culpable conduct* This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.’ ” (*Alcaraz v. Vece*, 14 Cal. 4th 1149, 1169, 60 Cal. Rptr. 2d 448, 929 P.2d 1239 (1997) (emphasis in original).) See, also, *Alpert v. Villa Romano Homeowners Assn.*, which held that minutes of the defendant's meetings reflecting a decision to repair a sidewalk, could be introduced to show the defendant's knowledge of a sidewalk defect before plaintiff's fall, despite an objection under Evidence Code § 1151. (*Alpert v. Villa Romano Homeowners Assn.*, 81 Cal. App. 4th 1320, 1339–1342, 96 Cal. Rptr. 2d 364 (2d Dist. 2000).)

Evidence of subsequent repairs is permitted in strict liability cases. (*Ault v. International Harvester Co.*, 13 Cal. 3d 113, 118, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974).)

In *Hilliard v. A. H. Robins Co.*, plaintiff sought punitive damages from the Dalkon Shield manufacturer and tried to introduce evidence that the defendant had acted in conscious disregard of the safety of others by continuing to market the device after it was aware of the injuries it had caused plaintiff. The Court of Appeal reversed the trial court's decision to exclude the evidence under § 1151. The court found that the section's policy of promoting subsequent precautions would not be served by excluding evidence of the failure to change a defective product or withdraw it from the market. (*Hilliard v. A. H. Robins Co.*, 148 Cal. App. 3d 374, 401, 196 Cal. Rptr. 117 (2d Dist. 1983).)

When a nonparty makes the subsequent repair, evidence of it is not foreclosed by § 1151. In *Magnante v. Pettibone–Wood Manufacturing Co.*, plaintiff sued for injuries suffered when a device manufactured by defendant disconnected and part of it struck the plaintiff. Subsequent to the accident, a coworker of plaintiff, who was not employed by the manufacturer-defendant, modified the device to prevent future disconnections. The trial court's decision to admit this evidence was affirmed. (*Magnante v. Pettibone–Wood Manufacturing Co.*, 183 Cal. App. 3d 764, 228 Cal. Rptr. 420 (4th Dist. 1986).) The decision in *Magnante* was limited in *Santilli v. Otis Elevator Co.*, which held that if: (1) the nonparty making the repair works for the plaintiff's employer; (2) one issue in the case is the employer's liability; (3) the employer's liability is not based on a strict liability theory; and (4) the determination of the party's liability will directly affect the damages that the nonparty will pay, § 1151 bars evidentiary use of the remedial measures taken by the nonparty. (*Santilli v. Otis Elevator Co.*, 215 Cal. App. 3d 210, 214, 263 Cal. Rptr. 496 (1st Dist. 1989).) Though the facts of *Santilli* seem to track those of *Magnante*, the earlier case was distinguished, in part, by noting that it never considered the workers' compensation issue.

Comment

Evidence of a “recall” of a product by a defendant manufacturer should be closely scrutinized for the purpose for which it is admitted. While admissible to impeach or to show knowledge of the defect, proof of the recall should not be introduced for any reason barred by Evidence Code § 1151.

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§ 6:33. Excluding evidence of offer to compromise—In general

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West's Key Number Digest, [Evidence](#) 🔑212, 219

West's Key Number Digest, [Criminal Law](#) 🔑408

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[C.J.S., Criminal Law §§ 1220, 1224, 1227, 1222](#)

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[Evidence Code § 1152\(a\)](#), excludes evidence of an offer to compromise a claim if offered to prove liability for the claim. Any conduct or statement, including admissions, made in the negotiations of a compromise is inadmissible to prove liability for the claim. These rules are based on the public policy in favor of the settlement of disputes without litigation. ([Evidence Code § 1152](#), Comment.)

The comment to [§ 1152](#) clarifies that statements made in the context of settlement negotiations are inadmissible. “Although statements that are truly independent of an offer to compromise are still admissible ... the question which statements are ‘connected’ and which statements are independent ... must be answered in light of the strong policy in favor of promoting candor during settlement negotiations embodied in the statute.” ([Caira v. Offner](#), 126 Cal. App. 4th 12, 36, 24 Cal. Rptr. 3d 233 (4th Dist. 2005); accord: [Zhou v. Unisource Worldwide](#), 157 Cal.App.4th 1471, 1477–1478 (2007).)

[Section 1152\(a\)](#), bars only those statements made after a dispute about liability has arisen. Evidence is admissible, however, that proves the construction given a contract by the parties' conduct “before any controversy has arisen as to its meaning.” ([Warner Constr. Corp. v. City of Los Angeles](#), 2 Cal. 3d 285, 296–297, 85 Cal. Rptr. 444, 466 P.2d 996 (1970); [Price v. Wells Fargo Bank](#), 213 Cal. App. 3d 465, 481, 261 Cal. Rptr. 735 (1st Dist. 1989).) In *Price*, correspondence by plaintiffs conceded that they knew the maturity date of loans had

passed and that the loans were past due. The correspondence requested a delay in foreclosure. Since the court concluded that at the time of the letters there was no dispute over the obligations under the loan agreement, it refused to exclude the evidence under § 1152. (*Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 481, 261 Cal. Rptr. 735 (1st Dist. 1989); see also *Southern Cal. Edison Co. v. Superior Court*, 37 Cal. App. 4th 839, 851, 44 Cal. Rptr. 2d 227 (2d Dist. 1995).)

Section 1152 does not affect the admissibility of evidence of partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim. (*Evidence Code* § 1152(c)(1); *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 480, 261 Cal. Rptr. 735 (1st Dist. 1989).) It does not affect the admissibility of evidence of a debtor's payment or promise to pay all or a part of the debtor's preexisting debt when such evidence is offered to prove the creation of a new duty on the debtor's part or a revival of the preexisting duty. (*Evidence Code* § 1152(c)(2).)

A house seller sued his broker for selling the house below its value, and the broker prevailed. In an effort to bring the lawsuit within the listing agreement's attorney fees provision, broker sought to introduce the seller's settlement conference statement, in which seller offered to compromise his claim for the amount of the broker's commission. Section 1152 barred introduction of the statement because it tended to establish liability for the fees. (*Hasler v. Howard*, 120 Cal. App. 4th 1023, 1026, 16 Cal. Rptr. 3d 217 (2d Dist. 2004).)

Evidence that a person has offered or accepted or promised to accept anything, including money, or any act or service in satisfaction of a claim or any statements or conduct made in negotiation of the satisfaction is inadmissible to prove the invalidity of the claim or any part of it. (*Evidence Code* § 1154.) This section appears to be the mirror image of section 1152, and focuses on a claimant who offers to accept a compromise. "[T]he admissibility of settlement discussions does not differ under these two related statutes" (*Zhou v. Unisource Worldwide*, 157 Cal.App.4th 1471, 1475, fn.2. (2007).)

Evidence of statements, writings, or benevolent gestures expressing sympathy relating to the pain, suffering, or death of a person involved in an accident and made to that person (or his or her family) is inadmissible as an admission of liability in a civil matter. Statements of fault which accompany the expression of sympathy are not inadmissible. (*Evidence Code* § 1160.)

In a criminal matter an offer by the defendant to the victim to pay for medical expenses incurred as a result of the allegedly criminal act is admissible; § 1152 is inapplicable to criminal cases. (*People v. Muniz*, 213 Cal. App. 3d 1508, 262 Cal. Rptr. 743 (4th Dist. 1989).) The only exception to this is an offer for civil resolution of a criminal dispute pursuant to *Code of Civil Procedure* § 33; such an offer is inadmissible. (*Evidence Code* § 1153.5.)

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§ 6:34. Excluding evidence of offer to compromise—Admissibility for other purposes

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[C.J.S., Criminal Law §§ 1220, 1224, 1227, 1222](#)

[C.J.S., Evidence § 379](#)

An offer of compromise or statements made during settlement negotiations are admissible for any purpose other than proving liability of the party making the offer/statements. In the libel suit of *Carney v. Santa Cruz Women Against Rape*, evidence of an apology made by the source of the news story as part of her settlement is admissible to prove the truth or falsity of the statements made in the defendant's newsletter. (*Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1023–1024, 271 Cal. Rptr. 30 (6th Dist. 1990).)

In *Zhou v. Unisource Worldwide*, 157 Cal.App.4th 1471, 1472–1473 (2007), plaintiff was injured in an accident caused by a Unisource truck in 2003 and reinjured in an accident in 2004. Plaintiff wrote twice to the insurance company representing the driver in the 2004 accident in an attempt to settle his 2004 claim. Relying on *Fieldston Associates, Inc. v. Whitecliff Laboratories, Inc.*, 276 Cal.App.2d 770, 772, 81 Cal.Rptr. 332 (1969), Zhou concluded that these letters were admissible in the lawsuit involving the 2003 claim: the plaintiff's letters regarding his purported injuries from the ... 2004 accident were not offered to disprove the merits of the claim under negotiation, but rather ‘to show the invalidity of a different claim.’” (at 1479.)

Evidence of an insurance company's settlement offer may be admissible, not to prove liability, but to prove the failure to process a claim in good faith. (*White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 887, 221 Cal. Rptr. 509, 710 P.2d 309 (1985); *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal. App. 4th

847, 915, 93 Cal. Rptr. 2d 364 (1st Dist. 2000).) However, if the court admits this evidence then, at the request of the party against whom the evidence is admitted, evidence relating to any other offer to compromise the same claim shall also be admissible for the same purpose. ([Evidence Code § 1152\(b\)](#), which was enacted in 1987 to modify the holding in *White*; see [Maler v. Superior Court](#), 220 Cal. App. 3d 1592, 1600, 270 Cal. Rptr. 222 (2d Dist. 1990).)

Where defendant claims plaintiff unreasonably delayed performance of a contract, plaintiff may introduce proof of negotiations to show its good faith basis for the delay. ([Warner Constr. Corp. v. City of Los Angeles](#), 2 Cal. 3d 285, 297–298, 85 Cal. Rptr. 444, 466 P.2d 996 (1970).)

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§ 6:35. Excluding evidence of offer to plead guilty

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West's Key Number Digest, [Evidence](#) 🔑 207(4)

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[C.J.S., Criminal Law §§ 1220, 1224, 1227, 1222](#)

[C.J.S., Evidence §§ 364, 397 to 398](#)

A criminal defendant's offer to plead guilty, or the actual guilty plea that is later withdrawn, is inadmissible in any action or proceeding. ([Evidence Code § 1153](#).) This rule has been interpreted to exclude any statements made during the plea negotiations in addition to guilty pleas and offers to plead guilty. ([People v. Tanner](#), 45 Cal. App. 3d 345, 119 Cal. Rptr. 407 (4th Dist. 1975).) It also appears that statements made at other times but revealed to the prosecution during plea negotiations are excluded. In *People v. Crow*, the defendant in a child molesting case had turned over a psychologist's report to the prosecution in an attempt to obtain a better plea offer. The defendant's statements in this report were found to be covered by the proscription of [§ 1153](#). ([People v. Crow](#), 28 Cal. App. 4th 440, 450, 33 Cal. Rptr. 2d 624 (4th Dist. 1994).) In *People v. Cummings*, the court held that [§ 1153](#) did not bar introduction of incriminating statements made by the defendant to the prosecutor in an interview set up by the defense attorney, where the purpose of the interview was to convince the prosecutor that the defendant was innocent of the charges. "This purpose cannot be characterized as a plea negotiation." The court also noted that the defendant was *Miranda'd* prior to the interview. ([People v. Cummings](#), 4 Cal. 4th 1233, 1315–1318, 1318, 18 Cal. Rptr. 2d 796, 850 P.2d 1 (1993).)

"Bona fide plea negotiations include statements made to the trial court and to the prosecuting attorney because these are the participants in a plea bargain." ([People v. Magana](#), 17 Cal.App.4th 1371, 1377 (1993).) An "offer to plead guilty" has been construed not to include statements that simply evidence a consciousness of

guilt. (*People v. Silva*, 45 Cal. 3d 604, 630, 247 Cal. Rptr. 573, 754 P.2d 1070 (1988).) In *Silva*, after his arrest for murder, the defendant said, “Why don't you just take me to the gas chamber at San Quentin ...?” This was not considered an offer to plead guilty. Protected “offers to plead guilty” must be made in the course of bona fide plea negotiations. This includes statements made to the trial court and to the prosecuting attorney. They do not include statements made in anger to the trial court or statements contained in a letter to a fellow gang member. (*People v. Leonard*, 40 Cal. 4th 1370, 1404, 58 Cal. Rptr. 3d 368, 157 P.3d 973 (2007), cert. denied, 2007 WL 2692238 (U.S. 2007); *People v. Magana*, 17 Cal. App. 4th 1371, 1377, 22 Cal. Rptr. 2d 59 (2d Dist. 1993).) *Evidence Code* § 1153 does not preclude the prosecutor from introducing inconsistent statements made by the defendant in the course of plea negotiations to impeach the defendant's testimony at trial. (*People v. Crow*, 28 Cal. App. 4th 440, 449–453, 33 Cal. Rptr. 2d 624 (4th Dist. 1994).)

Warning

It seems unlikely that, in criminal prosecutions, § 1153 will survive the passage of Proposition 8, which requires the admission of all relevant evidence. No case has yet ruled on this issue, though the court in *People v. Cummings* specifically reserved the issue. (*People v. Cummings*, 4 Cal. 4th 1233, 1318, 18 Cal. Rptr. 2d 796, 850 P.2d 1 (1993).) Even if the scope of the section has been limited by Proposition 8, the court might still exclude such pleas or offers to plead under § 352. That is, if the court believes that the defendant's offer or plea was primarily motivated by a desire to avoid risk rather than by a consciousness of guilt, evidence of it might cause undue prejudice or juror confusion. However, the policy behind the statute, encouraging plea negotiations, is not a relevant factor under *Evidence Code* § 352 and, therefore, may not be relied on by the court to exclude the evidence.

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§ 6:36. Excluding evidence of mediation

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West's Key Number Digest, [Evidence](#) 🔑 219, 212

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[C.J.S., Witnesses §§ 369 to 371](#)

No evidence of anything said or any admission made or writing prepared for the purpose of, in the course of, or pursuant to a mediation (as defined in [Evidence Code § 1115\(a\)](#)) or a mediation consultation (as defined in [Evidence Code § 1115\(c\)](#)) is admissible or subject to discovery in any noncriminal proceeding. ([Evidence Code § 1119\(a\)](#) and (b).) Since photographs, witness statements and recorded raw test data (as distinct from actual physical samples from the air or from destructive testing) are all “writings” as defined in § 250, each is protected from discovery by [section 1119](#) if “prepared for the purpose of, in the course of or pursuant to a mediation.” ([Rojas v. Superior Court](#), 33 Cal. 4th 407, 416–417, 15 Cal. Rptr. 3d 643, 93 P.3d 260 (2004).) No good cause exception exists from the protection of [§ 1119](#). ([Rojas](#), 33 Cal. 4th at 423.) Mediation briefs and e-mails designed to clarify statements made in such briefs are confidential. ([Wimsatt v. Superior Court](#), 152 Cal. App. 4th 137, 158–159, 61 Cal. Rptr. 3d 200 (2d Dist. 2007).)

A juvenile delinquency proceeding pursuant to [Welfare and Institutions Code § 602](#) is “noncriminal” within the meaning of [Evidence Code § 1119](#) and its confidentiality provisions apply. “However ... the public policy served by the confidentiality provisions of [section 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](#), 62 Cal. App. 4th 155, 160–161, 167, 74 Cal. Rptr. 2d 464 (3d Dist. 1998).) All communications, negotiations, or settlement discussions by and between participants in the course of

a mediation or mediation consultation shall remain confidential. ([Evidence Code § 1119\(c\)](#).) This includes conversations between mediation participants during the course of the mediation that occur while the mediator is absent, if the communications materially relate to the mediation. ([Eisendrath v. Superior Court](#), 109 Cal. App. 4th 351, 364, 134 Cal. Rptr. 2d 716 (2d Dist. 2003).) Evidence otherwise admissible or subject to discovery outside of a mediation or mediation consultation shall not be protected from disclosure or become inadmissible solely by reason of its use in a mediation or mediation consultation. ([Evidence Code § 1120\(a\)](#).)

No one may submit to a court and a court may not consider any report, assessment, evaluation, recommendation, or finding by the mediator, other than a report mandated by court rule or other law that states only whether an agreement was reached, absent agreement of the parties. ([Evidence Code § 1121](#); see [Evidence Code § 703.5](#), which bars the testimony of a mediator in any subsequent civil proceeding.) In *Foxgate Homeowners' Assn. v. Bramalea California, Inc.*, the California Supreme Court held “there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. Neither a mediator nor a party may reveal communications made during mediation.” ([Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.](#), 26 Cal. 4th 1, 4, 108 Cal. Rptr. 2d 642, 25 P.3d 1117 (2001).) In *Foxgate*, the court ruled a mediator may not report a party's failure to participate in the mediation in good faith to the trial court. It allowed a party, however, to report to the trial court concerning the participants' conduct during mediations. (At p. 4.) *Foxgate* specifically approved of the constitutionally mandated exception to confidentiality created in *Rinaker*, discussed above. (At p. 15–16)

The statutory scheme allows for express waivers of the mediation privilege. ([Evidence Code §§ 1118 and 1122\(a\)\(1\)](#).) In [Eisendrath v. Superior Court](#), 109 Cal. App. 4th 351, 134 Cal. Rptr. 2d 716 (2d Dist. 2003), the court concluded that the implied waiver provisions of [Evidence Code § 912\(a\)](#) (disclosure of significant part of communication) applies only to the eight privileges listed in that subdivision. ([Eisendrath](#), 109 Cal. App. 4th at 362.) No such implied waiver exists for the mediation privilege. *Eisendrath* held further that, while four privileges are accompanied by provisions subjecting them to an implied waiver when the holder of the privilege tenders an issue involving the content of the protected communications, no such waiver applies to the mediation privilege. ([Eisendrath](#), 109 Cal. App. 4th at 363.) *Eisendrath* was a marital dissolution case. In [In re Marriage of Kieturakis](#), 138 Cal. App. 4th 56, 85–87, 41 Cal. Rptr. 3d 119 (1st Dist. 2006), the court recognized the breadth of the mediation privilege and that it is to be strictly construed, since it lacks a “good cause” exception and implied exceptions. Therefore, to promote mediated marital property settlements, the court held that the presumption of undue influence that arises when an interspousal transaction advantages one spouse does not apply to marital settlement agreements reached through mediation.

Under most situations a written or oral settlement agreement is not made inadmissible or protected from disclosure if the parties so agree. ([Evidence Code §§ 1123 and 1124](#).) [Section 1123](#) requires that the written settlement agreement must be signed by “the settling parties.” In [Stewart v. Preston Pipeline Inc.](#), 134 Cal. App. 4th 1565, 1579–1584, 36 Cal. Rptr. 3d 901 (6th Dist. 2005), the court concluded that a written settlement agreement signed only by an attorney was admissible and enforceable against the client. A written settlement agreement is admissible only if it “provides that it is enforceable or binding or words to that effect.” ([Section 1123\(b\)](#).) An oral settlement agreement must be recorded ([Evidence Code § 1118\(a\)](#)) in the presence of the parties and mediator. ([Evidence Code § 1118\(b\)](#).) The parties must expressly state on the record that they agree to the terms recited ([Evidence Code § 1118\(b\)](#)) and that the agreement is enforceable or binding. ([Evidence Code § 1118\(c\)](#).) Finally the recording must be reduced to a writing and signed within 72 hours after being recorded. ([Evidence Code §](#)

1118(d).) These provisions clarify a situation left muddled by the dispute between [Ryan v. Garcia](#), 27 Cal. App. 4th 1006, 1013, 33 Cal. Rptr. 2d 158 (3d Dist. 1994) and [Regents of University of California v. Sumner](#), 42 Cal. App. 4th 1209, 1213, 50 Cal. Rptr. 2d 200 (1st Dist. 1996) over the admissibility and enforceability of oral agreements reached in mediations.

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§ 6:37. Excluding evidence of liability insurance

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Evidence that a person had liability insurance at the time an injury was inflicted is inadmissible to prove negligence or other wrongdoing. ([Evidence Code § 1155](#).) Such evidence is considered both irrelevant and unduly prejudicial. ([Blake v. E. Thompson Petroleum Repair Co.](#), 170 Cal. App. 3d 823, 830, 216 Cal. Rptr. 568 (6th Dist. 1985).)

If there is any admissible purpose other than to prove that the party is liable, evidence of liability insurance may be introduced, subject to [Evidence Code § 352](#). ([Turner v. Mannon](#), 236 Cal. App. 2d 134, 140, 45 Cal. Rptr. 831 (5th Dist. 1965).) For example, if a party makes an admission and there is an incidental reference to insurance that cannot be redacted, the entire statement is admissible. ([Continental Airlines, Inc. v. McDonnell Douglas Corp.](#), 216 Cal. App. 3d 388, 409, 264 Cal. Rptr. 779 (2d Dist. 1989).)

Facts showing a bias on the part of a witness may be brought out on cross-examination even if insurance is revealed thereby. In [Brainard v. Cotner](#), a personal injury case, defendant told the police that the accident resulted from certain conduct of the plaintiff. Before trial, on first learning of this statement, plaintiff called defendant and told her the statement was false. The defendant responded, "Well, I did it because I was fearful of my insurance." The trial court's decision to exclude this statement was error. ([Brainard v. Cotner](#), 59 Cal. App. 3d 790, 795–796, 130 Cal. Rptr. 915 (2d Dist. 1976).)

In a bad faith action against an insurance company that closed its file without paying an insured's claim, the company may provide the jury with its reason for so acting. In [Kardly v. State Farm Mut. Auto. Ins. Co.](#), the trial

judge erroneously prevented the defendant from informing the jury that it had closed its file because the insured told the company it had decided to pursue its claim against a different insurance company (which also had coverage). (*Kardly v. State Farm Mut. Auto. Ins. Co.*, 31 Cal. App. 4th 1746, 1751–1752, 37 Cal. Rptr. 2d 612 (2d Dist. 1995).)

An attorney may question jurors in voir dire as to any ownership interest in an insurance company if the questions do not unnecessarily suggest that the other party is insured. (*Hart v. Wielt*, 4 Cal. App. 3d 224, 230, 84 Cal. Rptr. 220 (3d Dist. 1970).)

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Chapter
6. Evidence Affected Or Excluded By Extrinsic Policies
E. Miscellaneous Exclusion Policies

§ 6:38. Excluding evidence or discovery of medical committee records—In-hospital studies and research committee reports

West's Key Number Digest

West's Key Number Digest, [Witnesses](#)  [184\(1\)](#)

Legal Encyclopedias

[C.J.S., Witnesses § 297](#)

When in-hospital medical or medical-dental staff committees engage in research for the purpose of reducing morbidity or mortality, the written records of such committees relating to such studies are subject to discovery but are inadmissible in any action or administrative proceeding. ([Evidence Code § 1156\(a\)](#).)

When quality assurance committees governing the delivery of Short-Doyle Medi-Cal services engage in research and medical or psychiatric study for the purpose of reducing morbidity or mortality, the written records of such committees relating to such medical or psychiatric study are subject to discovery but are inadmissible in any action or administrative proceeding. ([Evidence Code § 1156.1\(a\)](#).) These exclusions do not affect the admissibility of original patient records. ([Evidence Code §§ 1156\(c\), 1156.1\(c\)](#).) These exclusions do not apply to criminal cases. ([Evidence Code §§ 1156\(d\), 1156.1\(d\)](#).)

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E. Miscellaneous Exclusion Policies

§ 6:39. Excluding evidence or discovery of medical committee records—Records and proceedings of medical quality assurance committees

West's Key Number Digest

West's Key Number Digest, [Witnesses](#) 🔑 184(1)

Legal Encyclopedias

[C.J.S., Witnesses § 297](#)

Neither the proceedings nor the records of certain organized hospital medical committees or peer review bodies are subject to discovery. ([Evidence Code § 1157\(a\)](#).) Evidence produced during an administrative hearing to reinstate a physician's privileges is not subject to compelled disclosure in a subsequent civil case filed by the physician seeking damages from the suspension. ([Joel v. Valley Surgical Center](#), 68 Cal. App. 4th 360, 368, 80 Cal. Rptr. 2d 247 (1st Dist. 1998).) The proceedings, written evaluations and related records of resident evaluation committees are also protected by this Code § from discovery. ([University of Southern California v. Superior Court](#), 45 Cal. App. 4th 1283, 53 Cal. Rptr. 2d 260 (2d Dist. 1996).) [Evidence Code § 1157](#) is based on the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. The quality of in-hospital medical practice is raised by protecting staff inquiries with confidentiality. ([Matchett v. Superior Court](#), 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317 (3d Dist. 1974).) The Legislature concluded that external access to the records of a peer committee would tend to inhibit the free flow of information and impair the accurate evaluation of health care facilities causing a decline in the quality of health care. ([People v. Superior Court \(Memorial Medical Center\)](#), 234 Cal. App. 3d 363, 373, 286 Cal. Rptr. 478 (2d Dist. 1991).) Similar protections apply to the records of organized committees of nonprofit medical care foundations and certain professional standards review organizations ([Evidence Code § 1157.5](#)); quality assurance committees governing the delivery of Short–Doyle Medi–Cal services ([Evidence Code § 1157.6](#)); and local government agency committees monitoring specialty health services. ([Evidence Code § 1157.7](#).)

The identities of the members of a hospital peer review committee are not discoverable. ([Cedars-Sinai Med-](#)

ical Center v. Superior Court, 12 Cal. App. 4th 579, 588, 16 Cal. Rptr. 2d 253 (2d Dist. 1993).)

These discovery exclusions do not apply in criminal cases. ([Evidence Code § 1157\(e\)](#).) In *People v. Superior Court (Memorial Medical Center)*, the prosecution, prior to filing a criminal complaint, sought issuance of a search warrant, pursuant to [Penal Code § 1524](#), for the records of a hospital peer review committee concerning a doctor suspected of criminal negligence. The hospital objected, relying on [Evidence Code § 1157](#). The Court of Appeal held that the records of a peer review committee are not immune from discovery in criminal cases and that a special proceeding under [Penal Code § 1524](#) is a criminal action. (*People v. Superior Court (Memorial Medical Center)*, 234 Cal. App. 3d 363, 377, 389, 286 Cal. Rptr. 478 (2d Dist. 1991).)

The limited nature of the protections afforded to organized review committees in hospitals or peer review committees is discussed in *Hinson v. Clairemont Community Hospital*, which held that administrative activities that are independent from, though related to, medical staff committees, are not protected by [§ 1157](#). (*Hinson v. Clairemont Community Hospital*, 218 Cal. App. 3d 1110, 1126–1130, 267 Cal. Rptr. 503 (1990).) The specific holding in *Hinson*, that applications for medical staff privileges are not protected by [§ 1157](#), was disapproved of in *Alexander v. Superior Court*, which held that such applications are protected. (*Alexander v. Superior Court*, 5 Cal. 4th 1218, 1228, 23 Cal. Rptr. 2d 397, 859 P.2d 96 (1993).)

Although no person attending an organized review committee or peer review committee can be forced to testify as to what transpired at any meeting, this information is not privileged. (*Amid v. Hawthorne Community Medical Group, Inc.*, 212 Cal. App. 3d 1383, 1391, 261 Cal. Rptr. 240 (2d Dist. 1989).) Voluntary testimony by one who attended such a meeting is permissible. (*West Covina Hospital v. Superior Court*, 41 Cal. 3d 846, 851, 226 Cal. Rptr. 132, 718 P.2d 119 (1986).)

[Evidence Code § 1157\(a\)](#), “creates only a privilege against discovery from medical staff committees; it does not create a bar against introduction of evidence” otherwise obtained. (*Alexander v. Superior Court*, 5 Cal. 4th 1218, 1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96 (1993).)

In *Fox v. Kramer*, a malpractice action, a peer review committee had reviewed the medical procedure involved. The California Department of Health Services (DHS) also investigated and was provided with the peer review materials. (See *Arnett v. Dal Cielo*, 14 Cal. 4th 4, 56 Cal. Rptr. 2d 706, 923 P.2d 1 (1996), discussed below.) The California Supreme Court upheld the trial court's determination that plaintiffs could not subpoena the DHS investigator to give expert testimony based on the peer review records received and considered by the investigator. The court concluded plaintiffs' efforts ran afoul of [§ 1157](#) and the official information privilege contained in [Evidence Code § 1040](#). The court, however, declined to accept the argument that the evidence was barred because “peer review committee meetings qualify as subsequent ‘remedial or precautionary measures’ ” under [Evidence Code § 1151](#). (*Fox v. Kramer*, 22 Cal. 4th 531, 93 Cal. Rptr. 2d 497, 994 P.2d 343 (2000).) ([Section 1151](#) is discussed in [§ 6:32](#).)

The protections related to discovery or testimony do not apply to, among others, statements made at such a committee meeting by a party to a proceeding the subject of which was reviewed at the meeting, or to any person requesting facility staff privileges. ([Evidence Code §§ 1157\(c\) and 1157.6](#).)

These discovery exclusions do not prevent the medical board of California from using a subpoena to obtain peer review records during an investigation of a doctor. (*Arnett v. Dal Cielo*, 14 Cal. 4th 4, 56 Cal. Rptr. 2d 706,

[923 P.2d 1 \(1996\).](#))

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Chapter
7. Judicial Notice

§ 7:1. Purpose of judicial notice

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West's Key Number Digest, [Evidence](#) 🔑 1 to 52

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Citizens](#) §§ 24 to 25

[C.J.S., Criminal Law](#) §§ 916 to 937

[C.J.S., Evidence](#) §§ 8 to 119

[C.J.S., Trading Stamps and Coupons](#) § 2

Judicial notice may not be taken of any matter unless authorized or required by law. ([Evidence Code § 450](#).) Judicial notice is a little understood concept with potentially wide application. It is a method of introducing evidence of a matter of law or fact without resorting to formal proof. “The purpose of judicial notice is to expedite the production and introduction of otherwise admissible evidence.” ([Mozzetti v. City of Brisbane](#), 67 Cal. App. 3d 565, 578, 136 Cal. Rptr. 751 (1st Dist. 1977).) Within the confines of [Evidence Code § 450](#), which requires some statutory or decisional basis for each instance of judicial notice, virtually any matter of law or fact not reasonably subject to dispute can be noticed, if the opposing party is given an adequate opportunity to show that the matter is not free from dispute.

The court is required to take judicial notice of the items set forth in § 451 (discussed in §§ [7:2](#) to [7:7](#)). Even if not requested to do so, the court may take judicial notice of the items set forth in § 452 (discussed in §§ [7:8](#) to [7:16](#)). It is required to notice these items if a party so requests and complies with § 453. As the Comment to § 451 points out, there is overlap between the matters set forth in §§ 451 and 452. The introductory sentence to § 452 makes clear that under such circumstances, § 451 governs so that judicial notice is mandatory.

Judicial notice can occur in any evidentiary hearing, including a motion to suppress evidence. (*People v. Pifer*, 216 Cal. App. 3d 956, 962, 265 Cal. Rptr. 237 (5th Dist. 1989).) In addition, judicial notice is appropriate in non-evidentiary proceedings. Thus, a complaint that is facially sufficient is subject to a demurrer when facts judicially noticed render it defective. The reasoning behind this is to prevent the pleader from avoiding a demurrer by omitting facts that the court will judicially notice. (*Marina Tenants Assn. v. Deauville Marina Development Co.*, 181 Cal. App. 3d 122, 130, 226 Cal. Rptr. 321 (2d Dist. 1986); see also *Bethman v. City of Ukiah*, 216 Cal. App. 3d 1395, 1399, 265 Cal. Rptr. 539 (1st Dist. 1989).) “In ruling on a demurrer, a court may consider facts of which it has taken judicial notice. [Citation.] This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]” (*Fremont Indem. Co. v. Fremont General Corp.*, 148 Cal. App. 4th 97, 113, 55 Cal. Rptr. 3d 621 (2d Dist. 2007).) In addition, judicial notice can be taken in motions for summary judgment (*Ahrens v. Superior Court*, 197 Cal. App. 3d 1134, 1141, 243 Cal. Rptr. 420 (1st Dist. 1988)) and for judgment on the pleadings. (*First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1368, 258 Cal. Rptr. 893 (2d Dist. 1989).)

The Comment to § 450 notes that “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.” (See, e.g., *Carlton Browne & Co. v. Superior Court*, 210 Cal. App. 3d 35, 41, 258 Cal. Rptr. 118 (2d Dist. 1989).)

Simply because a fact is properly subject to judicial notice does not mean it is admissible; it is subject to all other evidentiary limitations as well. Thus, it can be challenged on relevancy grounds and under § 352. (*Mozzetti v. City of Brisbane*, 67 Cal. App. 3d 565, 578, 136 Cal. Rptr. 751 (1st Dist. 1977).) At least in the areas of official acts (*Evidence Code* § 452(c)) and court records (*Evidence Code* § 452(d)), the hearsay rule may provide a significant limitation on admissibility. Hearsay, however, has no role to play in some other areas of judicial notice. Consider, for example, a situation in which the pervasiveness of television becomes an issue and a copy of a recent census is introduced showing that 96 percent of all households owned a television set. (Compare *People v. Moran*, 39 Cal. App. 3d 398, 411, 114 Cal. Rptr. 413 (1st Dist. 1974).) The Census Bureau is an administrative agency of the United States and the *Statistical Abstract* is published as an official act of the executive branch. As such, it can be noticed under § 452(c). However, this piece of information is simply a compilation of the many hearsay statements reported by respondents to the census questionnaire and, as such, should be inadmissible. But the *Statistical Abstract* is also a “source of reasonably indisputable accuracy,” at least as to this issue. This permits the court to rely on it to “take judicial notice of the fact of the ubiquity of television sets” under *Evidence Code* § 452(h). (*People v. Moran*, 39 Cal. App. 3d 398, 411, 114 Cal. Rptr. 413 (1st Dist. 1974).)

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§ 7:2. Mandatory judicial notice—Of California and U.S. law

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 27 to 43

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 15 to 27, 41, 48 to 60, 97](#)

Judicial notice shall be taken of the decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in [§ 3, 4, or 5 of Article XI of the California Constitution](#). ([Evidence Code § 451\(a\)](#).)

California courts are mandated to take judicial notice of California and federal law because each is readily available. (Compare [Hinckley v. Bechtel Corp.](#), 41 Cal. App. 3d 206, 212, 116 Cal. Rptr. 33 (1st Dist. 1974).) For example, in *Wolfe v. State Farm Fire & Casualty Ins. Co.*, the court took judicial notice that insurers are obligated to offer earthquake insurance along with homeowners insurance because this is a statutory requirement under the Insurance Code. ([Wolfe v. State Farm Fire & Casualty Ins. Co.](#), 46 Cal. App. 4th 554, 560, 53 Cal. Rptr. 2d 878 (2d Dist. 1996).) Foreign law and the laws of other states, which are more difficult to discover, are subject to mandatory notice under §§ 452 and 453 only when a party furnishes the court with sufficient information. Even amendments to California statutes that are enacted after a lawsuit has commenced are subject to mandatory notice. ([Blinder v. Division of Narcotic Enforcement](#), 25 Cal. App. 3d 174, 181, 101 Cal. Rptr. 635 (1st Dist. 1972).)

[Sections 3, 4, and 5 of article XI of the California Constitution](#) relate to the adoption, amendment, or repeal of county and city charters.

Comment

Judicial notice of those items listed in § 451 is mandatory, whether or not any party requests that notice be taken. It is error for the trial court to fail to take mandatory notice, but, as the Comment to § 451 points out, such error is not inevitably reversible. “Depending upon the circumstances, the appellate court may hold that the error was ‘invited’ (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.”

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§ 7:3. Mandatory judicial notice—Of state and federal regulations

West's Key Number Digest

Wests Key Number Digest, [Evidence](#) 🔑47

Wests Key Number Digest, [Criminal Law](#) 🔑304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence § 37](#)

Judicial notice shall be taken of any matter made a subject of judicial notice by §§ 11343.6, 11344.6, or 18576 of the Government Code or by § 1507 of Title 44 of the United States Code. ([Evidence Code § 451\(b\)](#).)

This subdivision requires that judicial notice be taken of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State (Government Code § 11343.6) or printed in the California Code of Regulations or California Regulatory Code Supplement ([Government Code § 11344.6](#)). Judicial notice is also to be taken of the Rules of the State Personnel Board. ([Government Code § 18576](#).) Department of Social Services' regulations adopted pursuant to Welfare and Institutions Code § 16051 and filed with the Secretary of State are subject to mandatory judicial notice. ([Scott v. County of Los Angeles](#), 27 Cal. App. 4th 125, 144–145, 32 Cal. Rptr. 2d 643 (2d Dist. 1994).)

Judicial notice must also be taken of federal regulations and documents published in the Federal Register. (See [Ahrens v. Superior Court](#), 197 Cal. App. 3d 1134, 1141, 243 Cal. Rptr. 420 (1st Dist. 1988).) In [Philip Chang & Sons Associates v. La Casa Novato](#), 177 Cal. App. 3d 159, 171, 222 Cal. Rptr. 800 (5th Dist. 1986), the court held that judicial notice had to be taken of provisions of the Code of Federal Regulations, which set forth “the criteria utilized by the Commissioner of Federal Housing in determining whether to approve an application for a rental increase under a § 207 guaranteed mortgage.”

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§ 7:4. Mandatory judicial notice—Of rules of professional conduct and state rules of practice and procedure

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West's Key Number Digest, [Evidence](#) 🔑42, 20

West's Key Number Digest, [Criminal Law](#) 🔑304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 49, 55, 87, 100, 103](#)

Judicial notice shall be taken of rules of professional conduct for members of the bar adopted pursuant to [Business and Professions Code § 6076](#) and rules of practice and procedure for the courts of this state adopted by the Judicial Council. ([Evidence Code § 451\(c\)](#).)

The Comment to [§ 451](#) notes that “Judicial notice of the California Rules of Court is required These rules, adopted by the Judicial Council, are as binding on the parties as procedural statutes The Rules of Professional Conduct ... are, in effect, rules of the Supreme Court, for they must be approved by that court Subdivision (c), therefore, requires the court to take judicial notice of these rules to the same extent that it takes notice of other rules of court.”

In *David Welch Co. v. Erskine & Tulley*, plaintiffs recovered damages from a law firm for its breach of a fiduciary trust. The defendants contended that the trial court erred in not requiring plaintiff to present expert testimony establishing the relevant standard of care. The appellate court disagreed. “ ‘The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by expert testimony. If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded.’ The defendants' actions ‘were violations of professional standards; standards which the trial court was compelled to notice. ([Evidence Code § 451\(c\)](#)).’ ” (*David Welch Co. v. Erskine & Tulley*, 203 Cal. App. 3d 884, 892–893, 250 Cal. Rptr. 339 (1st Dist. 1988).)

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§ 7:5. Mandatory judicial notice—Of federal rules of pleading, practice, and procedure

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 42

West's Key Number Digest, [Criminal Law](#) 304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 49, 55](#)

Judicial notice shall be taken of 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. ([Evidence Code § 451\(d\)](#).) The Comment to [Evidence Code § 451](#) notes that the California and federal court rules that are required to be noticed under subsections (c) and (d) should be familiar to the court or easily discoverable from materials readily available. Since this may not be true of the court rules of other states, of the various United States Courts of Appeals, or of the local rules of a particular superior court, judicial notice is not required unless one of the parties complies with the provisions of [Evidence Code § 453](#).

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§ 7:6. Mandatory judicial notice—Of words and phrases

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  16

West's Key Number Digest, [Criminal Law](#)  304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 79 to 82](#)

Judicial notice shall be taken of the true signification of all English words and phrases and of all legal expressions. ([Evidence Code § 451\(e\)](#).) Judicial notice of these matters is necessary in order to conduct the proceedings.

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§ 7:7. Mandatory judicial notice—Of universally known facts

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 1 to 52

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Citizens](#) §§ 24 to 25

[C.J.S., Criminal Law](#) §§ 916 to 937

[C.J.S., Evidence](#) §§ 8 to 119

[C.J.S., Trading Stamps and Coupons](#) § 2

Judicial notice shall be taken of facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute. ([Evidence Code § 451\(f\)](#).) Despite the use of the phrase “universally known,” there is no requirement that every person know a fact for it to be judicially noticed. On the other hand, simply because a fact is obvious to the judge may not be enough. Thus, in *Tribune Newspapers West, Inc. v. Superior Court*, the court overturned a judge's decision barring the media from a felony preliminary hearing. In part, the reversal occurred because there had been no evidence introduced at the hearing on the circulation of the newspapers involved. *Tribune Newspapers* rejected the respondent court's reliance on its own observations that one of the papers “is now one of the fastest growing papers in this country ... and they are a very aggressive paper” and that “we have this all-pervasive publicity being undertaken.” ([Tribune Newspapers West, Inc. v. Superior Court](#), 172 Cal. App. 3d 443, 452, 218 Cal. Rptr. 505 (2d Dist. 1985).)

In *People v. Coulon*, the court took judicial notice of the term “hippies.” ([People v. Coulon](#), 273 Cal. App. 2d 148, 153, 78 Cal. Rptr. 95 (3d Dist. 1969).) In *People v. Bradley*, the court took judicial notice of the “mathematical truth” that a 120 H 120 opening has a 170 diagonal. ([People v. Bradley](#), 132 Cal. App. 3d 737, 743, 183 Cal. Rptr. 434 (4th Dist. 1982).) In *Wolfe v. State Farm Fire & Casualty Ins. Co.*, the court took judi-

cial notice of the “Northridge earthquake,” which occurred January 17, 1994. ([Wolfe v. State Farm Fire & Casualty Ins. Co.](#), 46 Cal. App. 4th 554, 560, 53 Cal. Rptr. 2d 878 (2d Dist. 1996).)

It is permissible to refer to an outside source to determine a “universally known” fact. Thus, a calendar may be referred to in order to determine the day of the week on which a particular date occurred.

As the Comment to [Evidence Code § 451](#) notes, the range of facts required to be noticed under this subsection is narrower than the range of facts subject to permissive notice under [Evidence Code § 452\(g\)](#) and (h).

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§ 7:8. Permissive notice—In general

[C.J.S., Criminal Law §§ 916 to 937](#)

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West's Key Number Digest, [Evidence](#) 🔑 1 to 52

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Citizens §§ 24 to 25](#)

[C.J.S., Evidence §§ 8 to 119](#)

[C.J.S., Trading Stamps and Coupons § 2](#)

Judicial notice may be taken of those matters listed in [Evidence Code § 452](#) to the extent that they are not covered by [Evidence Code § 451](#). Many of the matters covered by [§ 452](#) are similar to those covered by [§ 451](#). The primary difference is that they may not be as well known or as easily determined by the court. For this reason, the court is not required to take notice of them unless a party requests it and complies with the requirement of [Evidence Code § 453\(b\)](#), by furnishing the court with sufficient information to enable it to take notice.

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§ 7:9. Permissive notice—Of the laws of sister states, resolutions, and private acts

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 27 to 43

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 15 to 27, 41, 48 to 60, 97](#)

Judicial notice may be taken of 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. ([Evidence Code § 452\(a\)](#).) The laws of sister states, which may be somewhat more difficult to discern than federal or California law, are subject to permissive rather than mandatory notice. In interpreting this law, California courts may take judicial notice of the decisions of intermediate appellate courts in the foreign jurisdiction.

[Evidence Code § 311](#) provides that if the court is unable to determine the law of the other state the court may either:

- 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
- 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.

In *People v. Bray*, the defendant was charged with being an ex-felon in possession of a firearm. ([Penal Code § 12021](#).) The alleged felony conviction had occurred in Kansas, and it was far from clear whether Kansas considered the offense a felony. The appellate court found that the trial judge had erred in permitting an expert in Kansas law to testify on the issue ([People v. Bray](#), 52 Cal. App. 3d 494, 124 Cal. Rptr. 913 (4th Dist. 1975)):

It was improper to call an expert under these circumstances. When the court must use or interpret the law of a sister state, it is proper to take judicial notice ([Evidence Code §§ 451 and 452](#)). 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”; in this instance a Kansas attorney. Rather under [Evidence Code § 311](#) he should use the law of California or dismiss the action. ([People v. Bray](#), 52 Cal. App. 3d 494, 498, 124 Cal. Rptr. 913 (4th Dist. 1975).)

A lack of precision in citing the appropriate statutory subdivision is common in the judicial notice area. For example, in *Finnie v. Town of Tiburon*, the court took judicial notice of certain election results in Tiburon, California. Though properly done under [Evidence Code § 452\(g\)](#) or (h), the court relied on [§ 452\(a\)](#), which seems clearly inapplicable. ([Finnie v. Town of Tiburon](#), 199 Cal. App. 3d 1, 7, 244 Cal. Rptr. 581 (1st Dist. 1988).)

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Simons California Evidence Manual

Justice Mark B. Simons

Chapter
7. Judicial Notice

§ 7:10. Permissive notice—Of regulations and legislative enactments

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 27 to 35, 47

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 15 to 18, 23, 25, 27, 37, 41, 97](#)

Judicial notice may be taken of regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States. ([Evidence Code § 452\(b\)](#).) This broad provision permits judicial notice of any legislative enactment of any public entity in the United States. “Public entity” is defined in [Evidence Code § 200](#) as including “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.”

In *People v. Pifer*, the defendant, a state prisoner, contended that he had been searched in violation of the regulations contained in the California Department of Corrections Administrative Manual. Those regulations were judicially noticed under [§ 452\(b\)](#) and (c). ([People v. Pifer](#), 216 Cal. App. 3d 956, 962, 265 Cal. Rptr. 237 (5th Dist. 1989).)

In *California Agrarian Action Project, Inc. v. Regents of the University of California*, a group sued the university for improperly funding research grants under federal law. The Secretary of Agriculture had issued an administrative manual for obtaining approval of research projects that was judicially noticed. ([California Agrarian Action Project, Inc. v. Regents of the University of California](#), 210 Cal. App. 3d 1245, 1249, 258 Cal. Rptr. 769 (1st Dist. 1989).) In *Cooke v. Superior Court*, indigents sought a writ of mandate to compel Butte County to provide dental care. The Court of Appeal denied the writ because of the subsequent enactment by the county of a resolution providing such care, of which the court took judicial notice. The court rejected the contention that judicial notice could be taken only of county ordinances and not resolutions. ([Cooke v. Superior Court](#), 213 Cal.

App. 3d 401, 416, 261 Cal. Rptr. 706 (3d Dist. 1989).) Finally, in *Smith v. State Bar*, plaintiff sought a transfer of fees paid for one bar exam to a subsequent exam. The court found that the State Bar was a governmental agency and its “Instructions for Applicants” with attached “Withdrawal Refund Schedule” were properly subject to judicial notice under subdivisions (b) and (c) of § 452. (*Smith v. State Bar*, 212 Cal. App. 3d 971, 975–976, 261 Cal. Rptr. 24 (2d Dist. 1989).) However, in *Brosterhous v. State Bar*, the California Supreme Court clarified that the State Bar is “an administrative arm of the court only in its admissions and disciplinary functions.” (*Brosterhous v. State Bar*, 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 906 P.2d 1242 (1995).) Therefore the record of an arbitration conducted by the bar to determine a member's challenge to the calculation of the amount of dues used for “political activities” is not subject to judicial notice.

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Chapter
7. Judicial Notice

§ 7:11. Permissive notice—Of federal and state official acts

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 15 to 27, 38, 40 to 41, 45, 48 to 60, 97](#)

Judicial notice may be taken of the official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. ([Evidence Code § 452\(c\)](#).) This provision enables courts in California to take notice of a wide variety of official acts. As the Comment notes, an expansive reading must be provided to certain of its phrases. Thus, included in “executive” acts are those performed by administrative agencies. Included as acts of a “state” are those performed by counties, which are political subdivisions of a state.

Warning

One limit, too often unstated in the cases, applies: Though the existence of public documents may properly be the subject of judicial notice, the truth of the matters stated therein is not. ([Mangini v. R.J. Reynolds Tobacco Co.](#), 7 Cal.4th 1057, 1063–1064, 31 Cal.Rptr.2d 358, 875 P.2d 73 (1994), overruled on other grounds in [In re Tobacco Cases II](#), 41 Cal.4th 1257, 1262, 63 Cal.Rptr.3d 418, 163 P.3d 106 (2007); [Searles Valley Minerals Operations, Inc. v. State Board of Equalization](#), 160 Cal.App.4th 514, 519 (2008).)

As an example of the expansive reading of “state” acts, in [Marek v. Napa Community Redevelopment Agency](#), the court took judicial notice of the 1980–1981 statement of indebtedness, an official record of the auditor-controller of Napa County. ([Marek v. Napa Community Redevelopment Agency](#), 46 Cal. 3d 1070, 1076,

251 Cal. Rptr. 778, 761 P.2d 701 (1988); see also *Cooke v. Superior Court*, 213 Cal. App. 3d 401, 416, 261 Cal. Rptr. 706 (3d Dist. 1989), which confirmed that records of a county are properly noticed under this subdivision (c.) However, the acts of a council set up jointly by a county and the incorporated cities of that county are not those of the state or one of its subdivisions and thus cannot be judicially noticed. (*Edna Valley Assn. v. San Luis Obispo County etc. Coordinating Council*, 67 Cal. App. 3d 444, 449–450, 136 Cal. Rptr. 665 (2d Dist. 1977).)

As an example of the expansive reading of “executive” acts, in *Hogen v. Valley Hospital*, 147 Cal. App. 3d 119, 125, 195 Cal. Rptr. 5 (2d Dist. 1983), the court took judicial notice of the files of the Board of Medical Quality Assurance: “The records and files of an administrative board are properly the subject of judicial notice.” (*Hogen v. Valley Hospital*, 147 Cal. App. 3d 119, 125, 195 Cal. Rptr. 5 (2d Dist. 1983).) In addition, in *San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, the court upheld the taking of judicial notice of a letter sent from the California Secretary of Resources to the executive director of the California Coastal Commission. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, 38 Cal. App. 4th 523, 552–553, 45 Cal. Rptr. 2d 117 (1st Dist. 1995).)

The courts have consistently treated reports issued by legislative committees or executive agencies as “official acts” entitled to judicial notice. Given the sheer number of reports issued by such agencies each year, this presents an area of opportunity for counsel that should be closely regulated by trial judges. In *Love v. Superior Court*, the court considered the constitutionality of *Penal Code § 1202.6* (added in 1988), which required AIDS counseling and testing for convicted prostitutes. Among the documents judicially noticed was a 1986 publication of the United States Public Health Service that discussed AIDS. Admitted into evidence from that report was the conclusion that counseling and testing of infected persons is an “important component of prevention strategy.” (*Love v. Superior Court*, 226 Cal. App. 3d 736, 743, 276 Cal. Rptr. 660 (1st Dist. 1990).)

In *Peretto v. Department of Motor Vehicles*, the court considered the constitutionality of the California law allowing the administrative suspension of driver's licenses of those arrested for driving under the influence. To determine the need for such legislation, the court took judicial notice of a United States Department of Transportation study and admitted its conclusion that rapid suspension of driver's licenses in administrative proceedings was effective in reducing the incidence of driving under the influence. (*Peretto v. Department of Motor Vehicles*, 235 Cal. App. 3d 449, 452, 1 Cal. Rptr. 2d 392 (1st Dist. 1991).)

In *Ruddock v. Ohls*, the court's concern for the reliability of the information in the official record was evident, but it reached the right decision by the wrong route. In *Ruddock*, a minor sued her mother's former husband to establish paternity. The defendant sought to have the court take judicial notice of the minor's birth certificate, as an official record of Stanislaus County, wherein another man, named Ruddock, was listed as the father. The court declined to do so, stating that the birth certificate “is not the type of record that can be the subject of judicial notice under *Evidence Code § 452*.” (*Ruddock v. Ohls*, 91 Cal. App. 3d 271, 271, 154 Cal. Rptr. 87 (5th Dist. 1979).) The better analysis would have separated the judicial notice and admissibility questions. A birth certificate is a document to which judicial notice should be given. For example, to prove that a particular woman bore a child on a particular date, judicial notice of a birth certificate seems appropriate. However, once noticed, information in the certificate that is provided by a nongovernment employee who has no duty to report accurately, such as the mother, should not be admitted.

Comment

Given the large number of official reports issued each year on a variety of subjects, the imposition of reasonable limits on admissible matter in the reports still provides counsel with significant opportunities. Consider, for example, a wrongful death case in which plaintiff contends that the defendant was driving under the influence of alcohol. The defendant refused a chemical test, but has testified that he consumed only two glasses of wine. The Department of Motor Vehicles, pursuant to [Vehicle Code § 1666](#), has produced a blood alcohol table that shows that two glasses of wine should produce a blood alcohol level of approximately 0.04 in a person of defendant's weight. This "fact," which is contained in an official report, seems not reasonably subject to dispute. If the defendant's testimony is believed, judicial notice of the blood alcohol table would help establish that the defendant was not under the influence of alcohol at the time of the accident.

The advantages of introducing the evidence in this fashion, rather than calling a toxicologist, are obvious: It is a cheaper, faster, and "cleaner" way of proving the fact. It is cleaner because, on cross-examination, the toxicologist might well be asked questions by plaintiff about the defendant's driving pattern and field sobriety tests that lead the toxicologist to opine that such actions are consistent with being under the influence of alcohol.

Simply because a public employee signs a declaration does not automatically create an official record that must be given judicial notice. In [Childs v. State of California](#), 144 Cal. App. 3d 155, 162, 192 Cal. Rptr. 526 (1st Dist. 1983), the court found that a declaration that described the mailing practices of a state agency was not an "official act" but simply a description of an agency's practice. ([Childs v. State of California](#), 144 Cal. App. 3d 155, 162, 192 Cal. Rptr. 526 (1st Dist. 1983).)

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§ 7:12. Permissive notice—Of court records

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 49, 55 to 60](#)

Judicial notice may be taken of the 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. ([Evidence Code § 452\(d\)](#).) This subdivision permits a court to take judicial notice of its own records, including prior pleadings in a case. ([People v. Cavanna](#), 214 Cal. App. 3d 1054, 1058, 263 Cal. Rptr. 177 (2d Dist. 1989); [Lazzarone v. Bank of America](#), 181 Cal. App. 3d 581, 590, 226 Cal. Rptr. 855 (3d Dist. 1986).) In *Lazzarone*, the court sustained a demurrer after its review of the file in a related action demonstrated that res judicata applied. ([Lazzarone v. Bank of America](#), 181 Cal. App. 3d 581, 590, 226 Cal. Rptr. 855 (3d Dist. 1986).)

A court may also take judicial notice of the files in another action pending before the same court. ([Insurance Underwriters Clearing House, Inc. v. Natomas Co.](#), 184 Cal. App. 3d 1520, 1523, 228 Cal. Rptr. 449 (1st Dist. 1986).) An appellate court may notice its own opinion in a related appeal. ([In re Christy L.](#), 187 Cal. App. 3d 753, 754, 232 Cal. Rptr. 184 (3d Dist. 1986).) In computing a defendant's sentence, a court may take judicial notice of the records of the defendant's prior criminal convictions. ([In re Richard W.](#), 91 Cal. App. 3d 960, 981, 155 Cal. Rptr. 11 (5th Dist. 1979).) However, if the defendant is charged with petty theft and has a prior conviction of theft, the judge may not take judicial notice of the prior conviction if it is done in such a way as to take the issue of the defendant's guilt of the prior away from the jury. ([People v. Barre](#), 11 Cal. App. 4th 961, 965–966, 14 Cal. Rptr. 2d 307 (2d Dist. 1992).) The ability to take judicial notice also applies in extradition cases: A court may take judicial notice of orders of other California courts. Thus, in [People v. Superior Court \(Smolin\)](#), 41 Cal. 3d 758, 768–769, 225 Cal. Rptr. 438, 716 P.2d 991 (1986), rev'd on other grounds, 482 U.S.

400, 107 S. Ct. 2433, 96 L. Ed. 2d 332 (1987), the court considered a request by Louisiana to extradite the defendant for kidnapping his children from his ex-wife. Louisiana law provides that a parent may not be charged with kidnapping his or her own children if he or she is entitled to custody. At the defendant's request, the trial court took judicial notice of its own order several years earlier giving custody of the children to the defendant. This was upheld on appeal by the California Supreme Court.

Evidence Code § 452(d), also permits courts to take judicial notice of the records of other California courts in a prior proceeding as supporting documentation in a motion for summary judgment. (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union*, 180 Cal. App. 3d 985, 997, 225 Cal. Rptr. 852 (1st Dist. 1986).)

Finally, California courts can take notice of the records in court cases occurring in other states. (*Brown v. Watson*, 207 Cal. App. 3d 1306, 1309, 255 Cal. Rptr. 507 (2d Dist. 1989).)

The existence of a court record may be judicially noticed. However, the extent to which facts that are contained in this court record may be judicially noticed is the subject of no little dispute. The traditional statement of the rule is that “a court *cannot* take judicial notice of *hearsay allegations* as being true just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law.” (*Day v. Sharp*, 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918 (2d Dist. 1975) (citing Jefferson, California Evidence Benchbook (1972) § 47.3, p. 840) (emphasis in original).) In *Weiner v. Mitchell, Silberberg and Knupp*, the court slightly extended the *Day* rule to include the facts stated in an appellate opinion. (*Weiner v. Mitchell, Silberberg & Knupp*, 114 Cal. App. 3d 39, 46, 170 Cal. Rptr. 533 (2d Dist. 1980).) *Weiner* has been sharply criticized for “contraven[ing] substantial California authority.” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal. App. 4th 875, 885, 110 Cal. Rptr. 2d 877 (2d Dist. 2001); *Sosinsky v. Grant*, 6 Cal. App. 4th 1548, 1566, 8 Cal. Rptr. 2d 552 (5th Dist. 1992).)

Comment

Courts have begun to restate and limit the *Day* rule. (See *Day v. Sharp*, 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918 (2d Dist. 1975).) In *Sosinsky v. Grant*, the court distinguished judicial notice that a judge in a prior case had made a finding of fact from the taking of judicial notice that the facts found are the true facts. (*Sosinsky v. Grant*, 6 Cal. App. 4th 1548, 8 Cal. Rptr. 2d 552 (5th Dist. 1992).) Only facts that are not reasonably subject to dispute should be noticed. Simply because a judge has, after a contested hearing, found a fact to be true does not place it in the “indisputable” category. (See also *People v. Tolbert*, 176 Cal. App. 3d 685, 690, 222 Cal. Rptr. 313 (3d Dist. 1986) (“judicial notice cannot be taken of hearsay allegations as being true, even those made by a judge-declarant, just because they are part of a court record or file”).) *Sosinsky* contains an excellent discussion of most of the recently decided cases in this area and its conclusion that *Day* improperly extends judicial notice to the truth of facts stated in judicial orders seems correct. As an example of proper judicial notice, *Sosinsky* cites *Cote v. Henderson*, 218 Cal. App. 3d 796, 267 Cal. Rptr. 274 (2d Dist. 1990). In *Cote*, notice was taken that: (1) a felony complaint was filed; (2) a magistrate found that sufficient cause existed to believe that the defendant had violated the charges listed in the complaint; (3) an information was filed; (4) the defendant entered a no contest plea to one count and the others were dismissed; and (5) the defendant was placed on probation. (*Cote v. Henderson*, 218 Cal. App. 3d 796, 267 Cal. Rptr. 274 (2d Dist. 1990).) The current trend in the cases is to follow the *Sosinsky* approach and reject Justice Jefferson's. (*Kilroy v. State*, 119 Cal. App. 4th 140, 145–148, 14

Cal. Rptr. 3d 109 (3d Dist. 2004).)

In *Ramsden v. Western Union*, the court reversed a dismissal of plaintiff's claim for damages for malicious prosecution. The court held that, on a demurrer, it was inappropriate to take judicial notice of the facts contained in a police report from a misdemeanor case filed against plaintiff and later dismissed in order to controvert the allegations in plaintiff's civil complaint. (*Ramsden v. Western Union*, 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426 (2d Dist. 1977).)

There is a dispute as to whether courts, in a motion attacking the pleadings, may take judicial notice of court records such as admissions, depositions, and affidavits that were filed by a party in a related proceeding and that are inconsistent with that party's pleading. (Compare *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604–605, 176 Cal. Rptr. 824 (2d Dist. 1981) and *Hills Transp. Co. v. Southwest Forest Industries, Inc.*, 266 Cal. App. 2d 702, 708–710, 72 Cal. Rptr. 441 (2d Dist. 1968) (both of which took notice of the earlier records) with *Garcia v. Sterling*, 176 Cal. App. 3d 17, 221 Cal. Rptr. 349 (2d Dist. 1985) (which refused to take such notice).) In this dispute, the proper role of a demurrer seems to have become lost in the argument over the proper scope of judicial notice. It seems appropriate to take judicial notice of prior court records filed by a party that are inconsistent with that party's pleading. Certainly, the hearsay limitation on judicial notice of court records is not a problem. However, a demurrer should rarely be granted due to this inconsistency since demurrers are not an appropriate vehicle for determining the truth of disputed facts. (See the discussion in *Joslin v. H.A.S. Ins. Brokerage*, 184 Cal. App. 3d 369, 374–375, 228 Cal. Rptr. 878 (4th Dist. 1986).)

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§ 7:13. Permissive notice—Of rules of court

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 49, 55](#)

Judicial notice may be taken of the 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. ([Evidence Code § 452\(e\)](#).) This subdivision provides for permissive notice of a far broader range of court rules than [Evidence Code § 451\(c\)](#) and (d). Mandatory notice, under [§ 451](#), applies only to California rules set out by the Judicial Council and certain federal rules of court. Under [Evidence Code § 452\(e\)](#), if the party complies with [Evidence Code § 453](#), notice of any court rule is required.

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§ 7:14. Permissive notice—Of foreign law

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 22, 26](#)

Judicial notice may be taken of the law of an organization of nations and of foreign nations and public entities in foreign nations. ([Evidence Code § 452\(f\)](#).) [Evidence Code § 310](#) provides that the law of a foreign nation or organization of nations is a question of law to be determined by the court pursuant to the judicial notice provisions. [Evidence Code § 452\(f\)](#), makes this issue a matter of permissive notice (unless a party complies with [Evidence Code § 453](#) and provides sufficient information to the court to enable it to notice the matter).

[Evidence Code § 454](#) sets forth the kinds of information a court can rely on in deciding what the foreign law is. One curiosity is that in determining the law of a sister state, at least one appellate court has held that it is error to have an expert on that state's law testify on the issue. ([People v. Bray](#), 52 Cal. App. 3d 494, 498, 124 Cal. Rptr. 913 (4th Dist. 1975).) However, [§ 454\(b\)](#), provides for just such expert testimony when trying to determine the law of a foreign nation.

[Evidence Code § 311](#) provides that if the court is unable to determine the law of a foreign nation, the court shall either apply California law or dismiss the action without prejudice.

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§ 7:15. Permissive notice—Of common knowledge

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[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 9, 45, 87, 90 to 92, 107 to 110](#)

[C.J.S., Trading Stamps and Coupons § 2](#)

Judicial notice may be taken of 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. ([Evidence Code § 452\(g\)](#).) This subdivision limits judicial notice to common knowledge “within the territorial jurisdiction of the court.” The Comment notes that this refers to the county in which a superior court is located and the judicial district in which a municipal or justice court is located.

In affirming the denial of a motion to suppress, in *People v. Tobin*, the court took judicial notice of the fact that “Highway 80 is busy and was undoubtedly heavily traveled at the time in question.” ([People v. Tobin](#), 219 Cal. App. 3d 634, 639, 269 Cal. Rptr. 81 (1st Dist. 1990).) In another case, in discussing the propriety of a police search, the court took judicial notice of the fact that boots are less resilient than other articles of clothing. (*In re Willy L.*, 56 Cal. App. 3d 256, 262, 128 Cal. Rptr. 592 (5th Dist. 1976).) In *Greyhound Lines, Inc. v. Superior Court*, a personal injury suit based on the bus company’s alleged negligence in failing to provide seat belts, Greyhound claimed that “the installation of seat belts on passenger stages should be a matter for legislative or administrative determination and not be subject to the varying determinations of juries in separate cases.” In rejecting this contention, the court took judicial notice that “it is now a matter of common knowledge that safety belts are effective in reducing fatalities and minimizing injuries in motor vehicle collisions.” ([Greyhound Lines, Inc. v. Superior Court](#), 3 Cal. App. 3d 356, 358, 83 Cal. Rptr. 343 (3d Dist. 1970).) In evaluating the fisc-

al impact of an order requiring the state to fund certain benefits to disabled students, the appellate court took judicial notice, under §§ 452(g), 452(h) and 459, “that the terrible events of September 11, 2001 have dramatically changed the State's fiscal outlook.” (*Fry v. Saenz*, 98 Cal. App. 4th 256, 273, 120 Cal. Rptr. 2d 30 (3d Dist. 2002).)

In *People v. Harvath*, the court rejected the defendant's contention that the evidence failed to establish that the crime occurred in Los Angeles County by taking judicial notice that Venice is in that county. (*People v. Harvath*, 1 Cal. App. 3d 521, 524, 82 Cal. Rptr. 48 (2d Dist. 1969).) In *In re Juan C.*, the court approved taking judicial notice under Evidence Code § 452(g), that a well publicized riot situation arose in the city of Long Beach involving looting, assaults, and homicides. Taking notice of this fact permitted the trial court to uphold a city mandated curfew, which can only be imposed pursuant to Government Code § 8634 if an “emergency” situation exists. (*In re Juan C.*, 28 Cal. App. 4th 1093, 33 Cal. Rptr. 2d 919 (2d Dist. 1994).)

In *People v. Torres*, the court reviewed a search incident to an arrest. To establish probable cause for the arrest, the officers relied in part on their observation of the defendant's purchase of milk sugar and gelatin capsules. The court took “judicial notice that capsules and milk sugar are used in the processing of narcotics.” (*People v. Torres*, 56 Cal. 2d 864, 866–867, 17 Cal. Rptr. 495, 366 P.2d 823 (1961).) In *Daar v. Yellow Cab Co.*, the defendant asked the court to affirm the demurrer granted by the trial court. Plaintiff was a cab customer who filed a class action against defendant for overcharging on fares and claimed that the rate of overcharge was identical and uniform for each class member. Defendant asked the court to take judicial notice of several fare-setting practices that were “commonly known” in Los Angeles that demonstrated the falsity of the claim. The court rejected this request. “None of the facts suggested by defendant to be judicially noticed are of such common knowledge that they cannot reasonably be the subject of dispute.” (*Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 716, 63 Cal. Rptr. 724, 433 P.2d 732 (1967).)

Warning

These two Supreme Court cases, *Torres* and *Daar*, demonstrate the subjective nature of the conclusion that a fact is “common knowledge.” Is it really true that the steps in the processing of heroin for sale (*Torres*) are more commonly known than the steps utilized by taxicabs in setting fares (*Daar*)? If so, it would be an interesting reflection on Los Angeles, where both cases originated. The danger in this is that a party who relies on the trial court's decision to take judicial notice and then introduces no other proof on the issue runs the risk of suffering the same fate as *Yellow Cab Co.*: a reversal in the appellate court.

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§ 7:16. Permissive notice—Of verifiable facts

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[C.J.S., Citizens](#) §§ 24 to 25

[C.J.S., Criminal Law](#) §§ 916 to 937

[C.J.S., Evidence](#) §§ 8 to 119

[C.J.S., Trading Stamps and Coupons](#) § 2

Judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. ([Evidence Code § 452\(h\)](#).) The facts taken notice of under this subdivision need not be widely known if they are readily ascertainable and indisputable. The Comment notes that sources of reasonably indisputable accuracy “include not only treatises, encyclopedias, almanacs and the like, but also persons learned in the subject matter.” References relied on are not to be placed in evidence or sent in to the jury. Rather, the judge and lawyers consult the source to determine if notice should be taken. Placing this provision under [§ 452](#) rather than [§ 451](#) places the burden on the proponent to provide an adequate information source in order to require judicial notice.

In *Nguyen v. Scott*, plaintiff sued a real estate broker, in part for breaching the duty of honesty and fair dealing. In evaluating this claim, the court took judicial notice under [§ 452\(h\)](#), of “relevant criteria promulgated by a private professional association,” the Code of Ethics of the National Association of Realtors. (*Nguyen v. Scott*, 206 Cal. App. 3d 725, 736–737, 253 Cal. Rptr. 800 (1st Dist. 1988).) (Compare this with the mandatory notice taken of the rules of professional conduct for members of the bar, [Evidence Code § 451\(c\)](#), discussed in [§ 7:4](#).)

In *Mexican-American Political Association v. Brown* and *Diamond v. Allison*, the Supreme Court rejected two constitutional challenges to the practice of placing an incumbent's name first on the ballot. Over a strong dissent by Justice Tobriner, the court concluded that it was not appropriate to take judicial notice of the “fact” that a substantial number of electors vote for the first person listed on the ballot simply because the name is listed first. (*Mexican-American Political Association v. Brown*, 8 Cal. 3d 733, 734, 106 Cal. Rptr. 12, 505 P.2d 204 (1973); *Diamond v. Allison*, 8 Cal. 3d 736, 737, 106 Cal. Rptr. 13, 505 P.2d 205 (1973).)

The existence of a contract between private parties cannot be established by judicial notice under § 452(h). (*Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137, 1145, 37 Cal. Rptr. 2d 718 (2d Dist. 1995).)

In *Jones v. California Interscholastic Federation*, plaintiff unsuccessfully challenged defendant's rule precluding plaintiff from participating in varsity sports for more than eight semesters. The court held that semesters spent by the student in Illinois were to be counted and took judicial notice of a by-law of the Illinois High School Association imposing an identical eight-semester limit. (*Jones v. California Interscholastic Federation*, 197 Cal. App. 3d 751, 759, 243 Cal. Rptr. 271 (2d Dist. 1988).)

In *Schuhart v. Pinguelo*, the court refused to take judicial notice of an exhibit appended to the appellate brief because “it would require an expert to explain the meaning of the exhibit, and the exhibit is subject to dispute and not readily capable of accurate determination.” (*Schuhart v. Pinguelo*, 230 Cal. App. 3d 1599, 1609, 282 Cal. Rptr. 144 (1st Dist. 1991).)

In *People v. Archerd*, the defendant was convicted of three counts of murder caused by injecting his victims with insulin. The Supreme Court concluded that “it was proper for the trial court to consult textbooks concerning the nature of the properties of insulin as it is entitled to take judicial notice on its own of the expertise of the doctors testifying at the trial.” The court, however, disapproved of the trial judge's consultation with experts outside of court, since counsel had no opportunity to examine or cross-examine them. (*People v. Archerd*, 3 Cal. 3d 615, 638, 91 Cal. Rptr. 397, 477 P.2d 421 (1970).) In *People v. Moran*, the defendant asked to have his murder conviction reversed because the testimony of an unavailable witness was presented to the jury by videotape which, according to the defendant, was a less reliable medium than reading the written transcript of his prior testimony. The court rejected this argument, in part because of its “judicial notice of the fact of the ubiquity of television sets, as revealed by the 1970 census.” (*People v. Moran*, 39 Cal. App. 3d 398, 411, 114 Cal. Rptr. 413 (1st Dist. 1974).) In *People v. Abelson*, an automobile speeding case, the court took judicial notice of the foundational requirements of an engineering and traffic survey and then admitted it under the official records exception to the hearsay rule. (*People v. Abelson*, 104 Cal. App. 3d Supp. 16, 20, 164 Cal. Rptr. 369 (App. Dep't Super. Ct. 1980).) In *People v. Tobin*, the court upheld the denial of a motion to suppress, taking “judicial notice of the fact that at 7:30 p.m. on New Year's Day it was dark.” (*People v. Tobin*, 219 Cal. App. 3d 634, 639, 269 Cal. Rptr. 81 (1st Dist. 1990).)

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Chapter
7. Judicial Notice

§ 7:17. Converting permissive to mandatory notice—Sufficient notice

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑51

West's Key Number Digest, [Criminal Law](#) 🔑304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 9 to 12, 16 to 22, 27](#)

Comment

The primary difference between those items listed under [Evidence Code § 451](#), which requires mandatory notice, and those listed under [Evidence Code § 452](#), which provides for discretionary notice, is that the former are more easily determined by the court without the assistance of the parties. When, however, a party complies with [Evidence Code § 453](#) by giving sufficient notice and furnishing sufficient information, the trial court must notice even those matters listed under [Evidence Code § 452](#). (*People v. Smith*, 215 Cal. App. 3d 19, 25, 263 Cal. Rptr. 678 (1st Dist. 1989).)

As the Comment to [Evidence Code § 453](#) points out, “[t]he notice requirement is an important one since judicial notice is binding on the jury under Section 457.” The reasonableness of the notice varies depending on the precise nature of the matter under consideration and the likelihood of a dispute as to its accuracy. For example, when a party wishes the court to take judicial notice of a prior court record to support the party's contention that the prior case is a bar to the present one, reference to the prior action in the demurrer and defendant's declaration accompanying the demurrer provide sufficient notice. (*Carroll v. Puritan Leasing Co.*, 77 Cal. App. 3d 481, 486, 143 Cal. Rptr. 772 (2d Dist. 1978).) In *Carroll*, the prior court record was in a different county than the instant case. On the other hand in a suit for damages arising out of a plane crash, plaintiff's counsel referred to a report prepared by the Government Accounting Office during the cross-examination of an employee of defendant. This

was the first reference to the report and this lack of notice properly led to a refusal to take judicial notice of the report. ([Baker v. Beech Aircraft Corp.](#), 96 Cal. App. 3d 321, 338, 157 Cal. Rptr. 779 (4th Dist. 1979).)

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§ 7:18. Converting permissive to mandatory notice—Sufficient information

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑51

West's Key Number Digest, [Criminal Law](#) 🔑304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 9 to 12, 16 to 22, 27](#)

Comment

Most cases discussing [Evidence Code § 453](#) turn on the sufficiency of the information provided by the parties. It is the burden of the party seeking judicial notice, and not the court's, to provide the source material for determining the matter to be noticed. Section 454, discussed in [§ 7:19](#), sets forth the sources that are appropriate for this determination.

The Comment to [Evidence Code § 453](#) notes that the degree of persuasion required varies according to which subdivision of [Evidence Code § 452](#) is under consideration. For example, if the party seeks notice under subsection (g), it must show that the matter is not reasonably subject to dispute, that no reasonable person having the same information as is available to the judge could reasonably disbelieve it.

Even matters of law covered under [Evidence Code § 452](#) need not be noticed unless the party presents sufficient information. Thus, in *Salinero v. Pon*, the court upheld the trial court's refusal to take judicial notice of pre-1968 provisions of the Oakland Building Code because the party failed to provide the court with them. “While a court *may* take judicial notice of municipal ordinances ... and *must* do so if requested by a party, provided sufficient notice is given to adverse parties and the court is given sufficient information to enable it to take judicial notice of the matter ... here appellant failed to [do so].” ([Salinero v. Pon](#), 124 Cal. App. 3d 120,

133, 177 Cal. Rptr. 204 (1st Dist. 1981).)

The same rule applies to judicial notice of court records: when a request to take notice of the record is made, judicial notice is mandatory only if the party requesting it supplies the court with “sufficient, reliable and trustworthy sources of information about the matter A court is not required to seek out on its own initiative indisputable sources of information. Whether information supplied by a party is sufficient for the purpose will vary from case to case. In some cases, the original source documents may be required to provide the court with sufficient information.” (*People v. Maxwell*, 78 Cal. App. 3d 124, 130–131, 144 Cal. Rptr. 95 (2d Dist. 1978).) *Maxwell* approved the trial court’s refusal to take notice when neither party presented any documentary evidence from the prior record. (Compare *People v. Smith*, 215 Cal. App. 3d 19, 263 Cal. Rptr. 678 (1st Dist. 1989), where the court found that the prosecutor furnished sufficient court records for notice to be taken.) In *Smith*, the prosecutor sought judicial notice of an earlier *Kelly* hearing in another department and provided the court with transcripts of those proceedings.

In *Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley*, plaintiff-landowner challenged as insufficient a rent increase authorized by a rent control commission. Plaintiff challenged the commission’s gross rent calculations and relied on twelve appraisal treatises to establish a verifiable fact under § 452(h) (see the discussion in § 7:16). The court declined “to take judicial notice of this proposition, because we have not been provided with sufficient information to ensure the books cited are sources of indisputable accuracy.” (*Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley*, 180 Cal. App. 3d 152, 162, 225 Cal. Rptr. 364 (6th Dist. 1986).) See also *Fire Ins. Exchange v. Abbott*, where an insurer sought a declaration that policy exclusions for intentionally caused injuries precluded coverage for two insureds convicted of sexual abuse of minors. The insureds sought judicial notice of exclusions found in other insurance policies more specifically directed to child abuse, but the request was denied. “Insurer properly objects on the basis that insufficient information is supplied to establish the context of these photocopies.” (*Fire Ins. Exchange v. Abbott*, 204 Cal. App. 3d 1012, 1024, 251 Cal. Rptr. 620 (6th Dist. 1988).) In *Leibert v. Transworld Systems, Inc.*, defendant moved for summary judgment based on plaintiff’s failure to exhaust administrative remedies. In response, plaintiff claimed no such remedies existed and asked the court to take judicial notice of this fact. Under § 453, plaintiff submitted a declaration containing hearsay statements and an unauthenticated internal memorandum of the agency involved. The trial judge’s conclusion that this information was insufficient was affirmed. (*Leibert v. Transworld Systems, Inc.*, 32 Cal. App. 4th 1693, 1700, 39 Cal. Rptr. 2d 65 (1st Dist. 1995).)

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7. Judicial Notice

§ 7:19. Sources of information

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 1 to 52

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Citizens](#) §§ 24 to 25

[C.J.S., Criminal Law](#) §§ 916 to 937

[C.J.S., Evidence](#) §§ 8 to 119

[C.J.S., Trading Stamps and Coupons](#) § 2

[Evidence Code](#) § 454 provides the following:

(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 § 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.

This section provides the judge with wide latitude in deciding what sources are trustworthy. “Advice of persons learned in the subject matter” as well as written material may be consulted or used. If such advice is relied on, [Evidence Code](#) § 455(b), provides “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.”

In *Volkswagenwerk Aktiengesellschaft v. Superior Court*, the court was confronted with the question of determining West Germany's discovery rules. The case contains a lengthy discussion of the conclusions it reached following judicial notice of a wide variety of sources, many of which are listed. ([Volkswagenwerk Aktiengesellschaft v. Superior Court](#), 123 Cal. App. 3d 840, 852, 176 Cal. Rptr. 874 (1st Dist. 1981).)

In *People v. Stralla*, the defendant challenged his indictment for operating a gambling ship in Santa Monica Bay on the grounds that the territorial jurisdiction of the State of California did not extend over the Bay. In order to resolve the question, the court concluded it could consult “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](#), 14 Cal. 2d 617, 620, 96 P.2d 941 (1939).) The opinion then goes on to describe the court's reliance on such sources, including Webster's International Dictionary and Funk & Wagnalls New Standard Dictionary. ([People v. Stralla](#), 14 Cal. 2d 617, 620–621, 96 P.2d 941 (1939).)

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SIMCAEVID § 7:19

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Chapter
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§ 7:20. Procedure—Opportunity to present information

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑51

West's Key Number Digest, [Criminal Law](#) 🔑304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 9 to 12, 16 to 22, 27](#)

Whenever the court takes judicial notice under [Evidence Code § 452](#) (permissive notice) or § 451(f) (mandatory notice of universally known facts) of a matter of substantial consequence to the determination of the action, the court shall afford each party reasonable opportunity, before the jury is instructed or the cause submitted to the court, to present to the court information relevant to the propriety of taking notice of the matter and the tenor of the matter to be noticed. ([Evidence Code § 455\(a\)](#).)

Comment

What constitutes a “reasonable opportunity” depends on the complexity of the matter and its importance to the case. For example, taking judicial notice of a city ordinance may not require a hearing. Taking notice of a difficult question of foreign law, however, almost certainly will.

In *Estate of Nicholas*, the Court of Appeal reversed the trial court's order giving certain instructions to the administrator of a testamentary trust. It rejected, for several reasons, the trustee's contention that the order was supported, in part, by the trial court's judicial notice of its own records. First, no request for notice was made. Second, there was no indication in the record that the trial judge took judicial notice of anything. “In the absence of an indication on the record of matters judicially noticed, an appellate court ordinarily cannot conclude substantial evidence may be located somewhere in matters hypothetically subject to judicial notice.” Finally, if notice had been taken, the opposing party would have been deprived of its right under [Evidence Code § 455](#) to lit-

igate the propriety of taking notice since the subject of the notice was of substantial consequence to the determination of the action. (*Estate of Nicholas*, 177 Cal. App. 3d 1071, 1089–1090, 223 Cal. Rptr. 410 (3d Dist. 1986).)

Nicholas underscores the need for the court to make an adequate record when taking judicial notice of a matter. *Evidence Code* § 456 requires the court to make a clear record when denying a request for notice. This ensures that the parties will have an opportunity to submit evidence on the matter. (See *Heist v. County of Colusa*, 163 Cal. App. 3d 841, 850–851, 213 Cal. Rptr. 278 (3d Dist. 1984), where the court's failure to comply with § 456 was held to be harmless error.) See also Justice Sullivan's dissent in *Parker v. Twentieth Century–Fox Film Corp.*, in which he criticizes the reliance on a dictionary to avoid an essentially factual dispute about contract terms and discusses the due process implications in the requirements of *Evidence Code* § 455(a) (*Parker v. Twentieth Century–Fox Film Corp.*, 3 Cal. 3d 176, 188–189, 89 Cal. Rptr. 737, 474 P.2d 689 (1970)):

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. (*Evidence Code* § 455(b).)

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§ 7:21. Procedure—Conveying judicial notice to the jury

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  [51](#), [52](#)

West's Key Number Digest, [Criminal Law](#)  [304](#)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 8 to 14, 16 to 22, 27](#)

When the court has reviewed certain source material and decided to take judicial notice of some fact, it should convey that fact to the jury if it relates to a matter that would otherwise have been for determination by the jury. The references relied on, however, are not received in evidence or sent into the jury room. (Compare [People v. Archerd](#), 3 Cal. 3d 615, 638, 91 Cal. Rptr. 397, 477 P.2d 421 (1970).) Under [Evidence Code § 457](#), the court instructs the jury that the fact judicially noticed is binding on them. (But see [People v. Barre](#), 11 Cal. App. 4th 961, 965–966, 14 Cal. Rptr. 2d 307 (2d Dist. 1992), discussed in [§ 7:12](#).)

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§ 7:22. Procedure—Subsequent proceedings in trial court

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  52

West's Key Number Digest, [Criminal Law](#)  304

Legal Encyclopedias

[C.J.S., Criminal Law §§ 916 to 937](#)

[C.J.S., Evidence §§ 8 to 9, 14](#)

“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” ([Evidence Code § 458](#).) The Comment to [§ 458](#) notes that this section makes it clear that the failure or refusal of the trial court to judicially notice a matter at trial does not bar the trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding, such as a hearing on a motion for new trial.

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§ 7:23. Procedure—Experts

West's Key Number Digest

Wests Key Number Digest, [Trial](#) 18

Wests Key Number Digest, [Evidence](#) 51

Wests Key Number Digest, [Criminal Law](#) 304, 633(1)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 805, 916 to 937, 1542 to 1544, 1547, 1569 to 1571, 1624 to 1625](#)

[C.J.S., Evidence §§ 9 to 12, 16 to 22, 27](#)

[C.J.S., Trial §§ 91 to 92](#)

“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 [Evidence Code \[sections 730 and 731\]](#).” ([Evidence Code § 460](#).) This section covers the appointment and compensation of experts needed by the court to take judicial notice of a matter. This should be distinguished from experts a party provides when meeting its burden under [Evidence Code § 453](#).
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§ 7:24. Judicial notice by reviewing court

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 1 to 52

West's Key Number Digest, [Criminal Law](#) 🔑 304

Legal Encyclopedias

[C.J.S., Citizens](#) §§ 24 to 25

[C.J.S., Criminal Law](#) §§ 916 to 937

[C.J.S., Evidence](#) §§ 8 to 119

[C.J.S., Trading Stamps and Coupons](#) § 2

[Evidence Code](#) § 459(a), provides that the reviewing court shall take notice of all matters properly noticed by the trial court and all matters that should have been judicially noticed by the trial court under [Evidence Code](#) §§ 451 and 453. The reviewing court may take notice of matters specified in [Evidence Code](#) § 452. Even if the trial court has refused to take judicial notice of a matter, the appellate court can do so. (*Sebago, Inc. v. City of Alameda*, 211 Cal. App. 3d 1372, 1380, 259 Cal. Rptr. 918 (1st Dist. 1989).)

Comment

A party should operate on the assumption that if it fails to ask the trial court to take judicial notice of a matter, it may be unable to persuade an appellate court to do so. On occasion, a reviewing court will take judicial notice even though none was sought below. (See *Cal-American Income Property Fund II v. County of Los Angeles*, 208 Cal. App. 3d 109, 112, 256 Cal. Rptr. 21 (2d Dist. 1989); *County of Kern v. Ginn*, 146 Cal. App. 3d 1107, 1111, 194 Cal. Rptr. 512 (5th Dist. 1983).) Often, however, the reviewing court will refuse to do so. (See *People v. Dyer*, 45 Cal. 3d 26, 59, 246 Cal. Rptr. 209, 753 P.2d 1 (1988); *Cuenca v. Safeway San Francisco Employees Fed. Credit Union*, 180 Cal. App. 3d 985, 997, 225 Cal. Rptr. 852 (1st Dist. 1986).)

[Evidence Code § 459\(b\)](#), provides that the reviewing court has the same power as the trial court to consult any source of pertinent information to determine the propriety of taking judicial notice or to determine if the trial court's taking of judicial notice should be sustained. [Sections 459\(c\) and \(d\)](#), ensure that the parties have the same procedural protections at the appellate level as in the trial court.

In its review of a judgment on the pleadings in [First English Evangelical Lutheran Church v. County of Los Angeles](#), 210 Cal. App. 3d 1353, 1368, 258 Cal. Rptr. 893 (2d Dist. 1989), the Court of Appeal took judicial notice of a disputed interim county ordinance. In its landmark decision invalidating the liquor resale price maintenance statute, the California Supreme Court took notice of the prices charged for various liquor brands, even though they were not presented to the Department of Alcoholic Beverage Control at the initial hearing, because the information was derived from the price postings filed with the department pursuant to law. ([Rice v. Alcoholic Bev. etc. Appeals Bd.](#), 21 Cal. 3d 431, 455, 146 Cal. Rptr. 585, 579 P.2d 476 (1978).) An appellate court may take judicial notice of a city's rent control act and its rent control board regulations. ([Hazon-Iny Development, Inc. v. Unkefer](#), 116 Cal. App. 3d Supp. 1, 3, 172 Cal. Rptr. 191 (App. Dep't Super. Ct. 1980).) In [Adoption of Michelle T.](#), 44 Cal. App. 3d 699, 706, 117 Cal. Rptr. 856 (1st Dist. 1975), the court reversed a trial court decision denying a petition to adopt. The denial had been based on the sole ground of the age of petitioners. In deciding to reverse, the appellate court took “judicial notice of a recent authoritative work on child placement [which] emphasizes the importance to a child of continuity of parental relationships.” In [Saltares v. Kristovich](#), the court held that in ruling on a demurrer, a trial court can judicially notice “documents in the file of the case wherein the demurrer is interposed [citation], its own records [citation] as well as the files of another case pending in the court [citations]. These matters are likewise to be judicially noticed by a reviewing court.” ([Saltares v. Kristovich](#), 6 Cal. App. 3d 504, 511, 85 Cal. Rptr. 866 (2d Dist. 1970).) In [Swaffield v. Universal Ecsco Corp.](#), the Court of Appeal ruled that the defendants in a libel action were entitled to assert plaintiff's conviction in a federal criminal action as proof that plaintiff committed the acts charged in the indictment. Though the civil case was filed before the criminal case, the appellate court may take judicial notice that the federal conviction was upheld on appeal “when the judgment is appropriately drawn to the court's attention and the opposing party has adequate notice and opportunity to be heard on the question of the effect of such judgment.” ([Swaffield v. Universal Ecsco Corp.](#), 271 Cal. App. 2d 147, 159, 76 Cal. Rptr. 680 (2d Dist. 1969).)

In [Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.](#), 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (3d Dist. 2005), the court set out a helpful list of documents properly noticed as legislative history ([Kaufman](#), 133 Cal. App. 4th at 31–37) and those documents that are not properly noticed as legislative history ([Kaufman](#), 133 Cal. App. 4th at 37–39).

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Chapter
8. Using Writings In Trial

§ 8:1. Introducing writings in general

West's Key Number Digest

Wests Key Number Digest, [Trial](#)  39

Wests Key Number Digest, [Evidence](#)  366 to 383

Wests Key Number Digest, [Criminal Law](#)  663, 444

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382, 1384 to 1396, 1408, 1419 to 1421, 1636, 1638 to 1639, 1641 to 1642](#)

[C.J.S., Evidence §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052](#)

[C.J.S., Patents § 179](#)

[C.J.S., Trial §§ 148 to 153](#)

When a party wishes to introduce a writing into evidence, three different issues must typically be faced. First, the proponent must authenticate the writing. authentication is discussed beginning in [§ 8:5](#). Second, if the secondary evidence rule applies, it must be complied with. This rule is discussed in §§ [8:17](#) to [8:24](#). Finally, the party may face a hearsay objection. the definition of hearsay is discussed in [§ 2:1](#); the balance of chapter 2 discusses the many hearsay exceptions. The technique of introducing an exhibit, including a writing, is set forth in §§ [8:2](#) to [8:4](#). While this technique should prove acceptable in virtually all courtrooms, counsel should be aware that many judges have their own procedures on marking and introducing exhibits that should be complied with.

After a discussion of technique, the rules on authentication and secondary evidence will be set out in this chapter. Finally, the application of these rules to writings that constitute official records will be considered. To assist in the discussion, the following hypothetical set of facts is provided:

In a case involving a wrongful death resulting from an automobile accident, plaintiff calls John who testifies

that he saw a red car turn a corner at a high rate of speed, briefly fishtail, and then hit a woman exiting a parked vehicle. The red car stopped briefly and then accelerated leaving the scene. John observed the red car's license plate, wrote it on a scrap of paper, but no longer can recall the number, even after reviewing the paper. Plaintiff seeks to introduce that paper. Later in the trial, plaintiff will seek to introduce a report prepared and signed by the traffic officer who investigated the accident. This report contains the officer's measurements of skid marks left by the defendant's car and her calculation of the speed of the car from that information.

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Chapter
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§ 8:2. Technique for introducing a writing—Marking

West's Key Number Digest

West's Key Number Digest, [Trial](#)  39

West's Key Number Digest, [Criminal Law](#)  663

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1636, 1638 to 1639, 1641 to 1642](#)

[C.J.S., Trial §§ 148 to 153](#)

Plaintiff should mark both documents for identification. Some courts separately list plaintiff's exhibits (plaintiff's 1, 2, 3, etc.) and defendant's exhibits (defendant's A, B, C, etc.). Others simply list them consecutively without regard to the party introducing them (exhibit 1, 2, 3, etc.). Others assign plaintiff certain numbers (1 through 100) while defendant is assigned different numbers (101 through 200). Particularly in trials with a large number of exhibits, some courts require that the parties premark the exhibits and review the other party's exhibits before the hearing. This procedure can save substantial time. In this hypothetical, one can assume that this premarking has not been done.

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§ 8:3. Technique for introducing a writing—Description of the document

West's Key Number Digest

West's Key Number Digest, [Trial](#)  39

West's Key Number Digest, [Criminal Law](#)  663

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1636, 1638 to 1639, 1641 to 1642](#)

[C.J.S., Trial §§ 148 to 153](#)

After John has testified that he cannot recall the car's license number, plaintiff's counsel should state, "Your honor, I'd like to have this piece of paper [John's handwritten note] marked as plaintiff's exhibit 1 for identification. The record should reflect that I am showing it to defense counsel." It would be inappropriate for plaintiff to refer to the piece of paper in any more specific manner. For example, counsel may not refer to it as "a note prepared by John." This constitutes testimony and counsel is not a witness. This rule is frequently violated. Often the violation occurs when cross-examining a witness about a prior inconsistent statement made to the police, if the witness denies the prior statement or claims not to recall it. Counsel will present a copy of the report to the witness and state, "I'd like to have this police report marked as an exhibit. Witness, looking at this report does it refresh your recollection that you did, in fact, make this statement to the officer?" This error, while sometimes inadvertent, is often designed to ensure that the jury knows that the officer wrote such a statement in the report. Counsel should be required to refer to the police report in some more general way, for example as a "document."

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§ 8:4. Technique for introducing a writing—Exhibit sticker

West's Key Number Digest

West's Key Number Digest, [Trial](#) 39

West's Key Number Digest, [Criminal Law](#) 663

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1636, 1638 to 1639, 1641 to 1642](#)

[C.J.S., Trial §§ 148 to 153](#)

Before showing the paper to the witness, plaintiff should show it to opposing counsel and give it to the courtroom clerk who will affix an exhibit sticker. Then plaintiff asks, “Judge, may I approach the witness?” After receiving approval, the attorney hands John the paper and asks, “Does reviewing this exhibit refresh your recollection?” John replies in the negative.

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SIMCAEVID § 8:4

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§ 8:5. Authentication of documents—General requirements

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 366 to 383

West's Key Number Digest, [Criminal Law](#) 🔑 444

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382, 1384 to 1396, 1408, 1419 to 1421](#)

[C.J.S., Evidence §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052](#)

[C.J.S., Patents § 179](#)

A writing must be authenticated before the writing or secondary evidence of its content may be received in evidence. ([Evidence Code § 1401](#).) To authenticate a writing, the proponent must establish by evidence or other means provided by law facts sufficient to sustain a finding that it is the writing the proponent claims it to be. ([Evidence Code § 1400](#).) “ [T]he objection that a document has not been authenticated does not go to the truth of the contents of the document, but rather to the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent claims it to be.” (*City of Vista v. Sutro & Co.*, 52 Cal. App. 4th 401, 412, 60 Cal. Rptr. 2d 488 (4th Dist. 1997).) *Landale-Cameron Court, Inc. v. Ahonen*, 155 Cal.App.4th 1401, 1409 (2007), concluded the trial court had erred by excluding a written agreement to toll the statute of limitations. Counsel for the proponent “sufficiently authenticated the documents ... when he declared they were true and correct copies of documents sent by and received from prior counsel for the proponent in this litigation.” [Evidence Code §§ 1410 to 1454](#) set forth different methods of authenticating a writing. [Evidence Code § 1410](#) notes, however, that these code sections do not limit the means by which a writing may be authenticated or proved. For example, circumstantial evidence can be used for authentication. Thus in *People v. Olguin*, the court found that certain documents could be identified as having been prepared by one of the defendants based on the contents of the documents and their physical location. (*People v. Olguin*, 31 Cal. App. 4th 1355, 1372–1373, 37 Cal. Rptr. 2d 596 (4th Dist. 1994). See *People v. Gibson*, 90 Cal. App. 4th 371, 383, 108 Cal. Rptr. 2d 809 (2d Dist. 2001).)

To introduce a writing, the proponent must establish that the writing is authentic, which usually means that the writing was actually made or signed by its purported maker. ([Evidence Code § 1400](#), Comment.) Thus, in this hypothetical, the scrap of paper (exhibit 1) is authenticated if John testifies that it is the paper on which he wrote the number. If the hypothetical is varied so that plaintiff's exhibit 1 is a copy of the paper, it will be authenticated if John can say that it is a copy of the paper. (Secondary evidence problems with this are discussed in §§ [8:19](#) and [8:20](#).)

In some contexts, “authenticated” has a different meaning. For example, if a witness claims that a particular writing, a letter, is one received and acted on, the proponent would have to show that the letter offered was in fact the one received and acted on. ([Evidence Code § 1401](#), Comment.)

Finally, to authenticate the writing, the party may rely not only on evidence but also on other means provided by law, for example, presumptions, pleadings, or stipulation. ([Evidence Code § 1400](#), Comment.)

Tape recordings and their transcripts present related problems. Both the tape and the transcript are considered writings and must be properly authenticated. As to the tape, someone must testify to whom the voices on the tape belong and when, where, how, and by whom the tape was made. In addition, it must be established that the tape is a complete and accurate record of the conversation. A tape recording may, however, be admitted though substantial portions are unintelligible ([People v. Siripongs](#), 45 Cal. 3d 548, 574, 247 Cal. Rptr. 729, 754 P.2d 1306 (1988)), unless the audible portions of the tape are so incomplete that the tape lacks relevance. ([People v. Polk](#), 47 Cal. App. 4th 944, 952, 54 Cal. Rptr. 2d 921 (2d Dist. 1996).) Finally, a witness must testify that the transcript is an accurate record of the tape. ([O'Laskey v. Sortino](#), 224 Cal. App. 3d 241, 249–250, 273 Cal. Rptr. 674 (2d Dist. 1990).) Note that authentication is required only if the tape and/or transcript is admitted into evidence. When the officer who interviewed a defendant testifies after refreshing his recollection of the interview with the tape and transcript, there is no need to authenticate either. ([People v. Seaton](#), 26 Cal. 4th 598, 659, 110 Cal. Rptr. 2d 441, 28 P.3d 175 (2001).)

To introduce a videotape of the plaintiff performing work on a day he had claimed as a sick day, the defendant must present a witness “who saw the events depicted and [can] testify as to the dates and times of the events and the identification of those persons participating in them.” ([Ashford v. Culver City Unified School Dist.](#), 130 Cal. App. 4th 344, 349, 29 Cal. Rptr. 3d 728 (2d Dist. 2005).)

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§ 8:6. Authentication of documents—Alterations

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 366 to 383

West's Key Number Digest, [Criminal Law](#) 🔑 444

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382, 1384 to 1396, 1408, 1419 to 1421](#)

[C.J.S., Evidence §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052](#)

[C.J.S., Patents § 179](#)

Assume the scrap of paper (exhibit 1) reads as follows:

~~2PGN985~~
2BCM735
John Witness

Obviously, it has been altered. If a writing has been altered, after its execution, in a part material to the issue in dispute, or appears to have been so altered, the proponent must account for the alteration or apparent alteration in order to introduce the writing into evidence. The proponent may show that the alteration was made by another without the proponent's concurrence, that it was made with the consent of the parties affected by it, that it was otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. ([Evidence Code § 1402.](#))

When a party contends that a document has been altered, the proponent has the burden of showing that there

is no alteration or that the alteration is immaterial. The court must admit the document if sufficient evidence is presented to support a finding of authenticity by the trier of fact. ([People v. Morris](#), 53 Cal. 3d 152, 205, 279 Cal. Rptr. 720, 807 P.2d 949 (1991).) If John testified that he wrote the first number, then looked again and corrected it, the alteration problem would be solved.

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§ 8:7. Means of authenticating and proving writings—Testimony of subscribing witness

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 366 to 383

West's Key Number Digest, [Criminal Law](#) 🔑 444

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1382, 1384 to 1396, 1408, 1419 to 1421

[C.J.S., Evidence](#) §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052

[C.J.S., Patents](#) § 179

In the hypothetical discussed in [§ 8:6](#), John, the subscribing witness, has authenticated the document. While a perfectly appropriate method of authentication, the testimony of a subscribing witness is not mandatory, unless so provided by statute. ([Evidence Code § 1411](#).) If the testimony of a subscribing witness is required by statute and such witness denies or does not recollect the writing, the writing may be authenticated by other evidence. ([Evidence Code § 1412](#).)

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§ 8:8. Means of authenticating and proving writings—Testimony of any witness

West's Key Number Digest

Wests Key Number Digest, [Evidence](#) 🔑 366 to 383

Wests Key Number Digest, [Criminal Law](#) 🔑 444

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382, 1384 to 1396, 1408, 1419 to 1421](#)

[C.J.S., Evidence §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052](#)

[C.J.S., Patents § 179](#)

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness. ([Evidence Code § 1413.](#))

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§ 8:9. Means of authenticating and proving writings—Actions by adverse party

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 366 to 383

West's Key Number Digest, [Criminal Law](#) 🔑 444

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1382, 1384 to 1396, 1408, 1419 to 1421

[C.J.S., Evidence](#) §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052

[C.J.S., Patents](#) § 179

A writing may be authenticated by evidence that the adverse party has admitted its authenticity or has acted on it as authentic. ([Evidence Code § 1414.](#))

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SIMCAEVID § 8:9

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§ 8:10. Means of authenticating and proving writings—Evidence of genuineness of handwriting

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 366 to 383, 511, 561

West's Key Number Digest, [Criminal Law](#) 🔑 444, 491

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1155, 1382, 1384 to 1396, 1408, 1419 to 1421, 1453

[C.J.S., Evidence](#) §§ 679, 684, 800 to 803, 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052

[C.J.S., Patents](#) § 179

Assume that in the hypothetical the police report states that the driver of the red car provided the officer with a handwritten statement admitting responsibility for the accident. The driver has left the jurisdiction and the defendant is the owner of the automobile, who allegedly consented to the driving. The plaintiff seeks to authenticate the statement by an examination of the writing on it.

A writing may be authenticated by evidence of the genuineness of the handwriting of the maker. ([Evidence Code § 1415](#).) Three methods of doing this exist:

- An expert witness may provide evidence of the genuineness, or the lack thereof, of a writing after a comparison of such writing with a writing exemplar. An exemplar is a writing that the adverse party has admitted or treated as genuine or has otherwise been proved genuine to the court's satisfaction. ([Evidence Code § 1418](#).)
- The trier of fact may compare a questioned handwriting with a handwriting exemplar, as defined above, and determine whether the handwriting is genuine. ([Evidence Code § 1417](#).) Thus a jury may determine in a

criminal as well as a civil case that a party signed a document by comparing the handwriting on the questioned document to an authenticated exemplar of the party's handwriting. (*People v. Rodriguez*, 133 Cal. App. 4th 545, 553–554, 34 Cal. Rptr. 3d 886 (2d Dist. 2005).)

- A nonexpert witness may state an opinion as to whether a questioned writing is in the handwriting of a supposed writer if the witness has personal knowledge of that writer's handwriting by any means including but not limited to:
- Having seen the supposed writer write,
- Having seen a writing purporting to be in the writer's handwriting and on which the writer has acted or been charged, or
- Having received letters in the due course of mail purporting to be from the writer in response to letters duly addressed and mailed by the witness to the writer. (*Evidence Code* § 1416.)

Even though the adverse party has never admitted that the exemplar is genuine or treated it as such, and though no one testifies that the adverse party wrote it, if the circumstances persuade the court that the exemplar is genuine, a handwriting comparison based on it is admissible. (*People v. Ramos*, 30 Cal. 3d 553, 580, 180 Cal. Rptr. 266, 639 P.2d 908 (1982), rev'd on other grounds, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983).) In *Ramos*, an employment application served as the exemplar that was compared to a food order written out by a robber at a restaurant. The person who received the application testified that it was filed on behalf of one of the defendants who was there at the time but the witness could not recall seeing the defendant actually fill it out. The court ruled that in the absence of any contrary indication, the application was properly admitted as an exemplar. (*People v. Ramos*, 30 Cal. 3d 553, 580, 180 Cal. Rptr. 266, 639 P.2d 908 (1982), judgment rev'd, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983).)

Warning

The trier of fact and the nonexpert witness may only compare handwriting, while the expert witness may compare any form of writing, including typewriting. (*Evidence Code* § 1418, Comment.)

If the authentication is to be made by a comparison by an expert or by the trier of fact (*Evidence Code* §§ 1417, 1418) and the questioned writing is more than 30 years old, the questioned writing may be compared to one purporting to be genuine and generally respected and acted on as such by persons having an interest in knowing whether it is genuine. (*Evidence Code* § 1419.)

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§ 8:11. Means of authenticating and proving writings—Matters within exclusive knowledge of author

West's Key Number Digest

Wests Key Number Digest, [Evidence](#) 🔑 366 to 383

Wests Key Number Digest, [Criminal Law](#) 🔑 444

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1382, 1384 to 1396, 1408, 1419 to 1421](#)

[C.J.S., Evidence §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052](#)

[C.J.S., Patents § 179](#)

A writing may be authenticated by evidence that it refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing. ([Evidence Code § 1421](#).) This may provide an alternate means to authenticate the driver's statement in this hypothetical. Of course, a hearsay objection may lead to the exclusion of all or part of the statement even if it is properly authenticated.

Although it has often been said that a writing is not presumed to be what it purports to be ([O'Laskey v. Sortino](#), 224 Cal. App. 3d 241, 249, 273 Cal. Rptr. 674 (2d Dist. 1990)), its contents can be relied on for "self-authentication" if they reflect details likely to be known only to the claimed author. ([People v. Estrada](#), 93 Cal. App. 3d 76, 100, 155 Cal. Rptr. 731 (1st Dist. 1979).) In *Estrada*, the voice on a tape recording contained a request that could not reasonably have been made by anyone other than the defendant; in effect, "the conversation proves itself." (See [McAllister v. George](#), 73 Cal. App. 3d 258, 263, 140 Cal. Rptr. 702 (2d Dist. 1977).)

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§ 8:12. Means of authenticating and proving writings—Evidence that it was received in response to a communication

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  366 to 383

West's Key Number Digest, [Criminal Law](#)  444

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1382, 1384 to 1396, 1408, 1419 to 1421

[C.J.S., Evidence](#) §§ 816 to 822, 824 to 829, 838, 870 to 878, 881 to 882, 887, 904, 908, 916 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 988, 992, 997 to 1007, 1010 to 1021, 1026 to 1052

[C.J.S., Patents](#) § 179

A writing may be authenticated by evidence that it was received in response to a communication sent to the person who is claimed by the proponent to be the author of the writing. ([Evidence Code § 1420](#).) However, where counsel has written to a public agency asking for certain records and receives a cover letter signed by a government official with the records, [Evidence Code § 1420](#) serves to authenticate only the cover letter. ([People v. Babbitt](#), 45 Cal. 3d 660, 685, 248 Cal. Rptr. 69, 755 P.2d 253 (1988).)

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§ 8:13. Means of authenticating and proving writings—Graffiti

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  369

West's Key Number Digest, [Criminal Law](#)  444

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1382, 1384 to 1396, 1408, 1419 to 1421

[C.J.S., Evidence](#) §§ 819 to 822, 824 to 829, 917 to 918, 932, 935 to 939, 948, 957 to 963, 976, 982 to 983, 986, 992, 997 to 999, 1002 to 1007, 1010 to 1021

[Evidence Code](#) § 1410.5 provides that: (a) for purposes of authentication, a writing includes any graffiti consisting of written words, insignia, symbols, or any other markings which convey a particular meaning; (b) any such graffiti, 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 on outside the presence of the jury and is subject to the requirements of [Evidence Code](#) §§ 1416, 1417, and 1418.

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§ 8:14. Presumptions affecting authenticity—Burden of producing evidence

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  382

West's Key Number Digest, [Criminal Law](#)  444

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1382, 1384 to 1396, 1408, 1419 to 1421

[C.J.S., Evidence](#) §§ 818, 838, 904, 908, 916, 988, 1001

The presumptions set forth in [Evidence Code](#) §§ 1451 to 1454 affect the burden of producing evidence. ([Evidence Code](#) § 1450.)

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§ 8:15. Presumption for official signatures and seals

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑83

West's Key Number Digest, [Criminal Law](#) 🔑322

Legal Encyclopedias

[C.J.S., Criminal Law § 957](#)

[C.J.S., Evidence §§ 151, 159](#)

[Evidence Code § 1453](#)(b) sets out a presumption in favor of official signatures: “A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of ... a public employee of any public entity in the United States.” (See [Snelgrove v. Department of Motor Vehicles](#), 194 Cal. App. 3d 1364, 1375, 240 Cal. Rptr. 281 (1st Dist. 1987).) If the plaintiff seeks to authenticate the speed-from-skid report, it can rely on this presumption. In *Poland v. Department of Motor Vehicles*, petitioner challenged reliance on the official records hearsay exception to admit a police officer's statement on the ground that the only basis for concluding that the document was prepared by a police officer was the “document itself.” The court rejected that argument finding that “[Evidence Code § 1453](#) reflects an implicit policy decision that if a document ‘purports’ to be signed by a public employee acting in an official capacity, the likelihood of its authenticity is sufficiently high that in the absence of evidence to the contrary it should be found authentic.” ([Poland v. Department of Motor Vehicles](#), 34 Cal. App. 4th 1128, 1136, 40 Cal. Rptr. 2d 693 (1st Dist. 1995).) Thus the moving party was not required to prove the authenticity of the document by extrinsic evidence.

Section 1452 sets out a presumption in favor of official seals of certain domestic or foreign agencies which are presumed genuine and authorized until evidence is introduced sufficient to sustain a finding that they are not. When such evidence is introduced, the trier of fact determines authenticity without regard to the presumption created by the section. ([Evidence Code § 1452](#), Comment.) In *Jacobson v. Gourley*, the court reviewed a writ of mandate granted by the trial court ordering the DMV to revoke the suspension of a driver's license. At the administrative hearing a document from the police agency, specifying the driver's blood alcohol, was introduced

over an authenticity objection. The Court of Appeal concluded that the police agency emblem on the document did not constitute a “seal” and, therefore, the document should have been excluded. “The Evidence Code does not define ‘seal’ but the Code of Civil Procedure does: ‘A seal is a particular sign, made to attest, in the most formal manner, the execution of an instrument,’ ... The execution of an instrument is its subscription and delivery... . [Para.] If a seal attests to the execution of a document, and if execution means subscription, then it follows that there can be no seal of a document that has not been subscribed. The [police] report is not signed by anyone. Therefore the emblem stamped upon it does not meet the statutory definition of a seal.” ([Jacobson v. Gourley](#), 83 Cal. App. 4th 1331, 1334–1335, 100 Cal. Rptr. 2d 349 (4th Dist. 2000).)

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§ 8:16. Presumption for official signatures and seals—Acknowledged writings

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  83

West's Key Number Digest, [Criminal Law](#)  322

Legal Encyclopedias

[C.J.S., Criminal Law § 957](#)

[C.J.S., Evidence §§ 151, 159](#)

[Evidence Code § 1454](#) does the same for foreign official signatures if the writing to which the signature is affixed is accompanied by a statement certifying the genuineness of the signature and the official position of the signator in the manner set forth in that section. 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 complies with [Civil Code §§ 1180 et seq. \(Evidence Code § 1451.\)](#) These Civil Code sections generally provide that an instrument can be acknowledged by particular officials, listed in [Civil Code §§ 1180 to 1184](#), if the official “personally knows,” or has “satisfactory evidence,” as these terms are defined in section 1185, that the person making the acknowledgment is the person who is described in and who executed the instrument.

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§ 8:17. The secondary evidence rule—In general

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  157 to 187

West's Key Number Digest, [Criminal Law](#)  398 to 403

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

[C.J.S., Evidence §§ 1054 to 1131](#)

Since the enactment of the Evidence Code in 1965, a best evidence rule has existed setting forth the methods of proving the contents of a writing. In 1998, effective January 1, 1999, the Legislature replaced the best evidence rule with the secondary evidence rule. (See [Evidence Code § 1521\(d\)](#).) While this step was undertaken to clarify and simplify the law in this area, the general purpose remains the same: to determine when evidence other than the original of a writing may be introduced to prove the contents of that writing. When appropriate, cases decided prior to enactment of the secondary evidence rule will be relied on.

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§ 8:18. The secondary evidence rule—Applying the secondary evidence rule

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  157 to 187

West's Key Number Digest, [Criminal Law](#)  398 to 403

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

[C.J.S., Evidence §§ 1054 to 1131](#)

The content of a writing may be proved by an otherwise admissible original. ([Evidence Code § 1520](#).) The secondary evidence rule determines when evidence other than the original can be introduced to prove the content of a writing. Note that this rule applies only if a writing is involved and its content is in issue. The rule “is designed to minimize the possibility of misinterpreting writings. Since slight differences in written words or other symbols may make vast differences in meaning, the possibility for fraud or mistake in proof of the contents of a writing exists unless the writing itself is produced.” ([People v. Bizieff](#), 226 Cal. App. 3d 1689, 1696, 277 Cal. Rptr. 678 (5th Dist. 1991).)

In analyzing the secondary evidence rule, consider the following hypothetical:

Buyer agrees to purchase certain devices from seller, which buyer will then use as parts in the machines it manufactures. Buyer provides a set of specifications for the devices. On the first set of machines produced with the devices, the quality assurance supervisor observes a major problem, which she attributes to the devices provided by seller. She notes this in her quality report. Buyer refuses to pay for the devices and seller sues. A subsequent fire destroys some of seller's records, including the specifications.

Are the specifications and quality report “writings”?

Clearly both the specifications and the quality report are writings. [Evidence Code § 250](#) broadly defines

“writing” to be “handwriting, typewriting, printing photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or any combination thereof.” Included within this are “inscribed chattels,” an object that is both a writing and a chattel, for example, a credit card. ([People v. Bizieff](#), 226 Cal. App. 3d 1689, 1696, 277 Cal. Rptr. 678 (5th Dist. 1991).)

Is the proponent seeking to prove the content of either writing?

If either party seeks to introduce evidence about the specifications, it is attempting to prove the contents of that writing and can do so only if it introduces an otherwise admissible original ([Evidence Code § 1520](#)) or complies with the secondary evidence rule. Simply because an observation is written down, however, does not prohibit the witness from testifying about the observation. Thus, the quality supervisor may testify about the problems she observed without complying with the secondary evidence rule. (Cf. [Chatman v. Alameda County Flood Control etc. Dist.](#), 183 Cal. App. 3d 424, 429, 228 Cal. Rptr. 257 (1st Dist. 1986).) If seller seeks to impeach this testimony with what was written in the report, the rule will apply, since the content of the report is being proved.

In criminal cases, a parallel problem arises when an officer wishes to testify about a defendant's confession that was videotaped. If the officer observed the confession, the rule need not be complied with. (See [People v. Samuels](#), 36 Cal. 4th 96, 129–130, 30 Cal. Rptr. 3d 105, 113 P.3d 1125 (2005).) If the testimony is based solely on viewing the videotape, however, then it is the tape's contents that are being reported and either the original must be produced or the rule complied with.

If a witness is testifying about whether an agreement was made, not about the terms of the agreement, the requirements of the secondary evidence rule need not be complied with. ([Ponce v. Marr](#), 47 Cal. 2d 159, 162, 301 P.2d 837 (1956).)

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Chapter
8. Using Writings In Trial

§ 8:19. The secondary evidence rule—Admission of a copy to prove contents of writing

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  157 to 187

West's Key Number Digest, [Criminal Law](#)  398 to 403

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

[C.J.S., Evidence §§ 1054 to 1131](#)

[Evidence Code § 1521](#) governs the admissibility of a copy of a writing. Pursuant to subdivision (a) the content of a writing may be proved by otherwise admissible secondary evidence. Secondary evidence consists of either a copy of the writing or oral testimony concerning it. The phrase “otherwise admissible” clearly indicates that compliance with this rule does not eliminate either hearsay or authenticity problems. (See [Evidence Code § 1521\(c\)](#) (compliance with authentication requirements not excused).) As the Comment to this section notes, “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.”

A copy of a writing is admissible as secondary evidence of its content unless the court determines that a genuine dispute exists concerning material terms of the writing and justice requires the exclusion. ([Evidence Code § 1521\(a\)\(1\)](#).) Secondary evidence is also to be excluded if the court determines that its admission would be “unfair.” ([Evidence Code § 1521\(a\)\(2\)](#).) Thus copies are generally admissible. As the Comment to section 1520 notes, “Secondary evidence [is] 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.” The exceptions to admissibility set forth in subdivisions (a)(1) and (a)(2) are similar to those contained in former section 1511. The Comment states that cases interpreting that section (and [rule 1003 of the Federal Rules of Evidence](#)) “provide guidance” in applying subdivisions (a)(1) and (a)(2). Certain of these cases are noted in the Comment, which then goes on to set forth several factors courts can consider in admitting copies:

- Whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated;
- Whether the original was suppressed in discovery;
- Whether discovery conducted in a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original;
- Whether there are dramatic differences between the original and the secondary evidence (for example, the original but not the secondary evidence is in color and the colors provide significant clues to interpretation);
- Whether the original is unavailable and, if so, why; and
- Whether the writing is central to the case or collateral.

A classic circumstance for exclusion under subdivision (a)(2) is if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation applies.

Under prior law the burden was on the opponent of the evidence to raise issues concerning authenticity or unfairness. (*In re Crooks*, 51 Cal. 3d 1090, 1100, 275 Cal. Rptr. 420, 800 P.2d 898 (1990); *People v. Atkins*, 210 Cal. App. 3d 47, 55, 258 Cal. Rptr. 113 (2d Dist. 1989).)

A challenge to authenticity need not be based on the appearance of the document alone. Questions based on extrinsic facts may be sufficient to preclude admission. For example, in *Osswald v. Anderson*, respondent had successfully established a trust in his favor after the trial court admitted a duplicate of a quitclaim deed. On appeal the court ruled the duplicate should not have been admitted because genuine questions regarding the authenticity of the original and the duplicate had been raised. The court noted the ease with which a phony duplicate could have been created “with a good photocopy machine.” This speculation was enhanced with the fact that the deed had not been in a lawyer’s file “where it logically should have been” and neither respondent nor his lawyer could explain this. Moreover, counsel did not know where respondent obtained the copy and the copy was not produced until a few days before trial. (*Osswald v. Anderson*, 49 Cal. App. 4th 812, 819–820, 57 Cal. Rptr. 2d 23 (4th Dist. 1996).)

[Evidence Code § 1521](#)(b), notes that the use of oral testimony to prove the contents of a writing is governed by [Evidence Code § 1523](#), discussed in [§ 8:21](#).

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§ 8:20. The secondary evidence rule—Admission of a copy to prove contents of writing in criminal case

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#)  398 to 403

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[C.J.S., Criminal Law §§ 1127 to 1139](#)

In criminal cases, in addition to the grounds for exclusion set forth in [Evidence Code § 1521](#) (see discussion in [§ 8:19](#)), the court must 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. ([Evidence Code § 1522\(a\)](#).) This additional limitation was imposed in criminal cases because of the “narrower discovery rules” applicable. ([Evidence Code § 1522](#), Comment.) The Comment goes on to suggest that, in determining if the proponent 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.

The subdivision limiting the use of copies in criminal cases does not apply to any of the following:

- A duplicate as defined in § 260.
- A writing that is not closely related to the controlling issues in the action.
- A copy of a writing in the custody of a public entity.
- A copy of a writing that is recorded in the public records, if the record of a certified copy is made evidence of the writing by statute.

A comparison of §§ 1521 and 1522 suggests that in civil cases the court should not exclude a copy of a writing even if 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 *unless* a genuine issue exists concerning material terms of the writing or admission of the copy would be unfair.

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§ 8:21. The secondary evidence rule—Admission of oral testimony

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West's Key Number Digest, [Evidence](#)  157 to 187

West's Key Number Digest, [Criminal Law](#)  398 to 403

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

[C.J.S., Evidence §§ 1054 to 1131](#)

Oral testimony is inadmissible to prove the content of a writing unless specifically permitted by statute. ([Evidence Code § 1523\(a\)](#).) Oral testimony is not made inadmissible by this provision under certain circumstances. The Comment to [§ 1523](#) states, “[Section 1523](#) preserves former law governing the admissibility of oral testimony to prove the content of a writing.” Oral testimony may be admissible to prove the content of a writing under the following circumstances.

Lost or destroyed writings.

[Evidence Code § 1523\(a\)](#), does not bar the admissibility of oral testimony 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. ([Evidence Code § 1523\(b\)](#).) This subdivision continues former §§ 1501 and 1505 without substantive change. Thus the intentional destruction of the original will not bar introduction of oral testimony, so long as the destruction was not accompanied by fraudulent intent. ([People v. Peterson](#), 251 Cal. App. 2d 676, 679–680, 59 Cal. Rptr. 694 (2d Dist. 1967).) In addition, the court need not concern itself with the reason for the destruction of the document unless the proponent was involved. Thus, in *People v. Morris*, secondary evidence of a writing was admitted when the original of a letter was destroyed by a nonparty and the proponent did not contribute to the nonparty's decision to do so. ([People v. Morris](#), 53 Cal. 3d 152, 204, 279 Cal. Rptr. 720, 807 P.2d 949 (1991); see also [People v. Wright](#), 52 Cal. 3d 367, 392, 276 Cal. Rptr. 731, 802 P.2d 221 (1990).) Finally, in *People v. Bizieff*, the court interpreted former sections 1505 and 1501 to provide that if

the proponent has no copy or original, it may introduce oral testimony without proof of reasonable diligence to obtain a copy. (*People v. Bizieff*, 226 Cal. App. 3d 1689, 1696–1697, 277 Cal. Rptr. 678 (5th Dist. 1991).) However, former section 1505 did not permit one who never saw the writing to testify to its contents. (*Stenseth v. Wells Fargo Bank*, 41 Cal. App. 4th 457, 463, 48 Cal. Rptr. 2d 192 (6th Dist. 1995).) Presumably, that rule is also unchanged.

In *Dart Industries, Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (2002), the Supreme Court spelled out what an insured must prove to establish its rights under a lost insurance policy. First, secondary evidence is admissible and the contents of the original need not be proved verbatim. (*Dart Industries*, 28 Cal. 4th at 1069.) Second, oral testimony is often admitted to prove the contents of the lost document and a standard form of the document or evidence of a party's routine practice is also admissible. (*Dart Industries*, 28 Cal. 4th at 1070.) As in the situation where a policy exists, the claimant has the burden of proving he or she was insured under the lost policy during the pertinent period and the substance of each provision essential to relief. (*Dart Industries*, 28 Cal. 4th at 1071.) The insurer has the burden of proving the substance of any provision “ ‘essential to the defense.’ ” (*Dart Industries*, 28 Cal. 4th at 1072.)

Voluminous writings.

Section 1523(a), does not bar the admissibility of oral testimony concerning the contents of the writing 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. (*Evidence Code* § 1523(d).) This provision tracks former *Evidence Code* § 1509, though the former section related to all secondary evidence, not simply oral testimony. This exception has typically been applied to a summary of business records consisting of numerous accounts, where each of the accounts would be admissible as a business record. (*Vanguard Recording Society, Inc. v. Fantasy Records, Inc.*, 24 Cal. App. 3d 410, 418, 100 Cal. Rptr. 826 (1st Dist. 1972).) In *Vanguard*, a summary of plaintiff's sales of an artist's record during a seven-year period was prepared. The summary was based on approximately 50,000 sales invoices and abstracted by means of data processing machines. The summary was properly admitted.

A summary may delete irrelevant information that is included in the documents summarized. Thus, in *Wolfen v. Clinical Data, Inc.*, a suit for damages by a landlord against a commercial tenant, a summary of damages prepared by the owner from underlying invoices of repairs and innovations was properly admitted, even though it did not include cost items not chargeable to the defendant. (*Wolfen v. Clinical Data, Inc.*, 16 Cal. App. 4th 171, 182, 19 Cal. Rptr. 2d 684 (2d Dist. 1993).)

Original and copy not reasonably procurable.

Section 1523(a), does not bar the admissibility of oral testimony concerning the contents of a writing if the proponent does not have possession or control of the original or a copy of the writing and neither the writing nor a copy was reasonably procurable by the proponent by use of the court's process or by other available means. (*Evidence Code* § 1523(c)(1).) This rule continues former §§ 1502 and 1505 without change. The Comment notes that subdivision (c)(1) effectively continues the rule of former §§ 1503 and 1505 as to oral testimony of the content of a writing possessed by the opponent and not produced at the hearing despite notice it would be needed. Further subdivision (c)(1) continues the rule of former §§ 1506 to 1508 as to oral testimony of: (1) the content of a writing in the custody of a public entity; or (2) a writing recorded in the public records, where a re-

cord or the 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 through the exercise of reasonable diligence.

Collateral writings.

[Section 1523\(a\)](#), does not bar the admissibility of oral testimony concerning the contents of a writing if the writing is not closely related to the controlling issues and it would be inexpedient to require its production. This rule continues former §§ 1504 and 1505 without change. The Comment to § 1504 noted that this exception precludes hypertechnical insistence on the best evidence rule when production of the original would be impractical and its contents are not closely related to any important issue in the case.

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§ 8:22. The secondary evidence rule—Admission of oral testimony concerning contents of writing in criminal cases

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#)  398 to 403

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

In criminal cases, in addition to the grounds for exclusion set forth in [Evidence Code § 1523](#) (see discussion in [§ 8:21](#)), the court must exclude oral testimony 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. ([Evidence Code § 1522\(a\)](#).) This additional limitation was imposed in criminal cases because of the “narrower discovery rules” applicable ([Evidence Code § 1522](#), Comment.) The Comment goes on to suggest that, in determining if the proponent 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. The subdivision limiting the use of oral testimony in criminal cases does not exclude oral testimony concerning a writing that is not closely related to the controlling issues in the action.

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§ 8:23. The secondary evidence rule—Photographic copies and printed representations of writings

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West's Key Number Digest, [Evidence](#)  157 to 187

West's Key Number Digest, [Criminal Law](#)  398 to 403

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

[C.J.S., Evidence §§ 1054 to 1131](#)

[Evidence Code § 1550](#) provides for the admissibility of reproductions of business documents:

(a) If made and preserved as a part of the records of a business, as defined in § 1270, in the regular course of that business, the following types of evidence of 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 [§ 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 or reproduction, or an enlargement thereof.

(4) Any other photographic copy or reproduction, or an enlargement thereof.

(b) The introduction 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.

[Evidence Code § 1550.1](#) provides the following:

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 [Sections 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.

Photographic copies of lost or destroyed writings may be admitted under [Evidence Code § 1551](#), which provides the following:

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 [Evidence Code § 1531](#) and stating the date on which, and the fact that, it was so taken under his [or her] direction and control.

[Evidence Code § 1552\(a\)](#), replaced former § 1500.5. With one exception, it is identical to the replaced provision. It provides the following:

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. (Emphasis added.)

Former § 1500.5 required the proponent to show that the representation was the *best available evidence* of the existence and content of the computer information or computer program that it purports to represent. The new section requires the proponent to show, simply, that it is an accurate representation. Subdivision (a) does not apply to computer-generated official records certified in accordance with [Evidence Code § 452.5](#) or [§ 1530](#). ([Evidence Code § 1552\(b\)](#); see discussion in [§ 2:105](#).)

[Evidence Code § 1553](#) admits a printed representation of images stored on video or digital medium:

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 the evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

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§ 8:24. The secondary evidence rule—Preliminary examinations in felony cases

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West's Key Number Digest, [Criminal Law](#)  [398](#) to [403](#)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 1127 to 1139](#)

The conversion of the best evidence rule into the secondary evidence rule did not change the prior law that exempted preliminary examinations in felony cases. [Penal Code § 872.5](#) provides that, notwithstanding the secondary evidence rule, “in a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.”

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§ 8:25. Introducing an official report—Hypothetical

West's Key Number Digest

Wests Key Number Digest, [Trial](#)  39

Wests Key Number Digest, [Evidence](#)  366, 333, 160

Legal Encyclopedias

[C.J.S., Evidence §§ 834 to 840, 844 to 854, 856, 862, 870 to 878, 881, 923, 1061 to 1062, 1068 to 1072, 1075 to 1076, 1080, 1085, 1087 to 1089, 1091 to 1100](#)

[C.J.S., Trial §§ 148 to 153](#)

In the motor vehicle-personal injury case hypothetical, presented in [§ 8:1](#), assume that the plaintiff has sued not only the other driver but the state as well for poorly designing the freeway section where the accident occurred. Assume further that sometime prior to the accident the state had a report prepared of dangerous traffic conditions on the state freeway system. Traffic engineer Jones, employed by the state, reviewed accident rates and the design of highway sections with high rates and concluded that the highway section where the accident occurred in the hypothetical had an above average number of accidents and was poorly designed. How can plaintiff introduce Jones's conclusions against the state?

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§ 8:26. Introducing an official report—Checklist

West's Key Number Digest

Wests Key Number Digest, [Trial](#)  39

Wests Key Number Digest, [Evidence](#)  366, 333, 160

Legal Encyclopedias

[C.J.S., Evidence §§ 834 to 840, 844 to 854, 856, 862, 870 to 878, 881, 923, 1061 to 1062, 1068 to 1072, 1075 to 1076, 1080, 1085, 1087 to 1089, 1091 to 1100](#)

[C.J.S., Trial §§ 148 to 153](#)

As discussed in the beginning of the chapter, in admitting any writing, including an official record, the proponent must be prepared to confront three issues:

- Authentication
- Secondary evidence rule
- Hearsay exception requirements

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§ 8:27. Introducing an official report—Introducing report as an official record

West's Key Number Digest

West's Key Number Digest, [Trial](#)  39

West's Key Number Digest, [Evidence](#)  366, 333, 160

Legal Encyclopedias

C.J.S., [Evidence](#) §§ 834 to 840, 844 to 854, 856, 862, 870 to 878, 881, 923, 1061 to 1062, 1068 to 1072, 1075 to 1076, 1080, 1085, 1087 to 1089, 1091 to 1100

C.J.S., [Trial](#) §§ 148 to 153

Authentication.

The proponent must prove that this report is, in fact, what it purports to be: a state study of dangerous highway conditions prepared by traffic engineer Jones. Under [Evidence Code § 1453](#), the signature of Jones, “a public employee of any public entity in the United States” is presumed to be genuine and authorized. In the absence of evidence to the contrary, this presumption will suffice.

Secondary evidence rule.

Under [Evidence Code § 1530](#), a copy of a writing in the custody of a public entity is admissible if the copy purports to be published by the authority of the public entity and the copy is attested or certified as a “correct copy” of the original by a public employee having legal custody of the writing. (See also [Evidence Code § 1531](#).) [Evidence Code § 1453](#) can again be relied on to establish the authenticity of the signature on the certification. The secondary evidence rule is discussed beginning with [§ 8:17](#).

Hearsay.

While reliance on [Evidence Code §§ 1453](#) and [1530](#) may solve the authentication and secondary evidence issues, it does not address the hearsay problem. Unlike the business records exception, the elements of the offi-

cial records exception can be established without testimony. That the report was prepared by a public employee within the scope of the public employee's duty is clear. If the statistical basis for the report came from police reports of accidents that simply relate the time, date, and specific location of the accident, then the engineer's report is reliable. Both the preparation of these underlying reports and the conclusions derived from them by Engineer Jones are entitled to the presumption that official duty has been regularly performed. ([Evidence Code § 664](#); see the discussion of the official records exception in §§ [2:66](#) to [2:70](#).)

Thus, without the benefit of live testimony, each of the three issues on the checklist can be satisfied.
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§ 8:28. Introducing an official report—Introducing report as an admission

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 245, 255

Legal Encyclopedias

[C.J.S.](#), [Evidence](#) §§ 434, 449 to 450, 460 to 461

The authentication and secondary evidence issues are resolved in the same manner as when the report is introduced as an official record. (See [§ 8:27](#).)

Hearsay.

Some authority exists for treating reports of public entities as admissions of that public entity. First, an obvious analogy exists in the business record exception area. In *Levy-Zentner Co. v. Southern Pac. Transportation Co.*, a department of the defendant corporation reviewed the causes of an accident that had occurred and attributed some of them to the corporation in a prepared report. In addition to upholding the admission of that report as a business record, the court concluded that it could also be introduced as an admission. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.*, 74 Cal. App. 3d 762, 786–787, 142 Cal. Rptr. 1 (1st Dist. 1977).) See also *U.S. v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989), which held that the defendant in a federal prosecution for driving under the influence could introduce a manual prepared by the National Highway Traffic Safety Administration, which discussed the proper procedure for testing nystagmus, as a party admission of the government.

The admissions exception, unlike the business or official records exceptions to the hearsay rule, does not exclude statements made without personal knowledge or statements that consist of an otherwise inadmissible opinion. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.*, 74 Cal. App. 3d 762, 787, 142 Cal. Rptr. 1 (1st Dist. 1977).) Thus, if questions arise as to the reliability of the sources considered by Jones or Jones's expertise, use of the admissions exception may circumvent them.

Large numbers of reports are produced by state agencies. It would be unreasonable to treat each of them as

an admission that could be introduced in any lawsuit in which the state is a party. *Van Griffin* recognized this and admitted the safety manual in the driving-under-the-influence prosecution because the agency had been “charged with the development of rules for highway safety [and] was the relevant and competent section of the government; its pamphlet on sobriety testing was an admissible party admission.” ([U.S. v. Van Griffin, 874 F.2d 634, 638 \(9th Cir. 1989\)](#).) It should be kept in mind that section 1220 is so expansive on the types of statements permitted as admissions because the party has the opportunity to explain or deny the purported admission. This is quite a bit more difficult if the “admission” is made by a state employee years before and miles away.

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§ 8:29. Introducing an official report—Introducing report as nonhearsay

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  [333](#), [318](#)

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[C.J.S.](#), [Evidence](#) §§ [259](#), [263](#), [271](#), [273](#) to [278](#), [280](#), [834](#) to [840](#), [844](#) to [854](#), [856](#), [862](#), [923](#)

The authentication and secondary evidence issues are resolved in the same manner as when the report is introduced as an official record. (See [§ 8:27](#).)

Nonhearsay.

One element in the cause of action against the state is foreseeability. Even if the report by Engineer Jones is inadmissible for its truth under any of the various approaches considered, it should still be admitted to establish that the state was aware of the improper road design and, therefore, could foresee that accidents were likely to occur there.

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§ 8:30. Introducing an official report—Judicial notice

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  1 to 52

Legal Encyclopedias

[C.J.S., Citizens](#) §§ 24 to 25

[C.J.S., Evidence](#) §§ 8 to 119

[C.J.S., Trading Stamps and Coupons](#) § 2

Authentication and secondary evidence.

These are not issues in judicial notice. However, pursuant to [Evidence Code § 453](#), plaintiff must furnish the court with “sufficient information” to enable it to take judicial notice. Moreover, before taking notice the court should be persuaded that the matter is not reasonably subject to dispute. To accomplish this, plaintiff will undoubtedly present a copy of the report, preferably certified pursuant to [Evidence Code § 1531](#). Thus, the same evidence that would be necessary to satisfy the authentication and secondary evidence requirements will probably be produced as “information,” not evidence, to persuade the court to take judicial notice.

Judicial notice.

Under [Evidence Code § 452\(c\)](#), the report is an official act of the executive department of a state and therefore subject to judicial notice. However, not every statement in an official report is admissible under the judicial notice doctrine. Certain cases, however, have ignored the distinction between taking notice of a document and admitting any particular statement in the document. (See, e.g., the discussion in [§ 7:11](#).) To the extent that the plaintiff is able to persuade the court to admit Engineer Jones's conclusion simply because it is in an official report, judicial notice is a preferable method for that party; it avoids the otherwise difficult problem of establishing the reliability of Jones's sources and the propriety of Jones's conclusion.

If, however, the judge properly rejects plaintiff's effort and requires information that establishes that Jones's conclusion is not reasonably subject to dispute before taking judicial notice, this approach to admitting the report is less advantageous to the plaintiff. By authenticating the document, complying with the secondary evidence rule, and showing that Jones's sources were reliable and that Jones's conclusion was within the scope of the engineer's duties, plaintiff can introduce the report under the official records hearsay exception and prevail on the issue at trial if the jury believes that the engineer's conclusion is probably correct. This is far easier than convincing the judge that the conclusion is not reasonably subject to dispute, a predicate to simple admissibility under judicial notice. (See § 7:11.)

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Chapter
8. Using Writings In Trial

§ 8:31. Introducing an official report—Expert testimony

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 555

Legal Encyclopedias

[C.J.S.](#), [Evidence](#) §§ 597 to 598, 601 to 609, 611 to 614, 619, 634, 639 to 652, 662 to 665, 682, 713

There is little question that a properly qualified expert in traffic engineering or accident reconstruction can testify and rely on Jones's report in providing an opinion on the hazard presented by the roadway. The report is hearsay, but, even if no exception is set out, an expert may base an opinion on inadmissible matter, so long as it is "of a type that reasonably may be relied on by an expert in forming an opinion." ([Evidence Code § 801\(b\)](#).) On direct examination, the expert could mention his or her reliance on Jones's report and describe the report in general terms. Since it is hearsay, however, the expert can be precluded from describing Jones' study in detail and from introducing it into evidence. However, the court has discretion to admit such testimony and give a limiting instruction. (See the discussion in [§ 4:31](#).) When cross-examining the expert, counsel is given far more latitude in going into details of inadmissible matter relied on by the expert in forming the opinion. (See the discussion in [§ 4:33](#).)

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9. Burden Of Proof; Burden Of Producing Evidence

§ 9:1. Burden of proof—In general

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West's Key Number Digest, [Evidence](#) 🔑 90 to 98

West's Key Number Digest, [Criminal Law](#) 🔑 326

Legal Encyclopedias

[C.J.S., Criminal Law §§ 941 to 953](#)

[C.J.S., Evidence §§ 120 to 129](#)

The burden of proof involves two distinct issues: (1) which party must prove a fact (“allocation” discussed in [§ 9:2](#)); and (2) the degree to which that fact must be proved (“standards” discussed in [§ 9:3](#)). In civil cases, the burden is usually allocated to the party that loses if the claim or defense fails and requires proof by a preponderance of the evidence. In criminal cases, the burden is virtually always with the prosecution, which must establish guilt beyond a reasonable doubt.

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9. Burden Of Proof; Burden Of Producing Evidence

§ 9:2. Burden of proof—Allocating the burden of proof

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West's Key Number Digest, [Evidence](#) 🔑90 to 98

West's Key Number Digest, [Criminal Law](#) 🔑326

Legal Encyclopedias

[C.J.S., Criminal Law §§ 941 to 953](#)

[C.J.S., Evidence §§ 120 to 129](#)

[Evidence Code § 500](#) provides that “[e]xcept as otherwise provided by law” the burden of proof on a particular issue is normally assigned to the party to whom the fact is essential. ([Evidence Code § 500](#), Comment.) For example, in [In re Conservatorship of Hume](#), 140 Cal. App. 4th 1385, 1391, 44 Cal. Rptr. 3d 906 (4th Dist. 2006), the court noted that the conservator has a duty to file an inventory and accounting and, if one objects to it, the burden of proof is on the objector, who is the one seeking “*relief* by trying to change the result that would normally obtain without intervention....” Exceptions to this general rule may be created by constitutional, statutory, or decisional law (see [Evidence Code § 160](#)), but municipalities cannot change the normal allocation of the burden of proof by ordinance. ([Fisher v. City of Berkeley](#), 37 Cal. 3d 644, 697–698, 209 Cal. Rptr. 682, 693 P.2d 261 (1984).) A municipal ordinance governing rent control may, however, create a presumption affecting the burden of producing evidence. ([TG Oceanside, L.P. v. City of Oceanside](#), 156 Cal.App.4th 1355, 1374–1375 (2007).)

When a court considers shifting the normal allocation of the proof burden, the Comment to [Evidence Code § 500](#) directs it to consider the following factors: the knowledge of each party concerning the particular fact, the availability of the evidence to each party, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. Courts rarely shift the normal burden of proof. ([Sargent Fletcher, Inc. v. Able Corp.](#), 110 Cal. App. 4th 1658, 1670, 3 Cal. Rptr. 3d 279 (2d Dist. 2003).) *Sargent* contains an excellent analysis of this issue by Justice Epstein, which concludes, “[E]xceptions to the general rule placing the burden of proof for prima facie elements on defendants are made

when it is otherwise impossible for the plaintiff to make its case, and when policy considerations support affording the plaintiff greater protection.” (*Sargent*, 110 Cal. App. 4th at 1673; *Sander/Moses Productions, Inc. v. NBC Studios, Inc.*, 142 Cal. App. 4th 1086, 1096–1097, 48 Cal. Rptr. 3d 525 (2d Dist. 2006) [Even if one side has exclusive control over evidence needed by the other to prove its case, the burden of proof will not be shifted without evidence that the first party withheld the information.].) In *Sargent*, a case involving the misappropriation of a trade secret, the court refused to shift, to the defense, the plaintiff’s burden of proving the defendant improperly used the trade secret.

Examples of cases reallocating the burden of proof follow. In *Webster v. Trustees of Cal. State University*, the court considered [Government Code § 12942](#), which permits the creation of a retirement policy for tenured faculty members at institutions of higher education. The state university system permits reemployment beyond age 70 only if the faculty member is certified annually. Normally the burden of proof to show continued good performance would seem to rest with the faculty member. However, the trustees were deemed to have greater knowledge about job performance and greater access to information showing inability to perform, and were therefore assigned the burden of proof. (*Webster v. Trustees of Cal. State University*, 19 Cal. App. 4th 1456, 1463–1464, 24 Cal. Rptr. 2d 150 (5th Dist. 1993).)

In *Hellman v. Anderson*, the court ruled that a judgment debtor’s interest in a partnership may be foreclosed on and sold, even without the consent of the other partners, provided that the foreclosure does not unduly interfere with the partnership business. Because the knowledge about and evidence of the effect of foreclosure on the partnership belongs to the partner-judgment debtor, the burden of proving undue interference as a result of the foreclosure is assigned to the debtor. (*Hellman v. Anderson*, 233 Cal. App. 3d 840, 284 Cal. Rptr. 830 (3d Dist. 1991).) In addition, defendant bailees who are sued for the loss or damage of the bailment are assigned the burden of proving freedom from fault because the evidence is available almost exclusively to them. (*Gebert v. Yank*, 172 Cal. App. 3d 544, 552, 218 Cal. Rptr. 585 (2d Dist. 1985).)

Under the *res ipsa loquitur* doctrine, when a patient receives unusual injuries while unconscious during a medical procedure, any defendant who had any control over the patient’s body or the instrumentalities that might have caused the injuries has the burden of showing freedom from fault because only the defendants have knowledge of the facts concerning the issue. (*Ybarra v. Spangard*, 25 Cal. 2d 486, 493–494, 154 P.2d 687 (1944); see also *Morris v. Williams*, 67 Cal. 2d 733, 760, 63 Cal. Rptr. 689, 433 P.2d 697 (1967).)

In a claim for insurance coverage, the insured has the burden of establishing that the claim is within the basic scope of the insurance coverage. The insurer has the burden of establishing that an exclusion bars an otherwise covered claim. (*Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1186, 77 Cal. Rptr. 2d 537, 959 P.2d 1213 (1998).) In an action under a standard commercial general liability insurance policy, the insured bears the burden of proving that a claim comes within the “sudden and accidental” exception to the general pollution exclusion. (*Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1190, 77 Cal. Rptr. 2d 537, 959 P.2d 1213 (1998).)

In *Fisher v. Superior Court*, the Court of Appeal placed the burden of showing that a settlement between plaintiff and one defendant was not in good faith on the party attacking the settlement. In part, this decision was based on “the most desirable result in terms of public policy,” promoting settlements. (*Fisher v. Superior Court*, 103 Cal. App. 3d 434, 448, 163 Cal. Rptr. 47 (2d Dist. 1980).)

For reasons of policy and fairness, the plaintiff in a suit for punitive damages has the burden of proof concerning the defendant's financial condition. (*Adams v. Murakami*, 54 Cal. 3d 105, 119–120, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991).) Evidence of the defendant's ability to earn future income is a factor the jury may consider in setting punitive damages. (*Rufo v. Simpson*, 86 Cal. App. 4th 573, 620–623, 103 Cal. Rptr. 2d 492 (2d Dist. 2001).)

The allocation of the burden of proof must be distinguished from a presumption. *Evidence Code* § 600 defines a presumption as “an assumption of fact that the law requires to be made from another fact ... established in the action.” As an example of this distinction, consider *Evidence Code* § 521, discussed in § 9:9, which places the burden of proof on the party who claims that another failed to exercise due care. This does not, however, create a “presumption” of due care. Statutory presumptions are often interrelated with the allocation of the burden of proof. There is a statutory presumption that “official duty has been regularly performed.” (*Evidence Code* § 664.) When a criminal defendant claims that he or she is the victim of discriminatory prosecution, this presumption then operates to place the burden of proof on the defendant. (*People v. Smith*, 155 Cal. App. 3d 1103, 1128–1129, 203 Cal. Rptr. 196 (4th Dist. 1984).)

The burden of proof must also be distinguished from the burden of producing evidence, which is discussed in §§ 9:11 to 9:12.

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9. Burden Of Proof; Burden Of Producing Evidence

§ 9:3. Burden of proof—Standards of proof

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 90 to 98, 596

West's Key Number Digest, [Criminal Law](#) 🔑 326, 560

Legal Encyclopedias

[C.J.S., Criminal Law §§ 941 to 953, 1502](#)

[C.J.S., Evidence §§ 120 to 129, 1299 to 1308, 1310 to 1311, 1315 to 1317](#)

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. ([Evidence Code § 115.](#)) In *Addington v. Texas*, the United States Supreme Court set forth the rationale for having different standards of proof ([Addington v. Texas](#), 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)):

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” [Citation.] The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion. In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.

California has adopted four levels of proof for different types of cases:

- A party can be required to raise a reasonable doubt concerning the existence or nonexistence of a fact, or
- A party can establish the existence or nonexistence of a fact by:
 - A preponderance of the evidence,
 - Clear and convincing proof, or
 - By proof beyond a reasonable doubt.

Absent a contrary legal requirement, the burden of proof is by a preponderance of the evidence. ([Evidence Code § 115.](#))

The Comment to § 500 notes that requiring a party to present proof by a preponderance requires the party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence. (See [In re Winship](#), 397 U.S. 358, 371, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).) It has also been stated that “preponderance of the evidence” means that the evidence on one side outweighs or preponderates over evidence on the other side. Therefore, a decision contrary to the weight of the evidence would be contrary to the preponderance of the evidence. ([Chamberlain v. Ventura County Civil Service Com.](#), 69 Cal. App. 3d 362, 138 Cal. Rptr. 155 (2d Dist. 1977).)

Clear and convincing evidence is a higher burden of proof than preponderance. It requires a finding of “high probability”; the evidence must be “so clear as to leave no substantial doubt” or “sufficiently strong to command the unhesitating assent of every reasonable mind.” ([Lillian F. v. Superior Court](#), 160 Cal. App. 3d 314, 320, 206 Cal. Rptr. 603 (1st Dist. 1984).) In [Mattco Forge, Inc. v. Arthur Young & Co.](#), the court set forth a “summary of the evidentiary circumstances where California has recognized or imposed a clear and convincing burden of proof standard.” ([Mattco Forge, Inc. v. Arthur Young & Co.](#), 52 Cal. App. 4th 820, 852, 60 Cal. Rptr. 2d 780 (2d Dist. 1997). See [People v. Englebrecht](#), 88 Cal. App. 4th 1236, 1254, 106 Cal. Rptr. 2d 738 (4th Dist. 2001).)

[Penal Code § 1096](#) defines reasonable doubt as “not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction of the truth of the charge.”

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§ 9:4. Burden of proof—Standard of proof on selected civil issues

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West's Key Number Digest, [Evidence](#) 🔑 596, 598, 90 to 98

Legal Encyclopedias

[C.J.S., Evidence](#) §§ 120 to 129, 1299 to 1308, 1310 to 1312, 1315 to 1317

The correct standard of proof in civil cases in which fraud is an issue is preponderance of the evidence. ([Liodas v. Sahadi](#), 19 Cal. 3d 278, 286–293, 137 Cal. Rptr. 635, 562 P.2d 316 (1977).)

The burden of proof for the oral modification of a written contract is a preponderance of the evidence. ([Barratt v. Bank of America](#), 183 Cal. App. 3d 1362, 1370, 229 Cal. Rptr. 16 (4th Dist. 1986).)

In juvenile court placement cases, if foster parents seek de facto parent status, which conveys certain advantages in the proceedings, the court is to use a preponderance of the evidence standard of proof in conveying that status for purposes of the litigation. ([In re Joshua S.](#), 205 Cal. App. 3d 119, 125, 252 Cal. Rptr. 106 (4th Dist. 1988).)

The burden of proof to establish an oral joint venture or partnership agreement is a preponderance; clear and convincing evidence is not required. ([Weiner v. Fleischman](#), 54 Cal. 3d 476, 490, 286 Cal. Rptr. 40, 816 P.2d 892 (1991).)

The Lanterman–Petrus–Short (LPS) Act provides a graduated series of progressively longer periods of detention for the treatment of mentally ill individuals. Its purpose is both to protect public safety and to safeguard individual rights through judicial review. As the period of detention increases so does the county's burden of proof. Thus, if an individual is certified for 14 days of intensive treatment on the ground that he or she is gravely disabled or presents a danger as a result of a mental disorder or chronic alcoholism ([Welfare and Institutions Code § 5250](#)), and the person seeks judicial review by a petition for writ of habeas corpus ([Welfare and Institutions Code § 5275](#)), the county must justify certification by a preponderance of the evidence. ([In re Azzarella](#),

207 Cal. App. 3d 1240, 1248, 254 Cal. Rptr. 922 (4th Dist. 1989).) If, under the LPS Act, a petitioner seeks the appointment of a conservator with the power to commit a conservatee to a state mental hospital for up to one year ([Welfare and Institutions Code §§ 5350 et seq.](#)) because of a grave disability due to a mental disorder, the petitioner must establish the grave disability by proof beyond a reasonable doubt. ([Conservatorship of Roulet](#), 23 Cal. 3d 219, 235, 152 Cal. Rptr. 425, 590 P.2d 1 (1979).)

The standard of proof for a probable cause hearing under the Sexually Violent Predator Act ([Welfare and Institutions Code §§ 6600 et seq.](#)) is probable cause, not a preponderance of the evidence. Probable cause exists if a person of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion that the offender is a sexually violent predator. ([Cooley v. Superior Court](#), 29 Cal. 4th 228, 250–254, 127 Cal. Rptr. 2d 177, 57 P.3d 654 (2002).)

When a petitioner seeks appointment of a conservator for the person and estate of another under [Probate Code § 1500 et seq.](#), the petitioner must show by clear and convincing evidence that the person is unable to properly provide for his or her personal needs. ([Conservatorship of Sanderson](#), 106 Cal. App. 3d 611, 618, 165 Cal. Rptr. 217 (1st Dist. 1980).) *Sanderson* rejected both the preponderance standard sought by petitioner and the analogy to conservatorships under the LPS Act put forward by the conservatee.

[Family Code, section 760](#) sets out a rebuttable presumption that property acquired by either spouse during marriage is community property, but that presumption is overcome by establishing a gift by a preponderance of the evidence. ([In re Marriage of Ettefagh](#), 150 Cal. App. 4th 1578, 59 Cal. Rptr. 3d 419 (1st Dist. 2007).)

[Evidence Code § 662](#) sets out a statutory exception to the general rule requiring proof by a preponderance. “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.” In *Tannehill v. Finch*, the court applied that same burden of proof to a plaintiff, who sought to establish a one-half interest in property held in the defendant's name, in an action based on *Marvin v. Marvin*. ([Tannehill v. Finch](#), 188 Cal. App. 3d 224, 228, 232 Cal. Rptr. 749 (4th Dist. 1986); [Marvin v. Marvin](#), 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).) (See the discussion in § 10:20.)

In *People v. Englebrecht*, the court found that when the district attorney seeks a permanent injunction to abate a public nuisance based on alleged street gang activity, clear and convincing evidence is required. ([People v. Englebrecht](#), 88 Cal. App. 4th 1236, 1256–1257, 106 Cal. Rptr. 2d 738 (4th Dist. 2001).)

The standard of proof for termination of parental rights under the child dependency statutes ([Welfare and Institutions Code §§ 300 et seq.](#)) is preponderance of the evidence, and this is constitutional. ([Cynthia D. v. Superior Court](#), 5 Cal. 4th 242, 19 Cal. Rptr. 2d 698, 851 P.2d 1307 (1993).)

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§ 9:5. Burden of proof—Standard of proof on selected criminal issues

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 560 to 562, 326

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[C.J.S., Criminal Law §§ 941 to 953, 1482, 1502](#)

[Penal Code § 1096](#) places on the state the burden of proof of every element in a criminal case and sets the level of that burden as proof beyond a reasonable doubt. This echoes the requirement of the due process clause of the federal constitution. ([Mullaney v. Wilbur](#), 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).)

Various code sections, including [Evidence Code §§ 520 to 522](#), may be properly interpreted to place the burden of establishing certain facts, which might tend to negate guilt, on the defendant. [Evidence Code § 501](#) makes it clear however, that, with the exception of proving insanity (see the discussion in [§ 9:10](#)), any such statutory assignment of the burden to the defendant is also subject to [Penal Code § 1096](#).

The cases have approved of placing the burden on the defendant to prove an exculpatory fact. It is constitutional to require a criminal defendant to prove an affirmative defense by a preponderance of the evidence, so long as “affirmative defense” is understood to mean one that assumes that the elements of the crime have been proved but presents some excuse or justification. ([Martin v. Ohio](#), 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).) Examples of such affirmative defenses include the defenses of necessity ([People v. Waters](#), 163 Cal. App. 3d 935, 209 Cal. Rptr. 661 (6th Dist. 1985)), entrapment ([People v. Moran](#), 1 Cal. 3d 755, 760–761, 83 Cal. Rptr. 411, 463 P.2d 763 (1970)), and lawful acquisition of a hypodermic syringe ([People v. Fuentes](#), 224 Cal. App. 3d 1041, 1045, 274 Cal. Rptr. 17 (6th Dist. 1990).) See the general discussion in [People v. Bolden](#), 217 Cal. App. 3d 1591, 1600–1601, 266 Cal. Rptr. 724 (4th Dist. 1990).

It has been suggested that if an issue is collateral, it is appropriate to place the burden of its proof on the defendant, when the defendant has better access to the relevant information. ([Medina v. California](#), 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).) *Medina* upheld the constitutionality of [Penal Code § 1369](#), which

places on the defendant the burden of proving his or her own incompetence.

On occasion, a criminal defendant is given the burden of establishing facts to a preponderance when such facts are a predicate to challenging the reliability of the prosecution's evidence. Thus, the defense is given that burden if it seeks to establish that a prosecution witness is an accomplice, that prosecution evidence is hearsay, or that a prosecution witness has a prior felony conviction. (*People v. Tewksbury*, 15 Cal. 3d 953, 964–966, 968, 127 Cal. Rptr. 135, 544 P.2d 1335 (1976).) Nevertheless, when a statute or a case places on the defendant the burden of injecting a factual contention that tends to overcome or negate prosecution proof of an element of the crime, the defense need only raise a reasonable doubt as to the existence or nonexistence of the fact. Examples where the burden on the defendant is simply to raise a reasonable doubt include the medical defense to possession or cultivation of marijuana under the Compassionate Use Act of 1996 (*People v. Mower*, 28 Cal. 4th 457, 477, 122 Cal. Rptr. 2d 326, 49 P.3d 1067 (2002)), defense of unconsciousness (*People v. Babbitt*, 45 Cal. 3d 660, 694–696, 248 Cal. Rptr. 69, 755 P.2d 253 (1988)), alibi (*People v. Costello*, 21 Cal. 2d 760, 765–766, 135 P.2d 164 (1943)), and self-defense or defense of another (*People v. Roe*, 189 Cal. 548, 560–561, 209 P. 560 (1922)). In *People v. Mentch*, 55 Cal. Rptr. 3d 862, 153 P.3d 953 (Cal. 2007) (rev. granted February 2007), the Supreme Court will decide, among other issues, whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense is a burden of producing evidence or a burden of proof.

The burden of proof borne by a criminal defendant moving to withdraw a guilty plea pursuant to [Penal Code § 1018](#), before pronouncement of judgment, is by the standard of clear and convincing evidence. (*People v. Nance*, 1 Cal. App. 4th 1453, 1456, 2 Cal. Rptr. 2d 670 (4th Dist. 1991).)

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§ 9:6. Burden of proof—When prosecution's burden is below the reasonable doubt standard

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[C.J.S., Criminal Law §§ 464, 941 to 953, 1482, 1502](#)

At a preliminary examination, the magistrate must hold a defendant to answer on a felony charge if there is “sufficient cause to believe that the defendant is guilty.” ([Penal Code § 872\(a\)](#).) This requires “such a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.” ([Williams v. Superior Court](#), 71 Cal. 2d 1144, 1147, 80 Cal. Rptr. 747, 458 P.2d 987 (1969).) Any confusion caused by language that suggested that this required proof of only a rational possibility of guilt ([People v. Slaughter](#), 35 Cal. 3d 629, 200 Cal. Rptr. 448, 677 P.2d 854 (1984); [People v. McGlothen](#), 190 Cal. App. 3d 1005, 1011, 235 Cal. Rptr. 745 (1st Dist. 1987)) was removed by the passage of Proposition 115 in 1990, which added [Penal Code § 866\(b\)](#), to clarify that the prosecution must establish probable cause to believe that the defendant committed the offense.

In *People v. Rodriguez*, the Supreme Court held that the burden of proof for the prosecution at a probation revocation hearing was by a preponderance of the evidence and rejected the clear and convincing proof standard. ([People v. Rodriguez](#), 51 Cal. 3d 437, 441, 272 Cal. Rptr. 613, 795 P.2d 783 (1990).)

In establishing the voluntariness of a confession, the prosecution bears the burden of proof to a preponderance of the evidence. ([Lego v. Twomey](#), 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); [People v. Markham](#), 49 Cal. 3d 63, 71, 260 Cal. Rptr. 273, 775 P.2d 1042 (1989).)

When a witness attends a lineup held in violation of federal standards, his or her identification testimony at trial is barred unless the prosecution establishes by clear and convincing evidence that the in-court identification is based on observations of the suspect other than the lineup identification. ([U.S. v. Wade](#), 388 U.S. 218, 240, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).)

A state prisoner charged with felony assault made a prima facie showing that his conversations with counsel had been monitored electronically by the state and thus requested a dismissal. The court ruled that once the prima facie showing was made the burden shifted to the state to prove the legality of its conduct by clear and convincing evidence. (*People v. Jordan*, 217 Cal. App. 3d 640, 646, 266 Cal. Rptr. 86 (1st Dist. 1990).)

When the defendant challenges the validity of a warrantless search, the prosecution has the burden of establishing justification under a recognized warrant exception. (*People v. Rios*, 16 Cal. 3d 351, 355–356, 128 Cal. Rptr. 5, 546 P.2d 293 (1976).) That burden requires proof by a preponderance of the evidence. (*People v. James*, 19 Cal. 3d 99, 106, 137 Cal. Rptr. 447, 561 P.2d 1135 (1977) (consent to search); *People v. Superior Court*, 18 Cal. App. 3d 316, 321, 95 Cal. Rptr. 757 (2d Dist. 1971) (plain view doctrine).)

When the prosecution seeks to introduce proof of prior bad acts by the defendant under [Evidence Code § 1101](#), it need only prove that other crime by a preponderance of the evidence. (*People v. Carpenter*, 15 Cal. 4th 312, 380–382, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997).) However, in the penalty phase of a capital case, if the prosecution introduces evidence of other crimes as an aggravating circumstance, the judge must instruct sua sponte that “the jury could not consider the other-crimes evidence unless the commission of such crimes had been proven beyond a reasonable doubt.” (*People v. Gates*, 43 Cal. 3d 1168, 1202, 240 Cal. Rptr. 666, 743 P.2d 301 (1987).)

In sentencing a defendant, the court can consider crimes that the defendant was not charged with in setting restitution, if persuaded to a preponderance that the defendant is responsible for the additional losses. (*People v. Baumann*, 176 Cal. App. 3d 67, 80, 222 Cal. Rptr. 32 (4th Dist. 1985).) However, if the defendant is acquitted of a charge, the court may not consider that charge in determining whether to grant probation or the length of sentence unless convinced beyond a reasonable doubt that the defendant is guilty of it. (*People v. Takencareof*, 119 Cal. App. 3d 492, 498, 174 Cal. Rptr. 112 (5th Dist. 1981).)

When the defendant challenges the constitutionality of a prior conviction in a driving-under-the-influence case, the prosecution must establish its validity beyond a reasonable doubt. ([Vehicle Code § 41403\(b\)\(1\)](#); *Worsley v. Municipal Court*, 122 Cal. App. 3d 409, 421, 176 Cal. Rptr. 324 (2d Dist. 1981).) However, when a defendant seeks to attack collaterally the validity of a prior felony conviction, the defendant has the burden of proof to show the unconstitutionality of the conviction by a preponderance of the evidence. (*Curl v. Superior Court*, 51 Cal. 3d 1292, 1303, 276 Cal. Rptr. 49, 801 P.2d 292 (1990).) *Curl* involved a prior murder conviction alleged as a prior murder special circumstance in a capital case. It is submitted that the reasoning of *Curl* seems inconsistent with that of *Worsley* and may lead to a reevaluation of *Worsley*. Specifically, the burden of proof set forth in [Vehicle Code § 41403\(b\)\(1\)](#), could be interpreted to apply only to the issue of whether the defendant suffered the prior conviction, and not whether that conviction was constitutional. (Compare *Curl v. Superior Court*, 51 Cal. 3d 1292, 1304, 276 Cal. Rptr. 49, 801 P.2d 292 (1990).)

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§ 9:7. Instructions on burden of proof

West's Key Number Digest

Wests Key Number Digest, [Trial](#) 🔑 205, 234(7)

Wests Key Number Digest, [Criminal Law](#) 🔑 778

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 1798 to 1800, 1802, 1806 to 1807, 1818 to 1822

[C.J.S., Trial](#) §§ 563 to 564, 586, 623, 629 to 630

[Evidence Code § 502](#) tracks [Evidence Code § 115](#) in setting out the four possible burdens of proof that a party might bear. It then requires the court to instruct the jury as to which party bears the burden of proof on each issue and what that burden is. The court is obliged to give these instructions sua sponte. (See, e.g., [People v. Gates](#), 43 Cal. 3d 1168, 1202, 240 Cal. Rptr. 666, 743 P.2d 301 (1987).)

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§ 9:8. Burden of proof on claim of wrongdoing—Claim that person is guilty of crime or wrongdoing

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 90 to 98

West's Key Number Digest, [Criminal Law](#) 🔑 326

Legal Encyclopedias

[C.J.S., Criminal Law §§ 941 to 953](#)

[C.J.S., Evidence §§ 120 to 129](#)

“The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.” ([Evidence Code § 520](#).) This section applies even though the alleged wrongdoer is not a party. Thus, if a criminal defendant claims that a prosecution witness is an accomplice, the defendant has the burden of establishing this to a preponderance of the evidence before corroboration of the testimony is required. ([People v. Tewksbury](#), 15 Cal. 3d 953, 962–963, 127 Cal. Rptr. 135, 544 P.2d 1335 (1976).) When a criminal defendant contends that a prosecution witness's out-of-court statements were involuntary and that the witness's testimony should be inadmissible at trial, the defendant has the burden of proving that the statements were obtained involuntarily. ([People v. Douglas](#), 50 Cal. 3d 468, 500, 268 Cal. Rptr. 126, 788 P.2d 640 (1990).)

When a party claims that another is acting in bad faith, [§ 520](#) places the burden of proof on the claimant. Thus, in *Fisher v. Superior Court*, the court held that a defendant who alleges that a settlement between plaintiff and another defendant was not made in good faith has the burden of proof on that issue. ([Fisher v. Superior Court](#), 103 Cal. App. 3d 434, 448–449, 163 Cal. Rptr. 47 (2d Dist. 1980).) Although [§ 520](#) was not discussed, the court in *Fisher v. City of Berkeley*, held that a tenant who claims his or her eviction was retaliatory has the burden of proof and this burden cannot be shifted by a municipal ordinance. ([Fisher v. City of Berkeley](#), 37 Cal. 3d 644, 697–698, 209 Cal. Rptr. 682, 693 P.2d 261 (1984); compare [Beeman v. Burling](#), 216 Cal. App. 3d 1586, 1596–1597, 265 Cal. Rptr. 719 (1st Dist. 1990).)

Infrequently courts alter the normal burden of proof on wrongdoing and impose it on the defendant where a

policy judgment is made that there is a substantial probability the defendant has acted wrongly and the defendant's conduct makes it impossible, as a practical matter, to prove the wrongdoing. (See [Galanek v. Wismar](#), 68 Cal. App. 4th 1417, 1426–1427, 81 Cal. Rptr. 2d 236 (4th Dist. 1999) (spoliation of evidence); [McGee v. Cessna Aircraft Co.](#), 139 Cal. App. 3d 179, 190, 188 Cal. Rptr. 542 (4th Dist. 1983).) For a general discussion of this doctrine, see [National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.](#), 107 Cal. App. 4th 1336, 1346–1347, 133 Cal. Rptr. 2d 207 (2d Dist. 2003). This shift in the burden of proof does not occur, however, until plaintiff discharges its burden to produce some evidence of wrongdoing. ([Health Fraud](#), 107 Cal. App. 4th at 1346–1347.)

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§ 9:9. Burden of proof on claim of wrongdoing—Claim of negligence

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑90 to 98

West's Key Number Digest, [Negligence](#) 🔑1550 to 1573

Legal Encyclopedias

[C.J.S., Evidence §§ 120 to 129](#)

[C.J.S., Negligence §§ 710, 712 to 718, 720 to 733, 736 to 743](#)

“The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.” ([Evidence Code § 521](#).) This section states the general rule that places the burden of proof on the party claiming that another was negligent. There are exceptions to this rule. Perhaps the best known is the *res ipsa loquitur* doctrine. Under *res ipsa loquitur*, a party sued for negligence is obliged to establish that its conduct was free from fault when the following conditions are met:

- The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- It must be caused by an agency or instrumentality within the exclusive control of the defendant;
- It must not have been due to any voluntary action or contribution on the part of the plaintiff. ([Ybarra v. Spangard](#), 25 Cal. 2d 486, 489, 154 P.2d 687 (1944).)

This doctrine is applied in those cases “where the chief evidence of the true cause, whether culpable or innocent is practically accessible to [the defendants] but inaccessible to the injured person.” ([Martinides v. Mayer](#), 208 Cal. App. 3d 1185, 1194, 256 Cal. Rptr. 679 (2d Dist. 1989).) (See the discussion in [§ 10:18](#).)

In a related area, the burden of establishing that the defendant's negligence was the proximate cause of the injury is, on occasion, shifted so that the defendant must establish the absence of proximate cause. ([Haft v. Lone Palm Hotel](#), 3 Cal. 3d 756, 772, 91 Cal. Rptr. 745, 478 P.2d 465 (1970).) This so-called *Haft* shift is applied in

tort actions, particularly those involving strict liability for defective products. ([McKeon v. Hastings College](#), 185 Cal. App. 3d 877, 901, 230 Cal. Rptr. 176 (1st Dist. 1986).) It rests “on a policy judgment that when there is substantial probability that a defendant's negligence was a cause of an accident, and when the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove ‘proximate causation’ conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *not* a cause of the injury.” ([Haft v. Lone Palm Hotel](#), 3 Cal. 3d 756, 774, 91 Cal. Rptr. 745, 478 P.2d 465 (1970).)

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§ 9:10. Burden of proof on claim of insanity

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 331, 570(2)

Legal Encyclopedias

[C.J.S., Criminal Law §§ 945, 949, 1509](#)

The party claiming that any person, including the party, is or was insane has the burden of proof on that issue. ([Evidence Code § 522.](#))

One statutory exception to the prosecution's burden of proof beyond a reasonable doubt in a criminal case is that the defendant has the burden of proving the defense of insanity by a preponderance of the evidence. ([People v. Baker](#), 42 Cal. 2d 550, 564, 268 P.2d 705 (1954).) Placing this burden on the defendant is constitutional. ([People v. Flanagan](#), 275 Cal. App. 2d 966, 968, 80 Cal. Rptr. 408 (2d Dist. 1969).)

Effective January 1, 1982, the Legislature abrogated the defense of diminished capacity, though evidence of voluntary intoxication or mental disorder is still admissible on the issue of whether the defendant actually formed the required mental intent. (See [Penal Code §§ 22 and 28.](#)) When such evidence is presented, no affirmative defense is being submitted. Unlike the insanity defense, the defendant need not show a diminished state by a preponderance of the evidence. Rather, the defendant need only raise a reasonable doubt of his or her capacity to form the requisite intent to commit the crime or degree of crime charged.

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§ 9:11. Burden of producing evidence

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 90 to 98

West's Key Number Digest, [Criminal Law](#) 🔑 326

Legal Encyclopedias

[C.J.S., Criminal Law §§ 941 to 953](#)

[C.J.S., Evidence §§ 120 to 129](#)

[Evidence Code § 110](#) provides that the burden of producing evidence means “the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.” [Evidence Code § 550](#) allocates the burden of producing evidence. In the usual case, this burden is placed initially on the same party that has the burden of proof on that fact. ([Evidence Code § 550\(b\)](#); [J. Allen Radford Co. v. Superior Court](#), 216 Cal. App. 3d 1418, 1423, 265 Cal. Rptr. 535 (2d Dist. 1989); but see *Van Atta, James and Coleman*, discussed below.) As evidence is introduced, the burden of producing evidence can shift. As to any particular fact, this burden is on the party against whom a finding on that fact would be required in the absence of further evidence. ([Evidence Code § 550\(a\)](#).) When one party has the burden of producing evidence, the opposing party need not produce further evidence until the party with the burden produces sufficient evidence to meet that burden. ([People v. Zavala](#), 147 Cal. App. 3d 429, 440, 195 Cal. Rptr. 527 (2d Dist. 1983).)

The burden of producing evidence can shift though the burden of proof remains unchanged. For example, in *Van Atta v. Scott*, the California Supreme Court discussed the system for pretrial release of criminal defendants without bail, on their own recognizance. It found that the prosecution bears the burden of proof concerning the defendant's likelihood of appearance. In deciding this issue the court will consider evidence in two separate areas: (1) the defendant's ties to the community; and (2) the defendant's appearance record in past hearings. Although the defense is assigned the burden of producing evidence on the first factor and the prosecution on the second, the burden of proof on the ultimate issue remains with the prosecution. ([Van Atta v. Scott](#), 27 Cal. 3d 424, 438–446, 166 Cal. Rptr. 149, 613 P.2d 210 (1980).)

In motions to suppress evidence, the prosecution bears the burden of proof in justifying a warrantless search. (*People v. James*, 19 Cal. 3d 99, 137 Cal. Rptr. 447, 561 P.2d 1135 (1977); see the discussion in § 9:6.) The defense, however, has the burden of producing evidence that the search occurred without a warrant.

If a defendant on probation is charged with a new crime and the probation violation hearing precedes the new trial, a defendant who testifies at the hearing may be confronted with that testimony or evidence derived from it at his or her trial only under the conditions set forth in *People v. Coleman*, 13 Cal. 3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975). *Coleman* provides that the defendant must carry the initial burden of producing evidence that the prior revocation hearing relates to the new criminal charges and that the trial evidence is derived from his or her hearing testimony. If the defendant does so, the prosecution must prove by a preponderance of the evidence that: (1) there is no relationship between the criminal charges and the revocation issues; (2) there is no relationship between the testimony at the revocation hearing and the evidence to be introduced in the criminal trial; or (3) the evidence is admissible for the limited purpose of impeachment or rebuttal. (*People v. Coleman*, 13 Cal. 3d 867, 891, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975).)

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§ 9:12. Effect of presumptions on burdens of producing evidence or proof

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 90 to 98, 85
West's Key Number Digest, [Criminal Law](#) 🔑 326, 305

Legal Encyclopedias

[C.J.S., Criminal Law](#) §§ 41 to 42, 401 to 406, 414, 417, 941 to 971

[C.J.S., Evidence](#) §§ 120 to 129, 131 to 135, 152 to 154, 156, 167

When the statutory or decisional law sets forth a rebuttable presumption, the court may have to determine if it affects the burden of proof or only the burden of producing evidence. The difference can be significant. For example, if the presumption affects only the burden of producing evidence, it can be rebutted by evidence showing that a fact contrary to the one presumed is equally probable. A presumption affecting the burden of proof requires more persuasive evidence to be rebutted. ([Estate of Obernolte](#), 91 Cal. App. 3d 124, 129, 153 Cal. Rptr. 798 (2d Dist. 1979).)

[Evidence Code](#) §§ 603, 604, 605, and 630, discussed in Chapter 10, provide guidelines for determining the effect of the presumption. Generally speaking, a presumption affecting the burden of proof is designed to implement some policy objective. A presumption affecting the burden of producing evidence is designed to implement no public policy other than to facilitate the determination of the particular action in which it is applied.

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§ 10:1. Defining a “presumption”—Assumption of fact

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 53 to 89

West's Key Number Digest, [Criminal Law](#) 🔑 305

Legal Encyclopedias

[C.J.S., Common Law § 26](#)

[C.J.S., Conflict of Laws § 3](#)

[C.J.S., Criminal Law §§ 41 to 42, 401 to 406, 414, 417, 954 to 971](#)

[C.J.S., Evidence §§ 2, 130 to 196, 1341](#)

“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.” ([Evidence Code § 600\(a\)](#).) In [Marvin v. Adams](#), 224 Cal. App. 3d 956, 961, 274 Cal. Rptr. 308 (4th Dist. 1990), plaintiff sued for fraud on the basis that, in an agreement to exchange real property, defendant had misrepresented the acreage of certain property. Plaintiff presented no evidence that the defendant knew of the falsity of the representation, but in response to a motion for nonsuit plaintiff relied on the presumption that when misrepresentations are made by a landowner of the size of his or her property, knowledge of the falsity is presumed. Finding that a presumption is not evidence, the Court of Appeal upheld the nonsuit granted. ([Marvin v. Adams](#), 224 Cal. App. 3d 956, 961, 274 Cal. Rptr. 308 (4th Dist. 1990).)

Warning

Unlike an inference, a presumption is not always derived logically from the evidence. (Inferences are discussed in [§ 1:43](#).)

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§ 10:2. Defining a “presumption”—Three different types of presumptions

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West's Key Number Digest, [Evidence](#) 🔑 53 to 89

West's Key Number Digest, [Criminal Law](#) 🔑 305

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[C.J.S., Common Law § 26](#)

[C.J.S., Conflict of Laws § 3](#)

[C.J.S., Criminal Law §§ 41 to 42, 401 to 406, 414, 417, 954 to 971](#)

[C.J.S., Evidence §§ 2, 130 to 196, 1341](#)

The Evidence Code recognizes three different types of presumptions: conclusive presumptions, rebuttable presumptions-proof, and rebuttable presumptions-production.

Conclusive presumptions require the trier of fact to find the existence of the presumed fact regardless of the strength of the opposing evidence. ([Evidence Code § 601](#), Comment.) Several conclusive presumptions are set forth in [Evidence Code §§ 620 to 624](#) and discussed in §§ [10:8](#) to [10:10](#).

Rebuttable presumptions, unlike conclusive presumptions, can be overcome by the evidence. The code distinguishes between two types of rebuttable presumptions: a presumption affecting the burden of producing evidence (hereinafter referred to as a “rebuttable presumption-production”) and a presumption affecting the burden of proof (hereinafter referred to as a “rebuttable presumption-proof”). ([Evidence Code § 601](#).)

Certain rebuttable presumptions-production are set forth in [Evidence Code §§ 630 to 647](#) and discussed in §§ [10:11](#) to [10:19](#).

Certain rebuttable presumptions-proof are set forth in [Evidence Code §§ 660 to 669.5](#) and discussed in §§

10:20 to 10:27.

“ ‘Burden of producing evidence’ means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.” ([Evidence Code § 110.](#))

“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. ([Evidence Code § 115.](#))

Whenever a statute provides that a fact or group of facts is prima facie evidence of another fact, it establishes a rebuttable presumption. ([Evidence Code § 602.](#))

Whenever a statute sets forth a presumption, it is important to determine which of the three is provided for, since each has a different effect. The “strongest” presumption is the conclusive presumption since it cannot be contested. The rebuttable presumption-proof is a stronger presumption than the rebuttable presumption-production. ([People v. Medina, 51 Cal. 3d 870, 885, 274 Cal. Rptr. 849, 799 P.2d 1282 \(1990\).](#))

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§ 10:3. What is effect of “rebuttable presumption–production”?

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West's Key Number Digest, [Evidence](#) 🔑85

West's Key Number Digest, [Criminal Law](#) 🔑324

Legal Encyclopedias

[C.J.S., Criminal Law §§ 954 to 955](#)

[C.J.S., Evidence §§ 131 to 135, 152 to 154, 156, 167](#)

The effect of a rebuttable presumption-production is that it requires “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.” ([Evidence Code § 604](#).) An example is noted in the Comment to [Evidence Code § 604](#): If a party proves that a letter was mailed, the trier of fact must find that the letter was received in the absence of any believable contrary evidence. However, if the opposing party denies receiving the letter, the presumption disappears, and the trier must then weigh the denial of receipt against the inference (no longer a presumption) of receipt arising from proof of mailing and must then decide the issue. (See the discussion in [Bonzer v. City of Huntington Park](#), 20 Cal. App. 4th 1474, 1481, 25 Cal. Rptr. 2d 278 (2d Dist. 1993).)

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§ 10:4. What is effect of “rebuttable presumption–proof”?

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West's Key Number Digest, [Evidence](#) 🔑85

West's Key Number Digest, [Criminal Law](#) 🔑324

Legal Encyclopedias

[C.J.S., Criminal Law §§ 954 to 955](#)

[C.J.S., Evidence §§ 131 to 135, 152 to 154, 156, 167](#)

The effect of a rebuttable presumption-proof is that once the preliminary fact is proved, a finding of the conclusionary fact is required if no contradictory evidence is presented or when the contradictory evidence leaves the mind of the trier of fact in equilibrium. This presumption “impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.” ([Evidence Code § 606](#).)

When a rebuttable presumption affecting the burden of proof comes into play in a jury trial, it is sufficient to require that the issue be presented to the trier of fact. Thus, in *Haycock v. Hughes Aircraft Co.*, plaintiff sued on the basis that he had an implied in fact contract not to be discharged without good cause. [Labor Code § 2922](#) creates a rebuttable presumption-proof of at-will employment. Therefore the trial court's decision, as a matter of law, that the contract required good cause to be shown erroneously removed the issue from the jury. ([Haycock v. Hughes Aircraft Co.](#), 22 Cal. App. 4th 1473, 1488–1495, 28 Cal. Rptr. 2d 248 (2d Dist. 1994).)

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§ 10:5. Court determination of the type of rebuttable presumption

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑 53 to 89

West's Key Number Digest, [Criminal Law](#) 🔑 305

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[C.J.S., Common Law § 26](#)

[C.J.S., Conflict of Laws § 3](#)

[C.J.S., Criminal Law §§ 41 to 42, 401 to 406, 414, 417, 954 to 971](#)

[C.J.S., Evidence §§ 2, 130 to 196, 1341](#)

How does the court determine if the rebuttable presumption affects the burden of proof or only the burden of production? The statute setting forth the rebuttable presumption may clarify either its type or effect. In the [Evidence Code §§ 630 to 669.5](#) do so. Statutes in other codes do the same. (See, e.g., [Civil Code § 1793.2\(e\)](#) (the lemon law).)

If the statute fails to specify, the court must classify the rebuttable presumption as one affecting production or proof depending on its purpose. Thus, if the presumption is one established to implement no public policy other than to facilitate the determination of the particular case in which it is applied, it is a rebuttable presumption-production. ([Evidence Code § 603.](#)) If, however, it is one established to implement a public policy other than to facilitate the determination of the particular action in which it is applied, it is a rebuttable presumption-proof. Examples of such public policies include the policy in favor of establishment of a parent-child relationship, the validity of marriage, the stability of title to property, and the security of those who entrust themselves or their property to the administration of others. ([Evidence Code § 605.](#)) Thus, in [Rancho Santa Fe Pharmacy, Inc. v. Seyfert](#), 219 Cal. App. 3d 875, 883, 268 Cal. Rptr. 505 (4th Dist. 1990), in order to determine the effect of the presumption of consideration in [Civil Code § 1614](#), the court had to decide if it was designed to imple-

ment a public policy or only to facilitate the determination of particular cases. It found that the latter was true. See also *Hewitt v. Meaney*, which held that the presumption of an easement implements a public policy and is, therefore, a rebuttable presumption-proof. (*Hewitt v. Meaney*, 181 Cal. App. 3d 361, 366–367, 226 Cal. Rptr. 349 (6th Dist. 1986).) In *Zipton v. Workers' Comp. Appeals Bd.*, the court held that the presumptions of industrial causation of injury found in the Labor Code serve a public policy purpose and, therefore, are to be implemented by shifting the burden of proof. (*Zipton v. Workers' Comp. Appeals Bd.*, 218 Cal. App. 3d 980, 987–988, 267 Cal. Rptr. 431 (1st Dist. 1990).) In *People v. Dubon*, 90 Cal. App. 4th 944, 952–953, 108 Cal. Rptr. 2d 914 (2d Dist. 2001), the court held that Penal Code § 1016.5, which provides relief for certain criminal defendants who plead guilty without an adequate advisement of the immigration consequences, creates a rebuttable presumption-proof that, if the record is silent, the defendant was not properly advised. The court, in *Gee v. Workers' Compensation Appeals Bd.*, held that the treating physician's presumption of correctness, in the Workers' Compensation field (Labor Code § 4062.9), implements the public policy of reducing medical-legal costs and expediting evaluations and, so, affects the burden of proof. (*Gee v. Workers' Compensation Appeals Bd.*, 96 Cal. App. 4th 1418, 1426, 118 Cal. Rptr. 2d 105 (5th Dist. 2002).)

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§ 10:6. Presumptions in criminal matters—Mandatory presumptions

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 305

Legal Encyclopedias

[C.J.S., Criminal Law §§ 40, 305, 695 to 709](#)

[Evidence Code § 607](#) provides that in a criminal case proof of one fact can establish another that is essential to the defendant's guilt if certain conditions are met. Despite this provision, these so-called mandatory presumptions, which lighten the prosecution burden or shift it to the defendant, are unconstitutional in most situations. This rule applies in mentally disordered offender cases, as well as criminal case. ([People v. Burroughs](#), 131 Cal. App. 4th 1401, 1405, 32 Cal. Rptr. 3d 729 (2d Dist. 2005).) A mandatory presumption is one that tells the trier of fact that it must find the conclusionary fact upon proof of the primary fact, unless the defendant introduces evidence to rebut the presumed connection between the facts.

In *People v. Roder*, discussed in [§ 10:7](#), the California Supreme Court held that the prosecution may not rest its case on a mandatory presumption unless “the basic fact proved *compels* the inference of guilt beyond a reasonable doubt.” ([People v. Roder](#), 33 Cal. 3d 491, 498, 189 Cal. Rptr. 501, 658 P.2d 1302 (1983); accord: [People v. McCall](#), 32 Cal. 4th 175, 183, 8 Cal. Rptr. 3d 337, 82 P.3d 351 (2004), cert. denied, 542 U.S. 923, 124 S. Ct. 2878, 159 L. Ed. 2d 782 (2004); [People v. Williams](#), 130 Cal. App. 4th 1440, 1444–1445, 30 Cal. Rptr. 3d 909 (3d Dist. 2005).) In *People v. Reyes Martinez*, the trial court instructed the jury in a kidnapping case that the victim must be moved a substantial distance and that movement of 500 feet or more is sufficiently substantial to sustain a kidnapping conviction. The Court of Appeal found that this was a mandatory presumption and reversed the conviction. ([People v. Reyes Martinez](#), 14 Cal. App. 4th 1412, 1418–1419, 18 Cal. Rptr. 2d 300 (2d Dist. 1993).)

However, a court must distinguish between an improper mandatory presumption and an appropriate definition of substantive law. Thus, in [People v. McCall](#), 32 Cal. 4th 175, 8 Cal. Rptr. 3d 337, 82 P.3d 351 (2004), cert. denied, 542 U.S. 923, 124 S. Ct. 2878, 159 L. Ed. 2d 782 (2004), the defense argued that a mandatory pre-

sumption was created by [Health and Safety Code § 11383](#). [Subdivision \(c\)\(2\) of § 11383](#) makes possession of hydriodic acid with the intent to manufacture methamphetamine a felony. Subdivision (f) provides that “[f]or purposes of this section possession of specified chemicals with the intent to manufacture methamphetamine shall be deemed to be the possession of hydriodic acid.” The Supreme Court concluded that subdivision (f) was not phrased as a mandatory presumption. It held that use of the phrase “shall be deemed” created a rule of substantive law and that possession of the specified chemicals was the *legal equivalent* of possessing hydriodic acid. (*McCall*, 32 Cal. 4th at 188; *People v. Laughlin*, 137 Cal. App. 4th 1020, 40 Cal. Rptr. 3d 737 (5th Dist. 2006) [[Vehicle Code section 2800.2](#), subdivision (b) does not contain a mandatory presumption, but a rule of substantive law.].)

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§ 10:7. Presumptions in criminal matters—Permissive inferences

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#) 🔑 305

Legal Encyclopedias

[C.J.S., Criminal Law §§ 41 to 42, 401 to 406, 414, 417, 954 to 971](#)

People v. Roder approved converting a mandatory presumption to a permissive inference. The jury could be told by the judge that if it believed that the primary facts were true beyond a reasonable doubt, it could, but was not required to, infer that the conclusionary fact existed. ([People v. Roder](#), 33 Cal. 3d 491, 506–507, 189 Cal. Rptr. 501, 658 P.2d 1302 (1983).) *Roder* disallowed the presumption of guilty knowledge that property is stolen attributed to secondhand dealers by [Penal Code § 496](#).

Since *Roder*, no California decision has upheld the validity of any mandatory presumption in a criminal case. In *People v. Milham*, the court invalidated the mandatory presumption in driving-under-the-influence cases that a certain blood alcohol test result meant that the defendant was in fact under the influence. ([People v. Milham](#), 159 Cal. App. 3d 487, 505, 205 Cal. Rptr. 688 (2d Dist. 1984).) A permissive inference replaced it. In *In re Feiock*, the court reviewed a finding of contempt for failure to pay child support. The court rejected the mandatory presumption that contempt exists whenever a valid court order is violated, because such a presumption eliminated the prosecution's burden to establish ability to pay. ([In re Feiock](#), 180 Cal. App. 3d 649, 653–655, 225 Cal. Rptr. 748 (4th Dist. 1986), judgment vacated, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988).) In a criminal contempt proceeding, the citee must have notice of the order allegedly violated. If the citee was represented by counsel, who was present when the order was made, and, thereafter, counsel was served with a copy of the order, knowledge of it may be imputed to the client. This imputation of notice of an attorney to an alleged contemnor in a criminal case may be utilized as a permissive inference, but not as a mandatory presumption. ([Matter of Ivey](#), 85 Cal. App. 4th 793, 804–805, 102 Cal. Rptr. 2d 447 (2d Dist. 2000).) *People v. Anderson*, upheld [CALJIC No. 2.15](#), conscious possession of stolen property, because it involves a permissive inference, not a mandatory presumption. ([People v. Anderson](#), 210 Cal. App. 3d 414, 425–432, 258 Cal. Rptr. 482 (4th Dist.

1989).)

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§ 10:8. Conclusive presumptions—Facts in written instrument

West's Key Number Digest

West's Key Number Digest, [Contracts](#) 🔑 175(1)

West's Key Number Digest, [Evidence](#) 🔑 383

Legal Encyclopedias

[C.J.S., Contracts §§ 701, 709](#)

[C.J.S., Evidence §§ 816 to 817, 1035 to 1052](#)

[C.J.S., Patents § 179](#)

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, except as to a recital of consideration. ([Evidence Code § 622](#).) In *Plaza Freeway Limited Partnership v. First Mountain Bank*, the parties were successors in interest to the original landlord and tenant of commercial real property, who were unable to determine the termination date of the ground lease. At the time plaintiff purchased the property, defendant signed and delivered an estoppel certificate, which set forth a specific lease termination date. The trial court found the date on the certificate to be incorrect and decided on a different date. On appeal the court reversed, finding the estoppel certificate was a “written instrument” and [§ 622](#) required that the facts set forth in it were conclusively presumed to be true. ([Plaza Freeway Ltd. Partnership v. First Mountain Bank](#), 81 Cal. App. 4th 616, 96 Cal. Rptr. 2d 865 (4th Dist. 2000).) In *Stoneridge Parkway Partners, L.L.C. v. M.W. Housing Partners III, L.P.*, 153 Cal.App.4th 1373 (2007) the court held that the factual matter asserted in certain paragraphs went to the issue of consideration and refused to apply the presumption contained in [section 622](#).

[Section 622](#) does not apply to recitals in an adhesion contract. ([Bruni v. Didion](#), 160 Cal.App.4th 1272, 1291 (2008); see [City of Santa Cruz v. Pacific Gas & Electric Co.](#), 82 Cal.App.4th 1167, 1176–1177, 99 Cal.Rptr.2d 198 (2000).) In addition, this section does not preclude a claim of fraud or other grounds for rescission. ([Miller v. Criswell](#), 54 Cal.App.2d 524, 527–528, 129 P.2d 450 (1942).)

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§ 10:9. Conclusive presumptions—Estoppel by own statement or conduct

West's Key Number Digest

West's Key Number Digest, [Estoppel](#)  [52](#) to [58](#), [97](#) to [106](#)

Legal Encyclopedias

[C.J.S., Estoppel and Waiver §§ 2](#) to [4](#), [58](#) to [64](#), [66](#) to [81](#), [83](#) to [88](#), [120](#), [153](#) to [167](#)

Whenever a party has, by that party's own statement or conduct, intentionally and deliberately led another to believe a particular thing to be true and led the other to act on such belief, that party is not, in any litigation arising out of such statement or conduct, permitted to contradict it. ([Evidence Code § 623](#).) The doctrine of equitable estoppel has four elements:

- The party to be estopped must be apprised of the facts;
- The party must intend that his or her conduct shall be acted upon, or must so act that a party asserting the estoppel had a right to believe it was so intended;
- The other party must be ignorant of the true state of facts; and
- The party must rely upon the conduct to his or her injury. ([Guardianship of Ethan S.](#), 221 Cal. App. 3d 1403, 1415, 271 Cal. Rptr. 121 (1st Dist. 1990) (applying the doctrine of estoppel to prevent a man from claiming that a child was his natural son).)

In *Pugh v. State Farm Ins. Companies*, the court confirmed that an estoppel may be applied against a party only if justified by the party's own acts, not the acts of one falsely purporting to represent the party. ([Pugh v. State Farm Ins. Companies](#), 227 Cal. App. 3d 816, 823, 278 Cal. Rptr. 149 (6th Dist. 1991).)

Mere silence will not create an estoppel unless a party was under a duty to speak and/or circumstances required it. Compare *Sanchez v. Superior Court*, which held that a defendant's attorney is not required to inform plaintiffs that he had not been served in a companion matter, with *Tresway Aero, Inc. v. Superior Court*, which

held that the defendant is not permitted to fail to disclose a defect in a summons when she asks for an extension of time to answer, which takes the case beyond the three-year statutory period. (*Sanchez v. Superior Court*, 203 Cal. App. 3d 1391, 1400, 250 Cal. Rptr. 787 (6th Dist. 1988); *Tresway Aero, Inc. v. Superior Court*, 5 Cal. 3d 431, 96 Cal. Rptr. 571, 487 P.2d 1211 (1971).)

An estoppel may be asserted against the government. Thus, in *City of Sacramento v. Drew*, the city was precluded from contesting plaintiff's right to attorneys' fees on the basis that the result had been "inevitable." "The claim rings hollow when advanced by an opposing party who, having lost, claims that its failure was inevitable." (*City of Sacramento v. Drew*, 207 Cal. App. 3d 1287, 1300, 255 Cal. Rptr. 704 (3d Dist. 1989).) However, equitable estoppel is inapplicable to representations of matters of law to unrepresented parties and the government cannot be bound by the incorrect legal advice of its agents. Thus in *Park Area Neighbors v. Town of Fairfax*, the appellants were not excused from properly exhausting administrative remedies because of incorrect advice given by respondent's agents. (*Park Area Neighbors v. Town of Fairfax*, 29 Cal. App. 4th 1442, 35 Cal. Rptr. 2d 334 (1st Dist. 1994).) In addition, estoppel must not be applied against the government if doing so "would effectively nullify a strong rule of policy adopted for the benefit of the public." (*Feduniak v. California Coastal Com'n*, 148 Cal. App. 4th 1346, 1359, 1372–1380, 56 Cal. Rptr. 3d 591 (6th Dist. 2007).)

The burden of proving each element of an estoppel rests on the party seeking its benefit. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, 40 Cal. 3d 5, 16, 219 Cal. Rptr. 13, 706 P.2d 1146 (1985).)

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§ 10:10. Conclusive presumptions—Title of landlord

West's Key Number Digest

West's Key Number Digest, [Landlord and Tenant](#)  61 to 64

Legal Encyclopedias

[C.J.S., Landlord and Tenant §§ 589 to 614, 619 to 622, 624 to 638](#)

“A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.” ([Evidence Code § 624](#).) In cases where the landlord sues the tenant for rent, this rule prevents the tenant from defending against the person who placed the tenant in possession on the grounds that such person was without title. It is based on public policy. ([Hancock Oil Co. of Cal. v. Independent Distributing Co., 24 Cal. 2d 497, 506–507, 150 P.2d 463 \(1944\)](#).) The rule does not, however, prevent the tenant from interpleading the landlord and another in privity with the landlord, each of whom claims rent from the tenant for the same premises. ([Hancock Oil Co. of Cal. v. Independent Distributing Co., 24 Cal. 2d 497, 507–510, 150 P.2d 463 \(1944\)](#).)

This estoppel should not be applied where the tenant contends that fraud or misrepresentations were used to induce the tenant to enter into the lease. ([Sands v. Eagle Oil & Refining Co., 83 Cal. App. 2d 312, 321, 188 P.2d 782 \(1st Dist. 1948\)](#).)

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§ 10:11. Rebuttable presumptions affecting burden of producing evidence—Debtor–creditor relationships

West's Key Number Digest

West's Key Number Digest, [Payment](#) 🔑64

West's Key Number Digest, [Bills and Notes](#) 🔑490

Legal Encyclopedias

C.J.S., Bills and Notes; Letters of Credit §§ 120, 284 to 291, 294 to 297, 302

[C.J.S., Payment § 72](#)

“Money delivered by one to another is presumed to have been due to the latter.” ([Evidence Code § 631.](#))

“A thing delivered by one to another is presumed to have belonged to the latter.” ([Evidence Code § 632.](#))

An obligation delivered up to the debtor is presumed paid. ([Evidence Code § 633.](#))

A person in possession of an order on himself or herself for the payment of money or delivery of a thing is presumed to have so paid or delivered. ([Evidence Code § 634.](#))

An obligation possessed by the creditor is presumed unpaid. ([Evidence Code §§ 635, 636.](#)) In *Remington Investments, Inc. v. Hamedani*, the court noted that this presumption is based on normal business practices with a promissory note. However, when a document entitled “Promissory Note” is, in fact, a line of credit, the presumption may not apply. “The mere existence of this line of credit agreement does not support a presumption that the full amount of the line was ever advanced.” ([Remington Investments, Inc. v. Hamedani](#), 55 Cal. App. 4th 1033, 1042, 64 Cal. Rptr. 2d 376 (2d Dist. 1997).)

“The payment of earlier rent or installments is presumed from a receipt for later rent or installments.”

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§ 10:12. Rebuttable presumptions affecting burden of producing evidence—Indicia of ownership

West's Key Number Digest

Wests Key Number Digest, [Property](#) 🔑9

Wests Key Number Digest, [Bills and Notes](#) 🔑496(2)

Legal Encyclopedias

C.J.S., Bills and Notes; Letters of Credit §§ 284, 291, 295, 297

[C.J.S., Property §§ 67 to 71](#)

The things which a person possesses are presumed to be owned by that person. ([Evidence Code § 637.](#))

“A person who exercises acts of ownership over property is presumed to be the owner of it.” ([Evidence Code § 638.](#))

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§ 10:13. Rebuttable presumptions affecting burden of producing evidence—Judgment

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑82

West's Key Number Digest, [Judgment](#) 🔑951(1)

Legal Encyclopedias

[C.J.S., Evidence § 158](#)

[C.J.S., Judgments §§ 944 to 945](#)

“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.” ([Evidence Code § 639](#).)

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§ 10:14. Rebuttable presumptions affecting burden of producing evidence—Date of writing

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 70

West's Key Number Digest, [Criminal Law](#) 323

Legal Encyclopedias

[C.J.S., Criminal Law §§ 401 to 406, 414, 417, 957 to 967](#)

[C.J.S., Evidence § 193](#)

“A writing is presumed to have been truly dated.” ([Evidence Code § 640](#).) In *Snelgrove v. Department of Motor Vehicles*, the court relied on this presumption to help establish the foundation for a business record without evidence. ([Snelgrove v. Department of Motor Vehicles](#), 194 Cal. App. 3d 1364, 1375, 240 Cal. Rptr. 281 (1st Dist. 1987).)

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§ 10:15. Rebuttable presumptions affecting burden of producing evidence—Letter correctly addressed

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  71

Legal Encyclopedias

[C.J.S., Evidence §§ 152 to 156](#)

A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. ([Evidence Code § 641](#).) In *Bank of America v. Giant Inland Empire R.V. Center, Inc.*, the county sent the Bank a notice of tax sale, which was returned as undeliverable. It was unclear if county received the returned notice before or after the sale occurred. The presumption contained in [§ 641](#) applied and the county presented no evidence to rebut it. Evidence established that the county would have received back the undelivered notice before the tax sale, if ordinary delays occurred. The trial court's decision to ignore this evidence, because of possible “breakdowns” in the mail delivery system, which could have occurred was erroneous. ([Bank of America v. Giant Inland Empire R.V. Center, Inc.](#), 78 Cal. App. 4th 1267, 1278–1279, 93 Cal. Rptr. 2d 626 (4th Dist. 2000).)

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§ 10:16. Rebuttable presumptions affecting burden of producing evidence—Duty to convey real property

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  69

West's Key Number Digest, [Trusts](#)  372(1)

Legal Encyclopedias

[C.J.S., Evidence §§ 150, 157, 185](#)

[C.J.S., Trusts §§ 736 to 739](#)

A person under a duty to convey real property to another is presumed to have actually done so when such presumption is necessary to perfect title. ([Evidence Code § 642.](#))

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§ 10:17. Rebuttable presumptions affecting burden of producing evidence—Presumptions affecting authenticity of writings

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  70, 372

Legal Encyclopedias

[C.J.S.](#), [Evidence](#) §§ 193, 1010 to 1021

A writing purporting to affect an interest in real or personal property is presumed to be authentic if it:

- Is at least 30 years old;
- Is in such condition as to create no suspicion concerning its authenticity;
- Was kept or found in a place where such writing if authentic would be kept or found; and
- Has been generally acted on as authentic by persons having an interest in the matter. ([Evidence Code § 643.](#)) Note the related hearsay exceptions in [Evidence Code §§ 1330](#) and [1331](#).

“A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.” ([Evidence Code § 644.](#))

A book purporting to contain reports of decided cases is presumed to contain correct reports of such cases. ([Evidence Code § 645.](#))

“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.” ([Evidence Code § 645.1.](#))

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§ 10:18. Rebuttable presumptions affecting burden of producing evidence—Res ipsa loquitur

West's Key Number Digest

West's Key Number Digest, [Negligence](#) 🔑 1610 to 1625

Legal Encyclopedias

[C.J.S., Food § 97](#)

[C.J.S., Negligence §§ 744 to 781](#)

A presumption of negligence, in a personal injury case, arises when the plaintiff proves the three conditions required by the res ipsa loquitur doctrine. This presumption is one affecting the burden of producing evidence. ([Evidence Code § 646\(b\)](#).)

The three conditions that must be proved by plaintiff are:

- It is the kind of injury that ordinarily does not occur in the absence of negligence;
- The injury was caused by an agency or instrumentality in the exclusive control of defendant; and
- The injury was not due to any voluntary action or contribution by plaintiff which was the responsible cause of the injury. ([Brown v. Poway Unified School Dist.](#), 4 Cal. 4th 820, 825–826, 15 Cal. Rptr. 2d 679, 843 P.2d 624 (1993), which concluded that res ipsa will rarely apply in slip-and-fall cases. Compare [Blackwell v. Hurst](#), 46 Cal. App. 4th 939, 945, 54 Cal. Rptr. 2d 209 (2d Dist. 1996), which held that “use of the res ipsa doctrine is especially suited to a medical or dental malpractice setting in which the unwitting and often unconscious or semiconscious patient is at an evidentiary disadvantage because of his or her inability to demonstrate what occurred in the hospital or surgical room setting.”)

For a discussion of the nondelegable duties of a surgeon present in the operating room with the patient at all pertinent times, see [Fields v. Yusuf](#), 144 Cal. App. 4th 1381, 1389–1392, 51 Cal. Rptr. 3d 277 (2d Dist. 2006).

Since the res ipsa presumption is one affecting the burden of production, if it arises the jury must find that the defendant's negligence caused the injury unless the defendant produces evidence sufficient to support a contrary finding. If such evidence is introduced, the presumption disappears. However, proof of the three conditions discussed above may support an inference that the defendant's negligence caused the injury, which can be weighed against contrary evidence. ([Evidence Code § 646](#), Comment.)

Whenever the defendant has introduced sufficient evidence to counter the presumption, the court may, and upon request shall, instruct the jury as follows:

- If the facts giving rise to a res ipsa loquitur presumption are established, the jury may draw the inference from such facts that the defendant's negligence was a proximate cause of the occurrence; and
- The jury shall not find that the defendant's negligent conduct was a proximate cause of the occurrence unless it believes, after weighing all the evidence in the case and drawing such inferences therefrom as are warranted, that it is more probable than not that the occurrence was caused by the defendant's negligence. ([Evidence Code § 646\(c\)](#).)

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§ 10:19. Rebuttable presumptions affecting burden of producing evidence—Return of process server

West's Key Number Digest

West's Key Number Digest, [Process](#)  145

Legal Encyclopedias

[C.J.S.](#), [Process](#) §§ 82 to 83, 87

The return of a process server registered pursuant to [Business and Professions Code §§ 22350 et seq.](#) establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return. ([Evidence Code § 647.](#))

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§ 10:20. Rebuttable presumptions affecting burden of proof—Owner of legal title to property

West's Key Number Digest

West's Key Number Digest, [Property](#) 🔑9

West's Key Number Digest, [Quieting Title](#) 🔑44(1)

West's Key Number Digest, [Husband and Wife](#) 🔑262.1

Legal Encyclopedias

[C.J.S., Husband and Wife §§ 297 to 300](#)

[C.J.S., Property §§ 67 to 71](#)

[C.J.S., Quieting Title §§ 75 to 76](#)

“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.” ([Evidence Code § 662.](#)) (See the discussion in [§ 9:4.](#))

Even in marital actions, where there is a claimed dichotomy between the legal and beneficial interests to property, this presumption applies. ([In re Marriage of Weaver](#), 224 Cal. App. 3d 478, 487, 273 Cal. Rptr. 696 (2d Dist. 1990).) Even when the parties have cohabited for many years, only clear and convincing evidence that one of them has entrusted property to the other or that the parties have agreed to buy property together can overcome the presumption of title solely in the name of one. ([Toney v. Nolder](#), 173 Cal. App. 3d 791, 796, 219 Cal. Rptr. 497 (1st Dist. 1985).) *Toney* is not limited to real property. ([Maglica v. Maglica](#), 66 Cal. App. 4th 442, 449, 78 Cal. Rptr. 2d 101 (4th Dist. 1998).)

This presumption applies only when legal title is clear and the only dispute relates to beneficial title. If legal title is also challenged, the presumption does not apply and the claimant must prove the case by a preponderance of the evidence. ([Murray v. Murray](#), 26 Cal. App. 4th 1062, 1066–1068, 31 Cal. Rptr. 2d 855 (5th Dist. 1994).)

When a married couple enters into a real property transfer during the marriage, each person has the same standard of disclosure toward the other applicable to any confidential, fiduciary relationship. ([Family Code § 721](#); [In re Marriage of Delaney](#), 111 Cal. App. 4th 991, 996, 4 Cal. Rptr. 3d 378 (1st Dist. 2003).) “As a consequence, when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence.” ([DeLaney](#), 111 Cal. App. 4th at 996.) In *DeLaney*, husband had transferred his separate property house to husband and wife as joint tenants. This created a conflict between the presumption in [Evidence Code § 662](#), favoring stability of title, and the presumption of undue influence, contained in [Family Code § 721](#), where one spouse obtains an advantage over another in an interspousal property transaction. That conflict should be resolved in favor of the Family Code presumption of undue influence. ([DeLaney](#), 111 Cal. App. 4th at 998.)

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§ 10:21. Rebuttable presumptions affecting burden of proof—Ceremonial marriage

West's Key Number Digest

West's Key Number Digest, [Marriage](#)  40

Legal Encyclopedias

[C.J.S., Marriage §§ 43, 51, 56](#)

“A ceremonial marriage is presumed to be valid.” ([Evidence Code § 663.](#))
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SIMCAEVID § 10:21

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§ 10:22. Rebuttable presumptions affecting burden of proof—Official duty regularly performed

West's Key Number Digest

West's Key Number Digest, [Evidence](#) 🔑83

West's Key Number Digest, [Criminal Law](#) 🔑322

Legal Encyclopedias

[C.J.S., Criminal Law § 957](#)

[C.J.S., Evidence §§ 151, 159](#)

It is presumed that official duty has been regularly performed, except for an arrest made without a warrant. ([Evidence Code § 664](#); [People v. Morgan](#), 221 Cal. App. 3d Supp. 1, 5, 270 Cal. Rptr. 597 (App. Dep't Super. Ct. 1990).) In *Morgan*, the court held that the prosecution could not rely on the presumption contained in § 664 to shift the burden of proof on the question of whether an officer had performed the preliminary steps necessary to validate a sobriety checkpoint, since the defendant established that his arrest at the checkpoint was without a warrant. ([People v. Morgan](#), 221 Cal. App. 3d Supp. 1, 5, 270 Cal. Rptr. 597 (App. Dep't Super. Ct. 1990).) However, this presumption applies to other functions performed by law enforcement officers. ([Department of California Highway Patrol v. Superior Court](#), 158 Cal.App.4th 726, 740 (2008).) [Under the Vehicle Code, arresting officer may issue a “fix-it” ticket or, upon finding disqualifying circumstances, a regular ticket. Relying on presumption, court may infer from the type of citation whether officer found disqualifying circumstances.]

The purpose of this presumption is that it relieves government officials from having to justify their conduct whenever it is called into question. ([Holcomb v. City of Los Angeles](#), 210 Cal. App. 3d 1560, 1568, 259 Cal. Rptr. 1 (2d Dist. 1989).) Note, however, that this “presumption is misplaced in a case ... where the record affirmatively shows the [governmental agency] failed to satisfy every requirement of its certified regulatory program.” ([Mountain Lion Foundation v. Fish & Game Com.](#), 16 Cal. 4th 105, 132, 65 Cal. Rptr. 2d 580, 939 P.2d 1280 (1997).) In addition, no presumption arises unless a government employee actually has an official duty to perform some act. In *Shea v. Department of Motor Vehicles*, the court refused to permit the government to rely on this presumption to validate a forensic alcohol analysis performed by a trainee. “Since a trainee has no offi-

cial duty to report the test results, his or her results are not entitled to the presumption that official duty was performed.” (*Shea v. Department of Motor Vehicles*, 62 Cal. App. 4th 1057, 1061, 72 Cal. Rptr. 2d 896 (4th Dist. 1998).)

This presumption can be relied on by a party whenever a government official's conduct is called into question, even if the government is not a party to the suit. See *In re Marriage of Patscheck*, where one party was permitted to rely on the statutory presumption to establish that the date of entry of judgment was correct. (*In re Marriage of Patscheck*, 180 Cal. App. 3d 800, 803, 225 Cal. Rptr. 787 (4th Dist. 1986).)

This presumption has frequently been relied on when a party has contended on appeal that the court failed to consider all factors required by law to govern its exercise of discretion, and the record is silent. *People v. Young* held that appellant had the burden of proof to show that the court failed to exercise its discretion in accordance with § 3051 of the Welfare and Institutions Code. (*People v. Young*, 228 Cal. App. 3d 171, 183, 278 Cal. Rptr. 784 (5th Dist. 1991).) In *Younesi v. Lane*, a party contended that the trial judge had failed to order the clerk to provide the notice triggering an appeal period. (*Younesi v. Lane*, 228 Cal. App. 3d 967, 974, 279 Cal. Rptr. 89 (2d Dist. 1991).) The court held that the presumption of regular performance placed the burden of proof on that party and ruled against it. This same presumption applied to the actions of the court clerk as well. In *People v. Wader*, the court relied on the presumption to conclude that a court reporter had properly read back testimony requested by the jury during its deliberations, even though the record was unclear as to whether this had actually occurred. (*People v. Wader*, 5 Cal. 4th 610, 661, 20 Cal. Rptr. 2d 788, 854 P.2d 80 (1993).) In *People v. Sangani*, the court relied on the presumption to reject the defendant's contention that the trial judge had relied on the incorrect legal standard in convicting him of certain felonies. (*People v. Sangani*, 22 Cal. App. 4th 1120, 1138, 28 Cal. Rptr. 2d 158 (1st Dist. 1994).) (But see *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, 15 Cal. 4th 51, 62, 61 Cal. Rptr. 2d 166, 931 P.2d 344 (1997) (general presumption not applicable under Code of Civil Procedure § 664.5 to establish notice of entry of judgment was mailed).)

However, the presumption that the court has followed established law does not apply “where the law in question was unclear or uncertain when the lower court acted.” (*In re Marriage of Jovel*, 49 Cal. App. 4th 575, 590, 56 Cal. Rptr. 2d 740 (6th Dist. 1996).) In *Jovel*, the trial court had ordered certain attorney's fees to be paid by a party, pursuant to Family Code § 2030(d), finding that the fees were incurred “to maintain or defend the action on the issues relating to that party.” The trial court did not further clarify the basis of its fee award and the appellate court found that the key phrase “issues relating to” in the statute had not been the subject of any earlier statutory interpretation. Thus no presumption under Evidence Code § 664 was proper.

This presumption has been relied on to reject a request for a peremptory writ sought by a party to ensure that a county that corrected an earlier impropriety would not rescind the corrected ordinance and return to its improper course of conduct. (*Cooke v. Superior Court*, 213 Cal. App. 3d 401, 417, 261 Cal. Rptr. 706 (3d Dist. 1989).) “We refuse to assume bad faith on the part of the County Instead, we presume official duty will be regularly performed and the County will comply with the law.” (*Cooke v. Superior Court*, 213 Cal. App. 3d 401, 418, 261 Cal. Rptr. 706 (3d Dist. 1989).)

In a license revocation proceeding, the Department of Motor Vehicles can rely on this presumption to satisfy its burden of proof on the reliability of chemical test results offered to prove the licensee's blood-alcohol concentration. The burden then shifts to the licensee to rebut the presumption of reliability. (*Davenport v. Depart-*

ment of Motor Vehicles, 6 Cal. App. 4th 133, 137, 7 Cal. Rptr. 2d 818 (2d Dist. 1992), which also stated that this could not be done in a criminal proceeding, at 144.) In *Baker v. Gourley*, the presumption was relied on to establish that proper procedures under Title 17 were followed after the blood specimen was collected. (*Baker v. Gourley*, 81 Cal. App. 4th 1167, 1173–1174, 97 Cal. Rptr. 2d 451 (4th Dist. 2000).) In *Petrica v. Dept. of Motor Vehicles*, the presumption was relied on to establish that the initial collection procedures were proper. (*Petrica v. Department of Motor Vehicles*, 89 Cal. App. 4th 1341, 1347, 107 Cal. Rptr. 2d 909 (1st Dist. 2001).) However this presumption may not be relied on to establish that the chemical test was performed within three hours of the driving. (*Yordamlis v. Zolin*, 11 Cal. App. 4th 655, 661, 14 Cal. Rptr. 2d 225 (1st Dist. 1992).)

When a criminal defendant seeks a dismissal on the basis of discriminatory prosecution, this presumption places the burden of proof on the defendant. (*People v. Smith*, 155 Cal. App. 3d 1103, 1129, 203 Cal. Rptr. 196 (4th Dist. 1984).)

Prosecutors, in attempting to establish that a defendant served a prior conviction, may introduce evidence of: (1) an abstract of conviction showing a prison sentence; and (2) Department of Corrections records showing that the defendant was, in fact, received. In *People v. Tenner*, the California Supreme Court held that the prosecution may then rely on the presumption in § 664 to prove that the sentence was actually served. (*People v. Tenner*, 6 Cal. 4th 559, 24 Cal. Rptr. 2d 840, 862 P.2d 840 (1993).) Proof that a prior prison term was, in fact, served, was greatly simplified by the enactment of the Criminal Convictions Record Act, effective January 1, 1997. A properly certified copy of a record of the criminal conviction is now admissible, among other things, “to prove the ... service of a prison term ... recorded by the record.” Thus there is no longer any need to present a record from the Department of Corrections showing that the defendant was received and then rely on the presumption contained in § 664. Note that it would also appear to be permissible for the prosecution to rely on a “prison packet” pursuant to Penal Code § 969b to prove the service of the prison term.

On occasion, this presumption may clash with the rule that the absence in a business record of a record of an asserted act can be offered to prove the nonoccurrence of the act. (*Evid. Code sect. 1272*.) The “presumption that official duty has been regularly performed cannot serve to supplement an official record seemingly complete on its face and which indicates the questioned duty has not been performed” (*Small v. Superior Court*, 148 Cal. App. 4th 222, 237, 55 Cal. Rptr. 3d 410 (4th Dist. 2007).)

If the constitutional validity of a prior conviction is challenged, the burden of proof is on the defendant. (*Curl v. Superior Court*, 51 Cal. 3d 1292, 1303, 276 Cal. Rptr. 49, 801 P.2d 292 (1990).)

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Chapter
10. Presumptions

§ 10:23. Rebuttable presumptions affecting burden of proof—Intend ordinary consequences of voluntary act

West's Key Number Digest

West's Key Number Digest, [Evidence](#)  68, 64

West's Key Number Digest, [Criminal Law](#)  312

Legal Encyclopedias

[C.J.S., Criminal Law §§ 41 to 42](#)

[C.J.S., Evidence § 181](#)

A person is presumed to intend the ordinary consequences of his or her voluntary act. In addition, an unlawful intent is presumed from the doing of an unlawful act. These presumptions are inapplicable in a criminal action to establish the specific intent of the defendant where it is an element of the crime charged. ([Evidence Code §§ 665 and 668.](#))

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Chapter
10. Presumptions

§ 10:24. Rebuttable presumptions affecting burden of proof—Court acting in lawful capacity

West's Key Number Digest

West's Key Number Digest, [Courts](#)  34

West's Key Number Digest, [Evidence](#)  82

West's Key Number Digest, [Criminal Law](#)  321

Legal Encyclopedias

[C.J.S., Courts §§ 74 to 77](#)

[C.J.S., Criminal Law § 957](#)

[C.J.S., Evidence § 158](#)

Any court or any judge, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction when the act of the judge or court is under collateral attack. ([Evidence Code § 666.](#))

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Chapter
10. Presumptions

§ 10:25. Rebuttable presumptions affecting burden of proof—Person not heard from for five years

West's Key Number Digest

West's Key Number Digest, [Death](#) 2

Legal Encyclopedias

[C.J.S.](#), [Death](#) §§ 8 to 14

“A person not heard from in five years is presumed to be dead.” ([Evidence Code § 667](#).) This presumption is closely related to [Probate Code § 12401](#), which provides that “a person who has not been seen or heard from for a continuous period of five years by those who are likely to have seen or heard from that person, and whose absence is not satisfactorily explained, after diligent search or inquiry, is presumed to be dead.” ([In re Starr](#), 104 Cal. App. 4th 487, 128 Cal. Rptr. 2d 282 (1st Dist. 2002).) In *Starr*, the court held that the proponent of this presumption rarely succeeds when the person missing is a fugitive from justice. ([Starr](#), 104 Cal. App. 4th at 496.)

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Chapter
10. Presumptions**§ 10:26. Rebuttable presumptions affecting burden of proof—Failure to exercise due care: Violation of statute, ordinance, or regulation****West's Key Number Digest**West's Key Number Digest, [Negligence](#) 🔑 [1591](#), [259](#), [409](#)**Legal Encyclopedias**[C.J.S., Negligence §§ 134 to 147](#), [190](#), [220](#), [713](#)

Failure to exercise due care is presumed if a person's violation of a statute, ordinance, or regulation of a public agency proximately caused death or injury to person or property. The death or injury must result from an occurrence which the law was designed to prevent. The victim must be one of a class of persons for whose protection the law was adopted. ([Evidence Code § 669\(a\)](#).) In *California Service Station and Auto. Repair Assn. v. American Home Assurance Co.*, the court noted the analytical distinction between creation of a duty of care and a standard of care. [Evidence Code § 669](#) assumes the existence of a duty of care and then sets the standard of conduct. Independent of this statute, the plaintiff must have the right to pursue a negligence action; the statute is relied on only to establish part of that cause of action. ([California Service Station and Auto. Repair Ass'n v. American Home Assur. Co.](#), 62 Cal. App. 4th 1166, 1177–1181, 73 Cal. Rptr. 2d 182 (1st Dist. 1998).) “The presumption of negligence created by [Evidence Code § 669](#) concerns the *standard* of care, rather than the *duty* of care.” ([Rosales v. City of Los Angeles](#), 82 Cal. App. 4th 419, 430, 98 Cal. Rptr. 2d 144 (2d Dist. 2000).) (Emphasis in original.)

[Evidence Code § 669](#) limits use of the negligence per se rule to those injuries resulting from “an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent.” In *Lua v. Southern Pacific Transportation Co.*, plaintiff sued for injuries suffered when he climbed onto a train that was stopped, blocking a public grade crossing. Plaintiff relied on a regulation limiting the time during which a train may block a grade crossing, but the court found that such regulations are “ ‘intended to prevent delays of traffic, and so may give rise to an action for damages resulting from such delay, but afford no protection against personal injuries caused by the position of the train.’ ” ([Lua v. Southern Pacific Transportation Co.](#), 6 Cal. App. 4th 1897, 1903, 9 Cal.

Rptr. 2d 116 (2d Dist. 1992); see also *Morris v. Horton*, 22 Cal. App. 4th 968, 972, 27 Cal. Rptr. 2d 585 (6th Dist. 1994).)

Section 669 also limits use of the negligence per se rule to those in “the class of persons for whose protection the statute, ordinance, or regulation was adopted.” For example, in *Randi W. v. Muroc Joint Unified School Dist.*, a molested child brought an action against various persons who, allegedly, had known and failed to reveal that a school vice principal had a history of sexual molestations. The cause of action for negligence per se was based on the theory that one or more defendants were mandated reporters under the Child Abuse and Neglect Reporting Act. A demurrer to this count was sustained on the basis that the Reporting Act was intended to protect only those children in the custodial care of the person charged with reporting the abuse. Other children subsequently molested by the same individual are not in the protected group. (*Randi W. v. Muroc Joint Unified School Dist.*, 14 Cal. 4th 1066, 1086–1087, 60 Cal. Rptr. 2d 263, 929 P.2d 582 (1997).)

Government Code § 815.6 applies the negligence per se doctrine to public entities. (*Hoff v. Vacaville Unified School Dist.*, 19 Cal. 4th 925, 939, 80 Cal. Rptr. 2d 811, 968 P.2d 522 (1998).) In *Alejo v. City of Alhambra*, the court ruled that a demurrer was improperly sustained to a complaint alleging a police officer negligently failed to investigate or report a reasonable suspicion of child abuse as required by the Child Abuse and Neglect Reporting Act. The court found the complaint stated a cause of action under the negligence per se doctrine despite the general rule that “one has no duty to come to the aid of another ... [T]here is no duty owed by police to individual members of the general public.” (*Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180, 1185, 89 Cal. Rptr. 2d 768 (2d Dist. 1999).)

What is the effect of the negligence per se rule on the doctrine of primary assumption of the risk in recreational activities, adopted in *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992) and *Ford v. Gouin*, 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724 (1992)? *Knight* held that one participant in a recreational sport may sue another only for reckless conduct or intentional infliction of injury, and not for merely negligent acts. (*Knight v. Jewett*, 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992).) Even when a plaintiff falls within the class of persons protected by a statute, § 669(a) does not assist in overcoming the *Knight* rule. “Evidence Code § 669(a) ‘does not establish tort liability. Rather it merely codifie[s] the rule that a presumption of *negligence* arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute.’ ” (original emphasis) (*Distefano v. Forester*, 85 Cal. App. 4th 1249, 1272, 102 Cal. Rptr. 2d 813 (4th Dist. 2001), quoting *Cheong v. Antablin*, 16 Cal. 4th 1063, 1078, 68 Cal. Rptr. 2d 859, 946 P.2d 817 (1997) (concurring op. of Chin, J.).)

The Comment to Evidence Code § 669 clarifies certain aspects of the rule basing due care on a statute, ordinance, or regulation. First, the presumption may be used to establish a plaintiff’s negligence, which contributed to the injury. Second, the presumption is one for simple, not gross negligence. Third, if the presumption is triggered, to overcome it the opponent of the presumption must prove that it is more probable than not that the violation was reasonable and justifiable under the circumstances.

The Comment clarifies that the questions of whether the statute was designed to prevent the type of occurrence that caused the injury and whether the plaintiff was in the protected class are questions of law. (See *Self-Insurers’ Security Fund v. ESIS, Inc.*, 204 Cal. App. 3d 1148, 1156, 251 Cal. Rptr. 693 (1st Dist. 1988).) Wheth-

er a party has actually violated a law and whether this violation proximately caused the injury are questions of fact. The question of justification, described in [Evidence Code § 669\(b\)](#), is also one of fact

[Evidence Code § 669\(b\)](#), provides that the presumption may be rebutted by showing that the violator acted reasonably under the circumstances or that the violator was a child who acted reasonably in the circumstances as described in [§ 669\(b\)\(2\)](#). This second showing may not be made if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

A rule, policy, manual, or guideline of state or local government setting forth standards of conduct for public employees is not a statute, ordinance, or regulation under [Evidence Code § 669\(a\)](#), unless formally adopted as a statute, ordinance, or regulation. ([Evidence Code § 669.1](#).) This same rule applies to uncodified standards and practices contained in a manual prepared by a federal agency. ([McDaniel v. Sunset Manor Co.](#), 220 Cal. App. 3d 1, 6, 269 Cal. Rptr. 196 (1st Dist. 1990).) Under [§ 669.1](#), a safety manual may not be introduced into evidence to *establish* the standard of care unless it is formally adopted as a statute, or ordinance or pursuant to the state or federal Administrative Procedure Acts. However, if not so adopted, it is still admissible and may be considered as evidence by the trier of fact on the question of negligence. ([Lugtu v. California Highway Patrol](#), 26 Cal. 4th 703, 720–721, 110 Cal. Rptr. 2d 528, 28 P.3d 249 (2001).)

If plaintiff relies on [§ 669](#) to establish a failure of due care, the defendant is not deprived of the assumption of risk defense except in those situations where the plaintiff is in a class of persons unable to protect themselves, such as employees of the defendant. ([King v. Magnolia Homeowners Assn.](#), 205 Cal. App. 3d 1312, 1316–1317, 253 Cal. Rptr. 140 (2d Dist. 1988).)

A federal statute or regulation may be adopted as a standard of care in a negligence action filed in state court. ([Weaver v. Chavez](#), 133 Cal. App. 4th 1350, 1354, 35 Cal. Rptr. 3d 514 (2d Dist. 2005) [applying a regulation adopted pursuant to the Commercial Motor Vehicle Safety Act, requiring that the driver of a commercial vehicle use “extreme caution” and reduce speed when hazardous conditions exist].) In the typical case in this area, the plaintiff has sought to use a federal safety statute to set the standard of care. (See, e.g., [Toole v. Richardson–Merrell Inc.](#), 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1st Dist. 1967).) A plaintiff may not, however, rely on a federal statute regulating an area of the economy and argue that its violation permits a recovery of damages where no negligence is involved. ([Sierra-Bay Fed. Land Bank Assn. v. Superior Court](#), 227 Cal. App. 3d 318, 332–335, 277 Cal. Rptr. 753 (3d Dist. 1991).) In *Sierra–Bay*, plaintiff alleged that the land bank association's decision to lend him money violated the Farm Credit Act of 1971 and that he was entitled to damages resulting from the subsequent foreclosure on his property. The court held that a demurrer to this cause of action should have been granted. ([Sierra-Bay Fed. Land Bank Assn. v. Superior Court](#), 227 Cal. App. 3d 318, 332–335, 277 Cal. Rptr. 753 (3d Dist. 1991).)

A plaintiff-employee may rely on Cal–OSHA provisions, like any other statute or regulation, “to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions.” ([Elsner v. Uveges](#), 34 Cal. 4th 915, 928, 22 Cal. Rptr. 3d 530, 102 P.3d 915 (2004).)

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Chapter
10. Presumptions

§ 10:27. Rebuttable presumptions affecting burden of proof—Growth limitation ordinances

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West's Key Number Digest, [Zoning and Planning](#) 🔑683.

Legal Encyclopedias

[C.J.S., Zoning and Land Planning § 309](#)

Growth limitation ordinances enacted by any city or county are presumed to affect adversely regional housing needs. The city or county that enacted the ordinance has the burden of proof to show that it is necessary to promote public health, safety, and welfare. ([Evidence Code § 669.5](#).) [Evidence Code § 669.5](#) also applies to growth control measures passed as initiatives by the electorate. ([Building Industry Assn. v. City of Camarillo](#), 41 Cal. 3d 810, 820–823, 226 Cal. Rptr. 81, 718 P.2d 68 (1986).) [Evidence Code § 669.5](#) applies in an action attacking a city charter amendment adopted by initiative, and an ordinance implementing the amendment, which were enacted before the effective date of [§ 669.5](#). ([Murphy v. City of Alameda](#), 11 Cal. App. 4th 906, 14 Cal. Rptr. 2d 329 (1st Dist. 1992).)

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Appendices

AppendixEvidence Code

An act to establish an Evidence Code, thereby consolidating and revising the law relating to evidence; amending various sections of the Business and Professions Code, Civil Code, Code of Civil Procedure, Corporations Code, Government Code, Health and Safety Code, Penal Code, and Public Utilities Code to make them consistent therewith; adding §§ 164.5, 3544, [3545](#), [3546](#), [3547](#), and [3548 to the Civil Code](#); adding §§ [631.7](#) and [1908.5 to the Code of Civil Procedure](#); and repealing legislation inconsistent therewith.

CREDIT(S)

CREDIT(S)Enacted by Stats.1965, c. 299.

CREDIT(S)

CREDIT(S)Operative January 1, 1967.

The people of the State of California do enact as follows:

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

§ 1.

Short title

This code shall be known as the Evidence Code.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 2.

Abrogation of common law rule of strict construction; liberal construction

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 3.

Severability

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 4.

Construction of code

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 5.

Construction of headings

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 6.

References to statutes; application

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 7.

Definitions

Unless otherwise expressly stated:

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 8.

Construction of tenses

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 9.

Construction of gender references

The masculine gender includes the feminine and neuter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 10.

Construction of singular and plural

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 11.

“Shall” and “may”

“Shall” is mandatory and “may” is permissive.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 12.

Operative date of code; effect on pending proceedings

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

DIVISION 2. WORDS AND PHRASES DEFINED

§ 100.

Application of definitions

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 105.

Action

“Action” includes a civil action and a criminal action.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 110.

Burden of producing evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 115.

Burden of proof

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

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 120.

Civil action

“Civil action” includes civil proceedings.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 125.

Conduct

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 130.

Criminal action

“Criminal action” includes criminal proceedings.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 135.

Declarant

“Declarant” is a person who makes a statement.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 140.

Evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 145.

The hearing

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 150.

Hearsay evidence

“Hearsay evidence” is defined in Section 1200.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 160.

Law

“Law” includes constitutional, statutory, and decisional law.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 165.

Oath

“Oath” includes affirmation or declaration under penalty of perjury.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 170.

Perceive

“Perceive” means to acquire knowledge through one's senses.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 175.

Person

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

CREDIT(S)

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

§ 177.

Dependent person

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

CREDIT(S)

CREDIT(S)(Added by Stats.2004, c. 823 (A.B.20), § 2.)

§ 180.

Personal property

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 185.

Property

“Property” includes both real and personal property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 190.

Proof

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 195.

Public employee

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 200.

Public entity

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 205.

Real property

“Real property” includes lands, tenements, and hereditaments.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 210.

Relevant evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 220.

State

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 225.

Statement

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 230.

Statute

“Statute” includes a treaty and a constitutional provision.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 235.

Trier of fact

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 240.

Unavailable as a witness

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

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

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

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to

testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 401, § 1; Stats.1988, c. 485, § 1.)

§ 250.

Writing

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 945 (A.B.1962), § 1.)

§ 255.

Original

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

CREDIT(S)

CREDIT(S)(Added by Stats.1977, c. 708, p. 2268, § 1.)

§ 260.

Duplicate

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

CREDIT(S)

CREDIT(S)(Added by Stats.1977, c. 708, p. 2268, § 2.)

DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

§ 300.

Applicability of code

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 17, p. 836, § 35; Stats.1998, c. 931 (S.B.2139), § 141, eff. Sept. 28, 1998; Stats.2002, c. 784 (S.B.1316), § 101.)

CHAPTER 2. PROVINCE OF COURT AND JURY

§ 310.

Questions of law for court

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

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 311.

Foreign law applicable; law undetermined; procedures

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 312.

Jury as trier of fact

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 3. ORDER OF PROOF

§ 320.

Power of court to regulate order of proof

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 4. ADMITTING AND EXCLUDING EVIDENCE

ARTICLE 1. GENERAL PROVISIONS

§ 350.

Only relevant evidence admissible

No evidence is admissible except relevant evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 351.

Admissibility of relevant evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 351.1.

Polygraph examinations; results, opinion of examiner or reference; exclusion

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1983, c. 202, § 1, eff. July 12, 1983.)

§ 352.

Discretion of court to exclude evidence

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 352.1.

Criminal sex acts; victim's address and telephone number

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 335, § 3. Amended by Stats.1996, c. 1075 (S.B.1444), § 5.)

§ 353.

Erroneous admission of evidence; effect

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 354.

Erroneous exclusion of evidence; effect

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 355.

Limited admissibility

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 356.

Entire act, declaration, conversation, or writing to elucidate part offered

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. PRELIMINARY DETERMINATIONS ON ADMISSIBILITY OF EVIDENCE

§ 400.

Preliminary fact

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 401.

Proffered evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 402.

Procedure for determining foundational and other preliminary facts

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 403.

Determination of foundational and other preliminary facts where relevancy, personal knowledge, or authenticity is disputed

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

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

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

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

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

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 404.

Determination of whether proffered evidence is incriminatory

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 405.

Determination of foundational and other preliminary facts in other cases

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

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

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

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

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 406.

Evidence affecting weight or credibility

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 5. WEIGHT OF EVIDENCE GENERALLY

§ 410.

Direct evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 411.

Direct evidence of one witness sufficient

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 412.

Party having power to produce better evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 413.

Party's failure to explain or deny evidence

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

DIVISION 4. JUDICIAL NOTICE

§ 450.

Judicial notice may be taken only as authorized by law

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 451.

Matters which must be judicially noticed

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1971, c. 438, p. 881, § 88; Stats.1972, c. 764, p. 1373, § 1; Stats.1982, c. 454, p. 1835, § 20; Stats.1985, c. 106, § 32; Stats.1986, c. 248, § 43.)

§ 452.

Matters which may be judicially noticed

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 452.5.

Criminal conviction records; computer-generated records; admissibility

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1996, c. 642 (A.B.1387), § 3. Amended by Stats.2002, c. 784 (S.B.1316), § 102.)

§ 453.

Compulsory judicial notice upon request

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 454.

Information that may be used in taking judicial notice

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 455.

Opportunity to present information to court

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 456.

Noting denial of request to take judicial notice

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

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 457.

Instructioning jury on matter judicially noticed

If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the trial court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 458.

Judicial notice by trial court in subsequent proceedings

The failure or refusal of the trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 459.

Judicial notice by reviewing court

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 460.

Appointment of expert by court

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

DIVISION 5. BURDEN OF PROOF; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS AND INFERENCES

CHAPTER 1. BURDEN OF PROOF

ARTICLE 1. GENERAL

§ 500.

Party who has the burden of proof

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 501.

Criminal actions; statutory assignment of burden of proof; controlling section

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](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 502.

Instructions on burden of proof

The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. BURDEN OF PROOF ON SPECIFIC ISSUES

§ 520.

Claim that person guilty of crime or wrongdoing

The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 521.

Claim that person did not exercise care

The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 522.

Claim that person is or was insane

The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 523.

Historic locations of water; claims involving state land patents or grants

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1994, c. 128 (S.B.1429), § 2.)

CHAPTER 2. BURDEN OF PRODUCING EVIDENCE

§ 550.

Party who has the burden of producing evidence

- (a) The burden of producing evidence as to a particular fact is on the party against whom a finding on 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 3. PRESUMPTIONS AND INFERENCES

ARTICLE 1. GENERAL

§ 600.

Presumption and inference defined

- (a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.
- (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 601.

Classification of presumptions

A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 602.

Statute making one fact prima facie evidence of another fact

A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 603.

Presumption affecting the burden of producing evidence defined

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 604.

Effect of presumption affecting burden of producing evidence

The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 605.

Presumption affecting the burden of proof defined

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3201, § 12.)

§ 606.

Effect of presumption affecting burden of proof

The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 607.

Effect of certain presumptions in a criminal action

When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. CONCLUSIVE PRESUMPTIONS

§ 620.

Conclusive presumptions

The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 621.

Repealed by stats.1992, c. 162 (A.B.2650), § 8, operative jan. 1, 1994

§ 621.1.

Repealed by stats.1993, c. 219 (A.B.1500), § 76

§ 622.

Facts recited in written instrument

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 623.

Estoppel by own statement or conduct

Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 624.

Estoppel of tenant to deny title of landlord

A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 3. PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE

§ 630.

Presumptions affecting the burden of producing evidence

The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 603, are presumptions affecting the burden of producing evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 631.

Money delivered by one to another

Money delivered by one to another is presumed to have been due to the latter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 632.

Thing delivered by one to another

A thing delivered by one to another is presumed to have belonged to the latter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 633.

Obligation delivered up to the debtor

An obligation delivered up to the debtor is presumed to have been paid.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 634.

Person in possession of order on self

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 635.

Obligation possessed by creditor

An obligation possessed by the creditor is presumed not to have been paid.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 636.

Payment of earlier rent or installments

The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 637.

Ownership of things possessed

The things which a person possesses are presumed to be owned by him.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 638.

Property ownership acts

A person who exercises acts of ownership over property is presumed to be the owner of it.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 639.

Judgment correctly determines rights of parties

A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 640.

Writing truly dated

A writing is presumed to have been truly dated.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 641.

Letter received in ordinary course of mail

A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 642.

Conveyance by person having duty to convey real property

A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to

have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 643.

Authenticity of ancient document

A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

- (a) Is at least 30 years old;
- (b) Is in such condition as to create no suspicion concerning its authenticity;
- (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
- (d) Has been generally acted upon as authentic by persons having an interest in the matter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 644.

Book purporting to be published by public authority

A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 645.

Book purporting to contain reports of cases

A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 645.1.

Printed materials purporting to be particular newspaper or periodical

Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 330, § 1.)

§ 646.

Res ipsa loquitur; instruction

- (a) As used in this section, “defendant” includes any party against whom the res ipsa loquitur presumption operates.
- (b) The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence.
- (c) If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
 - (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
 - (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

CREDIT(S)

CREDIT(S)(Added by Stats.1970, c. 69, p. 83, § 1.)

§ 647.

Return of process served by registered process server

The return of a process server registered pursuant to Chapter 16 (commencing with [Section 22350](#)) of Division 8 of the Business and Professions Code upon process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return.

CREDIT(S)

CREDIT(S)(Added by Stats.1978, c. 528, p. 1687, § 1.)

ARTICLE 4. PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

§ 660.

Presumptions affecting the burden of proof

The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 661.

Repealed by stats.1975, c. 1244, p. 3202, § 14

§ 662.

Owner of legal title to property is owner of beneficial title

The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 663.

Ceremonial marriage

A ceremonial marriage is presumed to be valid.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 664.

Official duty regularly performed

It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 665.

Ordinary consequences of voluntary act

A person is presumed to intend the ordinary consequences of his voluntary act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of

the crime charged.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 666.

Judicial action in lawful exercise of jurisdiction

Any court of this state or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 667.

Death of person not heard from in five years

A person not heard from in five years is presumed to be dead.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1983, c. 201, § 1.)

§ 668.

Unlawful intent

An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 669.

Due care; failure to exercise

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1967, c. 650, p. 2004, § 1.)

§ 669.1.

Standards of conduct for public employees; presumption of failure to exercise due care

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1987, c. 1201, § 13; Stats.1987, c. 1207, § 2.)

§ 669.5.

Ordinances limiting building permits or development of buildable lots for residential purposes; impact on supply of residential units; actions challenging validity

(a) Any ordinance enacted by the governing body of a city, county, or city and county which (1) directly limits, by number, the building permits that may be issued for residential construction or the buildable lots which may be developed for residential purposes, or (2) changes the standards of residential development on vacant land so that the governing body's zoning is rendered in violation of [Section 65913.1 of the Government Code](#) is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city, county, or city and county.

(b) With respect to any action which challenges the validity of an ordinance specified in subdivision (a) the city, county, or city and county enacting the ordinance shall bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city, county, or city and county.

(c) This section does not apply to state and federal building code requirements or local ordinances which (1) impose a moratorium, to protect the public health and safety, on residential construction for a specified period of time, if, under the terms of the ordinance, the moratorium will cease when the public health or safety is no longer jeopardized by the construction, (2) create agricultural preserves under Chapter 7 (commencing with [Section 51200](#)) 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 1144, p. 3703, § 2. Amended by Stats.1988, c. 541, § 1.)

§ 670.

Payments by check

(a) In any dispute concerning payment by means of a check, a copy of the check produced in accordance with [Section 1550 of the Evidence Code](#), together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a copy thereof produced in the same manner, creates a presumption that the check has been paid.

(b) As used in this section:

(1) "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."

CREDIT(S)

CREDIT(S)(Added by Stats.1992, c. 914 (S.B.833), § 51. Amended by Stats.2001, c. 854 (S.B.205), § 3.)

DIVISION 6. WITNESSES

CHAPTER 1. COMPETENCY

§ 700.

General rule as to competency

Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1985, c. 884, § 1.)

§ 701.

Disqualification of witness

(a) A person is disqualified to be a witness if he or she is:

- (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
- (2) Incapable of understanding the duty of a witness to tell the truth.

(b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1985, c. 884, § 2.)

§ 702.

Personal knowledge of witness

(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 703.

Judge as witness

(a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 703.5.

Judges, arbitrators or mediators as witnesses; subsequent civil proceeding

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under [paragraph \(1\) or \(6\) of subdivision \(a\) of Section 170.1 of the Code of Civil Procedure](#). However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with [Section 3160](#)) of Part 2 of Division 8 of the Family Code.

CREDIT(S)

CREDIT(S)(Added by Stats.1979, c. 205, p. 449, § 1. Amended by Stats.1980, c. 290, p. 617, § 1; Stats.1988, c. 281, § 1; Stats.1990, c. 1491 (A.B.3765), § 13; Stats.1993, c. 114 (A.B.1757), § 1; Stats.1993, c. 1261 (S.B.401), § 5; Stats.1994, c. 1269 (A.B.2208), § 7.)

§ 704.

Juror as witness

(a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 2. OATH AND CONFRONTATION

§ 710.

Oath required

Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1988, c. 486, § 1; Stats.2004, c. 823 (A.B.20), § 3.)

§ 711.

Confrontation

At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 712.

Blood samples; technique in taking; affidavits in criminal actions; service; objections

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1978, c. 93, p. 256, § 1, eff. April 14, 1978.)

CHAPTER 3. EXPERT WITNESSES

ARTICLE 1. EXPERT WITNESSES GENERALLY

§ 720.

Qualification as an expert witness

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 721.

Cross-examination of expert witness

(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion * * *.

(2) The publication has been admitted in evidence.

(3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1997, c. 892 (S.B.73), § 11.)

§ 722.

Credibility of expert witness

- (a) The fact of the appointment of an expert witness by the court may be revealed to the trier of fact.
- (b) The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 723.

Limit on number of expert witnesses

The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. APPOINTMENT OF EXPERT WITNESS BY COURT

§ 730.

Appointment of expert by court

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act.

CREDIT(S)

CREDIT(S)(Added by Stats.1979, c. 746, p. 2592, § 3, operative Jan. 1, 1983. Amended by Stats.1990, c. 295 (A.B.3371), § 1.)

§ 731.

Payment of court-appointed expert

- (a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any county in which the board of supervisors so provides, the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

CREDIT(S)

CREDIT(S)(Added by Stats.1979, c. 746, § 5, operative Jan. 1, 1983.)

§ 732.

Calling and examining court-appointed expert

Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 733.

Right to produce other expert evidence

Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 4. INTERPRETERS AND TRANSLATORS

§ 750.

Rules relating to witnesses apply to interpreters and translators

A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 751.

Oath required of interpreters and translators

- (a) An interpreter shall take an oath that he or she will make a true interpretation to the witness in a language that the witness understands and that he or she will make a true interpretation of the witness' answers to questions to counsel, court, or jury, in the English language, with his or her best skill and judgment.
- (b) In any proceeding in which a deaf or hard-of-hearing person is testifying under oath, the interpreter certified pursuant to subdivision (f) of Section 754 shall advise the court whenever he or she is unable to comply with his or her oath taken pursuant to subdivision (a).
- (c) A translator shall take an oath that he or she will make a true translation in the English language of any writing he or she is to decipher or translate.
- (d) An interpreter * * * regularly employed by the court and certified or registered in accordance with Article 4 (commencing with [Section 68560](#)) of [Chapter 2 of Title 8 of the Government Code](#), or a translator regularly employed by the court, may file an oath as prescribed by this section with the clerk of the court. The filed oath shall serve for all subsequent court proceedings until the appointment is revoked by the court.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 30, § 1, eff. March 7, 1984; Stats.1990, c. 1450 (S.B.2046), § 1; Stats.1997, c. 376 (A.B.1445), § 1.)

§ 752.

Interpreters for witnesses

- (a) When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.
- (b) The record shall identify the interpreter who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 30, § 2, eff. March 7, 1984; Stats.1984, c. 768, § 1.)

§ 753.

Translators of writings

- (a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.
- (b) The record shall identify the translator who may be appointed and compensated as provided in Article 2

(commencing with Section 730) of Chapter 3.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 30, § 3, eff. March 7, 1984.)

§ 754.

Deaf or hearing impaired persons; interpreters; qualifications; guidelines; compensation; questioning; use of statements

(a) As used in this section, “individual who is deaf or hearing impaired” means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to [Section 54.8 of the Civil Code](#).

(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is an individual who is deaf or hearing impaired and the individual who is deaf or hearing impaired is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.

(c) For purposes of this section, “appointing authority” means a court, department, board, commission, agency, licensing or legislative body, or other body for proceedings requiring a qualified interpreter.

(d) For the purposes of this section, “interpreter” includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the individual who is deaf or hearing impaired.

(e) For purposes of this section, “intermediary interpreter” means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or hearing impaired and the qualified interpreter.

(f) For purposes of this section, “qualified interpreter” means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired.

(g) In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hearing impaired or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the individual who is deaf or hearing impaired or his or her representative, appoint an intermediary interpreter.

(h) Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant to

which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and hearing-impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines * * *. By January 1, 1997, the Judicial Council shall approve one or more entities to administer testing for court interpreters for individuals who are deaf or hearing impaired. * * * Testing entities * * * may include educational institutions, testing organizations, joint powers agencies, or public agencies.

Commencing July 1, 1997, court interpreters for individuals who are deaf or hearing impaired shall meet the qualifications specified in subdivision (f).

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 ([Public Law 101-336](#))[1] 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).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1977, c. 1182, p. 3873, § 1; Stats.1984, c. 768, § 2; Stats.1989, c. 1002, § 2; Stats.1990, c. 1450 (S.B.2046), § 2; Stats.1991, c. 883 (S.B.585), § 1; Stats.1992, c. 118 (S.B.16), § 1, eff. July 7, 1992; Stats.1992, c. 913 (A.B.1077), § 14; Stats.1995, c. 143 (A.B.1833), § 1, eff. July 18, 1995.)

§ 754.5.

Privileged statements; deaf or hearing impaired persons; use of interpreter

Whenever an otherwise valid privilege exists between an individual who is deaf or hearing impaired and another person, that privilege is not waived merely because an interpreter was used to facilitate their communication.

CREDIT(S)

CREDIT(S)(Added by Stats.1990, c. 1450 (S.B.2046), § 3. Amended by Stats.1992, c. 913 (A.B.1077), § 15.)

§ 755.

Hearings or proceedings related to domestic violence; party not proficient in english; interpreters; fees

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1995, c. 888 (S.B.982), § 1.)

§ 755.5.

Medical examinations; parties not proficient in english language; interpreters; fees; admissibility of record

- (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.

CREDIT(S)

CREDIT(S)(Added by Stats.1992, c. 1302 (A.B.3107), § 5, eff. Sept. 30, 1992. Amended by Stats.1995, c. 938 (S.B.523), § 8, operative July 1, 1997.)

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

ARTICLE 1. DEFINITIONS

§ 760.

Direct examination

“Direct examination” is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 761.

Cross-examination

“Cross-examination” is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 762.

Redirect examination

“Redirect examination” is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 763.

Recross-examination

“Recross-examination” is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 764.

Leading question

A “leading question” is a question that suggests to the witness the answer that the examining party desires.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. EXAMINATION OF WITNESSES

§ 765.

Court to control mode of interrogation

(a) The court shall exercise reasonable control over the mode of interrogation of a witness so as to make 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1985, c. 884, § 3; Stats.1986, c. 1051, § 1; Stats.2004, c. 823 (A.B.20), § 4.)

§ 766.

Responsive answers

A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 767.

Leading questions

(a) Except under special circumstances where the interests of justice otherwise require:

(1) A leading question may not be asked of a witness on direct or redirect examination.

(2) A leading question may be asked of a witness on cross-examination or recross-examination.

(b) The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under

Section 273a, 273d, * * * 288.5, 368, or any of the acts described in [Section 11165.1](#) or [11165.2 of the Penal Code](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 1423, § 1, eff. Sept. 26, 1984; Stats.1995, c. 87 (A.B.355), § 1; Stats.2004, c. 823 (A.B.20), § 5.)

§ 768.

Writings

- (a) In examining a witness concerning a writing, it is not necessary to show, read, or disclose to him any part of the writing.
- (b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 769.

Inconsistent statement or conduct

In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 770.

Evidence of inconsistent statement of witness; exclusion; exceptions

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 771.

Production of writing used to refresh memory

- (a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.
- (b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.
- (c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:
 - (1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and
 - (2) Was not reasonably procurable by such party through the use of the court's process or other available means.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 772.

Order of examination

- (a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.
- (b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.
- (c) Subject to subdivision (d), a party may, in the discretion of the court, interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.
- (d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 773.

Cross-examination

- (a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.
- (b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to the direct examination.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 774.

Re-examination

A witness once examined cannot be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 775.

Court may call witnesses

The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 776.

Examination of adverse party or person identified with adverse party

(a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but, subject to subdivision (e), the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

- (2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.
- (3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.
- (4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.
- (e) Paragraph (2) of subdivision (b) does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination if the party who called the witness for examination under this section:
 - (1) Is also a person identified with the same party with whom the witness is identified.
 - (2) Is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2005, § 2.)

§ 777.

Exclusion of witness

- (a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.
- (b) A party to the action cannot be excluded under this section.
- (c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 778.

Recall of witness

After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 6. CREDIBILITY OF WITNESSES

ARTICLE 1. CREDIBILITY GENERALLY

§ 780.

Testimony; proof of truthfulness; considerations

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 782.

Sexual offenses; evidence of sexual conduct of complaining witness; procedure for admissibility; treatment of resealed affidavits

(a) In any 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 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, 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 of this code, the court may make an order stating what evidence may be in-

troduced 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 the alleged victim of the crime charged, the prosecution of which is subject to this section.

CREDIT(S)

CREDIT(S)(Added by Stats.1974, c. 569, p. 1388, § 1. Amended by Stats.1981, c. 726, p. 2876, § 1; Stats.1987, c. 177, § 1; Stats.1989, c. 1402, § 2; Stats.1996, c. 1075 (S.B.1444), § 6; Stats.2004, c. 61 (A.B.2829), § 1.)

§ 783.

Sexual harassment, sexual assault, or sexual battery cases; admissibility of evidence of plaintiff's sexual conduct; procedure

In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:

(a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 1328, § 3.)

ARTICLE 2. ATTACKING OR SUPPORTING CREDIBILITY

§ 785.

Parties may attack or support credibility

The credibility of a witness may be attacked or supported by any party, including the party calling him.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 786.

Character evidence generally

Application in criminal proceedings, see [People v. Harris \(1989\) 255 Cal.Rptr. 352, 47 Cal.3d 1047, 767 P.2d 619](#), rehearing denied and modified.

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 787.

Specific instances of conduct

Application in criminal proceedings, see [People v. Harris \(1989\) 255 Cal.Rptr. 352, 47 Cal.3d 1047, 767 P.2d 619](#), rehearing denied and modified.

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 788.

Prior felony conviction

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

- (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
- (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with [Section 4852.01](#)) of Title 6 of Part 3 of the Penal Code.
- (c) The accusatory pleading against the witness has been dismissed under the provisions of [Penal Code Section 1203.4](#), but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.

(d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 789.

Religious belief

Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 790.

Good character of witness

Application in criminal proceedings, see [People v. Harris \(1989\) 255 Cal.Rptr. 352, 47 Cal.3d 1047, 767 P.2d 619](#), rehearing denied and modified.

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 791.

Prior consistent statement of witness

Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 7. HYPNOSIS OF WITNESSES

§ 795.

Testimony of hypnosis subject; admissibility; conditions

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1984, c. 479, § 1. Amended by Stats.1987, c. 285, § 1; Stats.1996, c. 67 (A.B.2296), § 1; Stats.2002, c. 1013 (S.B.2026), § 77.)

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

ARTICLE 1. EXPERT AND OTHER OPINION TESTIMONY GENERALLY

§ 800.

Lay witnesses; opinion testimony

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 801.

Expert witnesses; opinion testimony

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 802.

Statement of basis of opinion

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 803.

Opinion based on improper matter

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the mat-

ter determined to be improper.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 804.

Opinion based on opinion or statement of another

(a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 805.

Opinion on ultimate issue

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. EVIDENCE OF MARKET VALUE OF PROPERTY

§ 810.

Application of article

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1978, c. 294, p. 615, § 3; Stats.1980, c. 381, p. 757, § 1.)

§ 811.

Value of property

As used in this article, “value of property” means market value of any of the following:

- (a) Real property or any interest therein.
- (b) Real property or any interest therein and tangible personal property valued as a unit.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1975, c. 1240, p. 3202, § 15, operative July 1, 1976; Stats.1978, c. 294, p. 615, § 4; Stats.1980, c. 381, p. 757, § 2.)

§ 812.

Market value; interpretation of meaning

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1975, c. 1240, p. 3202, § 16, operative July 1, 1976; Stats.1978, c. 294, p. 615, § 5.)

§ 813.

Value of property; authorized opinions; view of property; admissible evidence

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1978, c. 294, p. 615, § 6; Stats.1980, c. 381, p. 757, § 3.)

§ 814.

Matter upon which opinion must be based

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1975, c. 1240, p. 3202, § 17, operative July 1, 1976; Stats.1980, c. 381, p. 757, § 4.)

§ 814.5.

Repealed by stats.1971, c. 1574, p. 3154, § 1.4, operative july 1, 1972

§ 815.

Sales of subject property

When relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof, such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1978, c. 294,

p. 615, § 7.)

§ 816.

Comparable sales

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967.)

§ 817.

Leases of subject property

(a) Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the lease includes only the property or property interest being taken or a part thereof, such lease may not be taken into account in the determination of the value of property if it is entered into after the filing of the lis pendens.

(b) A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at an opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, § 4, operative Jan. 1, 1967. Amended by Stats.1978, c. 294, p. 616, § 8.)

§ 818.

Comparable leases

For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circum-

stances 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967.)

§ 819.

Capitalization of income

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967.)

§ 820.

Reproduction cost

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967.)

§ 821.

Conditions in general vicinity of subject property

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967.)

§ 822.

Matter upon which opinion may not be based

(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.

* * *

CREDIT(S)

CREDIT(S)(Added by Stats.1965, c. 1151, p. 2904, § 4, operative Jan. 1, 1967. Amended by Stats.1978, c. 294, p. 616, § 9; Stats.1980, c. 381, p. 758, § 5; Stats.1986, c. 1238, § 2; Stats.1987, c. 1278, § 1; Stats.2000, c. 948 (A.B.321), § 1.)

§ 823.

Property with no relevant, comparable market

Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 381, p. 758, § 6. Amended by Stats.1992, c. 7 (S.B.821), § 4.)

§ 824.

Nonprofit, special use property

(a) Notwithstanding any other provision of this article, a just and equitable method of determining the value of nonprofit, special use property, as defined by [Section 1235.155 of the Code of Civil Procedure](#), for which there is no relevant, comparable market, is the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use, together with the cost of constructing similar improvements. The method for determining compensation for improvements shall be as set forth in subdivision (b).

(b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by [Section 1235.155 of the Code of Civil Procedure](#), for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements.

(c) This section does not apply to actions or proceedings commenced by a public entity or public utility to acquire real property or any interest in real property for the use of water, sewer, electricity, telephone, natural gas, or flood control facilities or rights-of-way where those acquisitions neither require removal or destruction of existing improvements, nor render the property unfit for the owner's present or proposed use.

CREDIT(S)

CREDIT(S)(Added by Stats.1992, c. 7 (S.B.821), § 5.)

ARTICLE 3. OPINION TESTIMONY ON PARTICULAR SUBJECTS

§ 870.

Opinion as to sanity

A witness may state his opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or

(c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY [Repealed]

§ 890 to 895. Repealed by stats.1992, c. 162 (A.B.2650), § 9, operative jan. 1, 1994

§ 895.5.

Repealed by stats.1993, c. 219 (A.B.1500), § 77

§ 896, 897. Repealed by stats.1992, c. 162 (A.B.2650), § 9, operative jan. 1, 1994

DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

§ 900.

Application of definitions

Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division. They do not govern the construction of any other division.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 901.

Proceeding

“Proceeding” means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 902.

Civil proceeding

“Civil proceeding” means any proceeding except a criminal proceeding.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 903.

Criminal proceeding

“Criminal proceeding” means:

(a) A criminal action; and

(b) A proceeding pursuant to Article 3 (commencing with [Section 3060](#)) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for willful or corrupt misconduct in office.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 905.

Presiding officer

“Presiding officer” means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 2. APPLICABILITY OF DIVISION

§ 910.

Applicability of division

Except as otherwise provided by statute, the provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

§ 911.

Refusal to be or have another as witness, or disclose or produce any matter

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 912.

Waiver of privilege

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer–client privilege), 980 (privilege for confidential marital communications), 994 (physician–patient privilege), 1014 (psychotherapist–patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor–victim privilege), or 1037.5 (domestic violence counselor–victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer–client privilege), 994 (physician–patient privilege), 1014 (psychotherapist–patient privilege), 1035.8 (sexual assault counselor–victim privilege), or 1037.5 (domestic violence counselor–victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer–client privilege), 994 (physician–patient privilege), 1014 (psychotherapist–patient privilege), 1035.8 (sexual assault counselor–victim privilege), or 1037.5 (domestic violence counselor–victim privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1980, c. 917, p. 2915, § 1; Stats.2002, c. 72 (S.B.2061), § 1; Stats.2004, c. 405 (S.B.1796), § 1.)

§ 913.

Comment on, and inferences from, exercise of privilege

(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises

because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 914.

Determination of claim of privilege; limitation on punishment for contempt

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 915.

Disclosure of privileged information or attorney work product in ruling on claim of privilege

Text of section operative until July 1, 2005

(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 \(c\) of Section 2018 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 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1979, c. 1034, p. 3572, § 1; Stats.2001, c. 812 (A.B.223), § 13.)

For text of section operative July 1, 2005, see [Evidence Code § 915](#), post.

§ 916.

Exclusion of privileged information where persons authorized to claim privilege are not present

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 917.

Presumption that certain communications are confidential; privileged character of electronic communications

(a) Whenever 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 victim-counselor, or domestic violence victim-counselor 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](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 72 (S.B.2061), § 2;

Stats.2003, c. 468 (S.B.851), § 2; Stats.2004, c. 183 (A.B.3082), § 93.)

§ 918.

Error in overruling claim of privilege

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 919.

Admissibility where disclosure erroneously compelled; claim of privilege; coercion

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1974, c. 227, p. 426, § 1.)

§ 920.

Implied repeal of other statutes related to privileges

Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 4. PARTICULAR PRIVILEGES

ARTICLE 1. PRIVILEGE OF DEFENDANT IN CRIMINAL CASE

§ 930.

Privilege not to be called as a witness and not to testify

To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. PRIVILEGE AGAINST SELF-INCRIMINATION

§ 940.

Privilege against self-incrimination

To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 3. LAWYER-CLIENT PRIVILEGE

§ 950.

Lawyer

As used in this article, “lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 951.

Client

As used in this article, “client” means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 952.

Confidential communication between client and lawyer

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. * * *

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2006, § 3; Stats.1994, c. 186 (A.B.2662), § 1; Stats.1994, c. 587 (A.B.3600), § 9; Stats.2002, c. 72 (S.B.2061), § 3.)

§ 953.

Holder of the privilege

As used in this article, “holder of the privilege” means:

- (a) The client when he has no guardian or conservator.
- (b) A guardian or conservator of the client when the client has a guardian or conservator.
- (c) The personal representative of the client if the client is dead.
- (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 954.

Lawyer-client privilege

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10

(commencing with [Section 6160](#)) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word “persons” as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1968, c. 1375, p. 2695, § 2; Stats.1994, c. 1010 (S.B.2053), § 104.)

§ 955.

When lawyer required to claim privilege

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 956.

Exception: Crime or fraud

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 956.5.

Reasonable belief that disclosure of confidential communication relating to representation of client is necessary to prevent criminal act that lawyer reasonably believes likely to result in death of, or substantial bodily harm to, an individual; exception to privilege

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1993, c. 982 (S.B.645), § 8. Amended by Stats.2003, c. 765 (A.B.1101), § 2, operative July 1, 2004; Stats.2004, c. 183 (A.B.3082), § 94.)

§ 957.

Exception: Parties claiming through deceased client

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 958.

Exception: Breach of duty arising out of lawyer-client relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 959.

Exception: Lawyer as attesting witness

There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 960.

Exception: Intention of deceased client concerning writing affecting property interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 961.

Exception: Validity of writing affecting property interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 962.

Exception: Joint clients

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 4. PRIVILEGE NOT TO TESTIFY AGAINST SPOUSE

§ 970.

Spouse's privilege not to testify against spouse; exceptions

Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 971.

Privilege not to be called as a witness against spouse

Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 972.

Exceptions to privilege

A married person does not have a privilege under this article in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding to commit or otherwise place his or her spouse or his or her spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.
- (c) A proceeding brought by or on behalf of a spouse to establish his or her competence.
- (d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with [Section 200](#)) of [Part 1 of Division 2 of the Welfare and Institutions Code](#).
- (e) A criminal proceeding in which one spouse is charged with:
 - (1) A crime against the person or property of the other spouse or of a child, parent, relative, or cohabitant of either, whether committed before or during marriage.
 - (2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.
 - (3) Bigamy.
 - (4) A crime defined by [Section 270](#) or [270a of the Penal Code](#).
- (f) A proceeding resulting from a criminal act which occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to that marriage if prior to the legal marriage the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify.
- (g) A proceeding brought against the spouse by a former spouse so long as the property and debts of the marriage have not been adjudicated, or in order to establish, modify, or enforce a child, family or spousal support obligation arising from the marriage to the former spouse; in a proceeding brought against a spouse by the other parent in order to establish, modify, or enforce a child support obligation for a child of a nonmarital relationship of the spouse; or in a proceeding brought against a spouse by the guardian of a child of that spouse in order to establish, modify, or enforce a child support obligation of the spouse. The married person does not have a privilege under this subdivision to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but may assert the privilege as otherwise provided in this article if other information is requested by the former spouse, guardian, or other parent of the child. Any person demanding the otherwise privileged information made available by this subdivision, who also has an obligation to support the child for whom an order to establish, modify, or enforce child support is sought, waives his or her marital privilege to the same extent as the spouse as provided in this subdivision.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 71, p. 132, § 2; Stats.1982, c. 256, p. 833, § 1; Stats.1983, c. 244, § 1; Stats.1986, c. 769, § 1, eff. Sept. 15, 1986; Stats.1989, c. 1359, § 9.7.)

§ 973.

Waiver of privilege

(a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 5. PRIVILEGE FOR CONFIDENTIAL MARITAL COMMUNICATIONS

§ 980.

Confidential marital communication privilege

Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 981.

Exception: Crime or fraud

There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 982.

Commitment or similar proceedings

There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 983.

Competency proceedings

There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 984.

Proceeding between spouses

There is no privilege under this article in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 985.

Criminal proceedings

There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

- (a) A crime committed at any time against the person or property of the other spouse or of a child of either.
- (b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.
- (c) Bigamy.
- (d) A crime defined by [Section 270](#) or [270a of the Penal Code](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 71, p. 133, § 3.)

§ 986.

Juvenile court proceedings

There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing

with [Section 200](#)) of Part 1 of Division 2 of the Welfare and Institutions Code.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1982, c. 256, p. 833, § 2.)

§ 987.

Communication offered by spouse who is criminal defendant

There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 6. PHYSICIAN–PATIENT PRIVILEGE

§ 990.

Physician

As used in this article, “physician” means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 991.

Patient

As used in this article, “patient” means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 992.

Confidential communication between patient and physician

As used in this article, “confidential communication between patient and physician” means information, including information obtained by an examination of the patient, transmitted between a patient and his physician

in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2006, § 4.)

§ 993.

Holder of the privilege

As used in this article, “holder of the privilege” means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 994.

Physician-patient privilege

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a physician and patient shall exist between a medical or podiatry corporation as defined in the Medical Practice Act and the patient to whom it renders professional services, as well as between such patients and licensed physicians and surgeons employed by such corporation to render services to such patients. The word “persons” as used in this subdivision includes partnerships, corporations, limited liability companies, associations, and other groups and entities.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1968, c. 1375, p. 2696, § 3; Stats.1980, c. 1313, p. 4532, § 12; Stats.1994, c. 1010 (S.B.2053), § 105.)

§ 995.

When physician required to claim privilege

The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 996.

Patient-litigant exception

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 997.

Exception: Crime or tort

There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 998.

Criminal proceeding

There is no privilege under this article in a criminal proceeding.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 999.

Communication relating to patient condition in proceeding to recover damages; good cause

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 318, p. 764, § 1.)

§ 1000.

Parties claiming through deceased patient

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1001.

Breach of duty arising out of physician-patient relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1002.

Intention of deceased patient concerning writing affecting property interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1003.

Validity of writing affecting property interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1004.

Commitment or similar proceeding

There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1005.

Proceeding to establish competence

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1006.

Required report

There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1007.

Proceeding to terminate right, license or privilege

There is no privilege under this article in a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 7. PSYCHOTHERAPIST–PATIENT PRIVILEGE

§ 1010.

Psychotherapist

As used in this article, “psychotherapist” means a person who is, or is reasonably believed by the patient to be:

(a) A person authorized * * * to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with [Section 2900](#)) of Division 2 of the Business and Professions Code.

(c) A person licensed as a clinical social worker under Article 4 (commencing with [Section 4996](#)) of Chapter 14 of Division 2 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a nonmedical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.

(e) A person licensed as a marriage and family * * * therapist under Chapter 13 (commencing with [Section 4980](#)) of Division 2 of the Business and Professions Code.

(f) A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist as required by [Section 2913 of the Business and Professions Code](#), or a person registered as a marriage and family * * * therapist intern who is under the supervision of a licensed marriage and family * * * therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician certified in psychiatry, as specified in [Section 4980.44 of the Business and Professions Code](#).

(g) A person registered as an associate clinical social worker who is under the supervision of a licensed clinical social worker, a licensed psychologist, or a board certified psychiatrist as required by [Section 4996.20](#) or [4996.21 of the Business and Professions Code](#).

(h) A person exempt from the Psychology Licensing Law pursuant to [subdivision \(d\) of Section 2909 of the Business and Professions Code](#) who is under the supervision of a licensed psychologist or board certified psychiatrist.

(i) A psychological intern as defined in [Section 2911 of the Business and Professions Code](#) who is under the supervision of a licensed psychologist or board certified psychiatrist.

(j) A trainee, as defined in [subdivision \(c\) of Section 4980.03 of the Business and Professions Code](#), who is fulfilling his or her supervised practicum required by [subdivision \(b\) of Section 4980.40 of the Business and Professions Code](#) and is supervised by a licensed psychologist, board certified psychiatrist, a licensed clinical social worker, or a licensed marriage and family * * * therapist.

(k) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with [Section 2700](#)) of Division 2 of the Business and Professions Code, who possesses a master's degree in psychiatric-mental health nursing

and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.

(l) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with [Section 2838](#)) of Chapter 6 of Division 2 of the Business and Professions Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.

(m) A person rendering mental health treatment or counseling services as authorized pursuant to [Section 6924 of the Family Code](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 1677, p. 4211, § 3; Stats.1970, c. 1396, p. 2624, § 1.5; Stats.1970, c. 1397, p. 2626, § 1.5; Stats.1972, c. 888, p. 1584, § 1; Stats.1974, c. 546, p. 1359, § 16; Stats.1983, c. 928, § 8; Stats.1987, c. 724, § 1; Stats.1988, c. 488, § 1; Stats.1989, c. 1104, § 37; Stats.1990, c. 662 (A.B.3613), § 1; Stats.1992, c. 308 (A.B.3035), § 2; Stats.1994, c. 1270 (A.B.2659), § 1; Stats.2001, c. 142 (S.B.716), § 1; Stats.2001, c. 420 (A.B.1253), § 1, eff. Oct. 2, 2001; Stats.2001, c. 420 (A.B.1253), § 1.5, eff. Oct. 2, 2001, operative Jan. 1, 2002.)

§ 1010.5.

Privileged communication between patient and educational psychologist

A communication between a patient and an educational psychologist, licensed under Article 5 (commencing with [Section 4986](#)) of Chapter 13 of Division 2 of the Business and Professions Code, shall be privileged to the same extent, and subject to the same limitations, as a communication between a patient and a psychotherapist described in subdivisions (c), (d), and (e) of Section 1010.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 545, § 1.)

§ 1011.

Patient

As used in this article, “patient” means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1012.

Confidential communication between patient and psychotherapist

As used in this article, “confidential communication between patient and psychotherapist” means information,

including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2006, § 5; Stats.1970, c. 1396, p. 2625, § 2; Stats.1970, c. 1397, p. 2627, § 2.)

§ 1013.

Holder of the privilege

As used in this article, “holder of the privilege” means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1014.

Psychotherapist-patient privilege; application to individuals and entities

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1969, c. 1436, p. 2943, § 1; Stats.1972, c. 1286, p. 2569, § 6; Stats.1989, c. 1104, § 38; Stats.1990, c. 605 (S.B.2245), § 1; Stats.1994, c. 1010 (S.B.2053), § 106; Stats.2002, c. 1013 (S.B.2026), § 78.)

§ 1014.5.

Repealed by stats.1994, c. 1270 (A.B.2659), § 2

§ 1015.

When psychotherapist required to claim privilege

The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1016.

Exception: Patient-litigant exception

There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party;
- or
- (d) The plaintiff in an action brought under [Section 376](#) or [377 of the Code of Civil Procedure](#) for damages for the injury or death of the patient.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1017.

Exception: Psychotherapist appointed by court or board of prison terms

- (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with

information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with [Section 2960](#)) of [Chapter 7 of Title 1 of Part 3 of the Penal Code](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2007, § 6; Stats.1987, c. 687, § 1.)

§ 1018.

Exception: Crime or tort

There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1019.

Exception: Parties claiming through deceased patient

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1020.

Exception: Breach of duty arising out of psychotherapist-patient relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1021.

Exception: Intention of deceased patient concerning writing affecting property interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1022.

Exception: Validity of writing affecting property interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1023.

Exception: Proceeding to determine sanity of criminal defendant

There is no privilege under this article in a proceeding under Chapter 6 (commencing with [Section 1367](#)) of [Title 10 of Part 2 of the Penal Code](#) initiated at the request of the defendant in a criminal action to determine his sanity.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1024.

Exception: Patient dangerous to himself or others

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1025.

Exception: Proceeding to establish competence

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1026.

Exception: Required report

There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1027.

Exception: Child under 16 victim of crime

There is no privilege under this article if all of the following circumstances exist:

- (a) The patient is a child under the age of 16.
- (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.

CREDIT(S)

CREDIT(S)(Added by Stats.1970, c. 1397, p. 2627, § 3.)

§ 1028.

Repealed by stats.1985, c. 1077, §§ 1, 2

ARTICLE 8. CLERGY PENITENT PRIVILEGES

§ 1030.

Member of the clergy

As used in this article, * * * a “member of the clergy” means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 806 (A.B.3027), § 19.)

§ 1031.

Penitent

As used in this article, “penitent” means a person who has made a penitential communication to a * * * member of the clergy.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 806 (A.B.3027), § 20.)

§ 1032.

Penitential communication

As used in this article, “penitential communication” means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a * * * member of the clergy who, in the course of the discipline or practice of * * * 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 806 (A.B.3027), § 21.)

§ 1033.

Privilege of penitent

Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 806 (A.B.3027), § 22.)

§ 1034.

Privilege of clergy

Subject to Section 912, a * * * member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.2002, c. 806 (A.B.3027), § 23.)

ARTICLE 8.5. SEXUAL ASSAULT VICTIM–COUNSELOR PRIVILEGE

§ 1035.

Victim

As used in this article, “victim” means a person who consults a sexual assault victim counselor for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2.)

§ 1035.2.

Sexual assault victim counselor

As used in this article, “sexual assault victim 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: law, medicine, societal attitudes, crisis intervention and counseling techniques, role playing, referral services, and 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: law, victimology, counseling techniques, client and system advocacy, and referral services.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2. Amended by Stats.1983, c. 580, § 1; Stats.1983, c. 1072, § 1; Stats.1990, c. 1342 (S.B.2501), § 1.)

§ 1035.4.

Confidential communication between the sexual assault counselor and the victim; disclosure

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2. Amended by Stats.1983, c. 1072, § 2.)

§ 1035.6.

Holder of the privilege

As used in this article, “holder of the privilege” means:

- (a) The victim when such person has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.
- (c) The personal representative of the victim if the victim is dead.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2.)

§ 1035.8.

Sexual assault victim-counselor privilege

A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault victim counselor if the privilege is claimed by:

- (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 victim counselor 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2.)

§ 1036.

Claim of privilege by sexual assault victim counselor

The sexual assault victim counselor 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 1035.8.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2.)

§ 1036.2.

Sexual assault

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1980, c. 917, p. 2916, § 2. Amended by Stats.1988, c. 102, § 1; Stats.2001, c. 854 (S.B.205), § 4.)

ARTICLE 8.7. DOMESTIC VIOLENCE VICTIM–COUNSELOR PRIVILEGE

§ 1037.

Victim

As used in this article, “victim” means any person who suffers domestic violence, as defined in Section 1037.7.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1.)

§ 1037.1.

Domestic violence counselor; qualifications

As used in this article “domestic violence counselor” means any of the following:

- (a) 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 domestic violence, who has received specialized training in the counseling of domestic violence victims, and who meets one of the following requirements:
 - (1) 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 domestic violence victims.
 - (2) Has at least 40 hours of training as specified in this paragraph and is supervised by an individual who qualifies as a counselor under paragraph (1); or is a psychotherapist, as defined in Section 1010. The training, supervised by a person qualified under paragraph (1), 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, 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.

(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 victims of domestic violence, 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 counseling victims of domestic violence.

(2) Has the minimum training for counseling victims of domestic violence 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: law, victimology, counseling techniques, client and system advocacy, and referral services.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1. Amended by Stats.1990, c. 1342 (S.B.2501), § 2.)

§ 1037.2.

Confidential communication; compulsion of disclosure by court; claim of privilege

As used in this article, “confidential communication” means information 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. It 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.

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.

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.

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1.)

§ 1037.3.

Child abuse; reporting

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](#).

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1.)

§ 1037.4.

Holder of the privilege

As used in this article, “holder of the privilege” means:

- (a) The victim when he or she has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1.)

§ 1037.5.

Privilege of refusal to disclose communication; claimants

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 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1.)

§ 1037.6.

Claim of privilege by counselor

The domestic violence counselor who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under subdivision (c) of Section 1037.5.

CREDIT(S)

CREDIT(S)(Added by Stats.1986, c. 854, § 1.)

§ 1037.7.

Domestic violence

As used in this article, “domestic violence” means “domestic violence” as defined in [Section 6211 of the Family Code](#).

CREDIT(S)

CREDIT(S)(Added by Stats.1993, c. 219 (A.B.1500), § 77.4.)

§ 1037.8.

Notice; limitations on confidential communications

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.

CREDIT(S)

CREDIT(S)(Added by Stats.2002, c. 629 (S.B.1735), § 1.)

ARTICLE 9. OFFICIAL INFORMATION AND IDENTITY OF INFORMER

§ 1040.

Privilege for official information

(a) As used in this section, “official information” means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so

and:

- (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
- (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.
- (c) Notwithstanding any other provision of law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with the provisions of [subdivision \(k\) of Section 1095](#) and [subdivision \(b\) of Section 2714 of the Unemployment Insurance Code](#), information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 1127, § 2.)

§ 1041.

Privilege for identity of informer

- (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:
- (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
 - (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.
- (b) This section applies only if the information is furnished in confidence by the informer to:
- (1) A law enforcement officer;
 - (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or
 - (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).
- (c) There is no privilege under this section to prevent the informer from disclosing his identity.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1042.

Adverse order or finding in certain cases

(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

(c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended Stats.1965, c. 937, p. 2549, § 2, operative Jan. 1, 1967; Stats.1969, c. 1412, p. 2891, § 1.)

§ 1043.

Peace or custodial officer personnel records; discovery or disclosure; procedure

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1978, c. 630, p. 2082, § 1. Amended by Stats.1989, c. 693, § 7; Stats.2002, c. 391 (A.B.2040), § 1.)

§ 1044.

Medical or psychological history records; right of access

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1978, c. 630, p. 2082, § 2.)

§ 1045.

Peace or custodial officers; access to records of complaints, investigations of complaints, or discipline imposed; relevancy; protective orders

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1978, c. 630, p. 2082, § 3. Amended by Stats.1982, c. 946, p. 3432, § 1; Stats.2002, c. 391 (A.B.2040), § 2.)

§ 1046.

Allegation of excessive force by peace or custodial officer; copy of police or crime report

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 539, § 1. Amended by Stats.2002, c. 391 (A.B.2040), § 3.)

§ 1047.

Records of peace or custodial officers; exemption from disclosure

Records of peace officers or custodial officers, as defined in [Section 831.5 of the Penal Code](#), including supervisory * * * officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the con-

duct is alleged to have occurred within a jail facility, shall not be subject to disclosure.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 539, § 2. Amended by Stats.2002, c. 391 (A.B.2040), § 4.)

ARTICLE 10. POLITICAL VOTE

§ 1050.

Privilege to protect secrecy of vote

If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 11. TRADE SECRET

§ 1060.

Privilege to protect trade secret

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1061.

Procedure for assertion of trade secret privilege

(a) For purposes of this section, and Sections 1062 and 1063:

(1) "Trade secret" means "trade secret," as defined in [subdivision \(d\) of Section 3426.1 of the Civil Code](#), or [paragraph \(9\) of subdivision \(a\) of Section 499c of the Penal Code](#).

(2) "Article" means "article," as defined in [paragraph \(2\) of subdivision \(a\) of Section 499c of the Penal Code](#).

(b) In addition to Section 1062, the following procedure shall apply whenever the owner of a trade secret wishes to assert his or her trade secret privilege, as provided in Section 1060, during a criminal proceeding:

(1) The owner of the trade secret shall file a motion for a protective order, or the people may file the motion on the owner's behalf and with the owner's permission. The motion shall include an affidavit based upon personal knowledge listing the affiant's qualifications to give an opinion concerning the trade secret at issue,

identifying, without revealing, the alleged trade secret and articles which disclose the secret, and presenting evidence that the secret qualifies as a trade secret under either [subdivision \(d\) of Section 3426.1 of the Civil Code](#) or [paragraph \(9\) of subdivision \(a\) of Section 499c of the Penal Code](#). The motion and affidavit shall be served on all parties in the proceeding.

(2) Any party in the proceeding may oppose the request for the protective order by submitting affidavits based upon the affiant's personal knowledge. The affidavits shall be filed under seal, but shall be provided to the owner of the trade secret and to all parties in the proceeding. Neither the owner of the trade secret nor any party in the proceeding may disclose the affidavit to persons other than to counsel of record without prior court approval.

(3) The movant shall, by a preponderance of the evidence, show that the issuance of a protective order is proper. The court may rule on the request without holding an evidentiary hearing. However, in its discretion, the court may choose to hold an in camera evidentiary hearing concerning disputed articles with only the owner of the trade secret, the people's representative, the defendant, and defendant's counsel present. If the court holds such a hearing, the parties' right to examine witnesses shall not be used to obtain discovery, but shall be directed solely toward the question of whether the alleged trade secret qualifies for protection.

(4) If the court finds that a trade secret may be disclosed during any criminal proceeding unless a protective order is issued and that the issuance of a protective order would not conceal a fraud or work an injustice, the court shall issue a protective order limiting the use and dissemination of the trade secret, including, but not limited to, articles disclosing that secret. The protective order may, in the court's discretion, include the following provisions:

(A) That the trade secret may be disseminated only to counsel for the parties, including their associate attorneys, paralegals, and investigators, and to law enforcement officials or clerical officials.

(B) That the defendant may view the secret only in the presence of his or her counsel, or if not in the presence of his or her counsel, at counsel's offices.

(C) That any party seeking to show the trade secret, or articles containing the trade secret, to any person not designated by the protective order shall first obtain court approval to do so:

(i) The court may require that the person receiving the trade secret do so only in the presence of counsel for the party requesting approval.

(ii) The court may require the person receiving the trade secret to sign a copy of the protective order and to agree to be bound by its terms. The order may include a provision recognizing the owner of the trade secret to be a third-party beneficiary of that agreement.

(iii) The court may require a party seeking disclosure to an expert to provide that expert's name, employment history, and any other relevant information to the court for examination. The court shall accept that information under seal, and the information shall not be disclosed by any court except upon termination of the action and upon a showing of good cause to believe the secret has been disseminated by a court-approved expert. The court shall evaluate the expert and determine whether the expert poses a discernible risk of disclosure. The court shall withhold approval if the expert's economic interests place the expert in a competitive position with the victim, unless no other experts are available. The court may interview the expert in camera in aid of its ruling. If the court rejects the expert, it shall state its reasons for doing so on the record and a transcript of those reasons shall be prepared and sealed.

(D) That no articles disclosing the trade secret shall be filed or otherwise made a part of the court record available to the public without approval of the court and prior notice to the owner of the secret. The owner of the secret may give either party permission to accept the notice on the owner's behalf.

(E) Other orders as the court deems necessary to protect the integrity of the trade secret.

(c) A ruling granting or denying a motion for a protective order filed pursuant to subdivision (b) shall not be construed as a determination that the alleged trade secret is or is not a trade secret as defined by [subdivision \(d\) of Section 3426.1 of the Civil Code](#) or [paragraph \(9\) of subdivision \(a\) of Section 499c of the Penal Code](#). Such a ruling shall not have any effect on any civil litigation.

* * *

(d) This section shall have prospective effect only and shall not operate to invalidate previously entered protective orders.

CREDIT(S)

CREDIT(S)(Added by Stats.1990, c. 149 (A.B.2986), § 1. Amended by Stats.1990, c. 714 (A.B.2553), § 1; Stats.2002, c. 784 (S.B.1316), § 103.)

§ 1062.

Exclusion of public from criminal proceeding; motion; contents; hearing; determination

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1990, c. 149 (A.B.2986), § 2. Amended by Stats.1990, c. 714 (A.B.2553), § 2.)

§ 1063.

Sealing of articles protected by protective order; procedures

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1990, c. 714 (A.B.2553), § 3.)

CHAPTER 5. IMMUNITY OF NEWSMAN FROM CITATION FOR CONTEMPT

§ 1070.

Refusal to disclose news source

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1971, c. 1717, p. 3658, § 1; Stats.1972, c. 1431, p. 3126, § 1; Stats.1974, c. 1323, p. 2877, § 1; Stats.1974, c. 1456, p. 3184, § 2.)

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

§ 1100.

Manner of proof of character

Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1101.

Evidence of character to prove conduct

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

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1986, c. 1432, § 1; Stats.1995, c. 439 (A.B.882), § 1; Stats.1996, c. 261 (S.B.1876), § 1.)

§ 1102.

Opinion and reputation evidence of character of criminal defendant to prove conduct

In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1103.

Character evidence of crime victim to prove conduct; evidence of defendant's character or trait for violence; evidence of manner of dress of victim; evidence of complaining witness' sexual conduct

(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

(c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under [Section 261, 262, or 264.1 of the Penal Code](#), or under [Section 286, 288a, or 289 of the Penal Code](#), or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1974, c. 569, p. 1388, § 2; Stats.1981, c. 726, p. 2876, § 2; Stats.1990, c. 268 (A.B.2615), § 1; Stats.1991, c. 16 (A.B.263), § 1, eff. March 18, 1991; Stats.1996, c. 1075 (S.B.1444), § 7; Stats.1998, c. 127 (A.B.1926), § 1.)

§ 1104.

Character trait for care or skill

Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1105.

Habit or custom to prove specific behavior

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1106.

Sexual harassment, sexual assault, or sexual battery cases; opinion or reputation evidence of plaintiff's sexual conduct; inadmissibility; exception; cross-examination

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 1328, § 4.)

§ 1107.

Intimate partner battering and its effects; expert testimony in criminal actions; sufficiency of foundation; abuse and domestic violence; applicability to Penal Code; impact on decisional law

(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.”

CREDIT(S)

CREDIT(S)(Added by Stats.1991, c. 812 (A.B.785), § 1. Amended by Stats.1992, c. 163 (A.B.2641), § 72, operative Jan. 1, 1994; Stats.1993, c. 589 (A.B.2211), § 60; Stats.1993, c. 219 (A.B.1500), § 77.5; Stats.2000, c. 1001 (S.B.1944), § 1; Stats.2004, c. 609 (S.B.1385), § 1.)

§ 1108.

Evidence of another sexual offense by defendant; disclosure; construction of section

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

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered * * * in compliance with the provisions of [Section 1054.7 of the Penal Code](#).

(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by [Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision \(b\), \(c\), or \(d\) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code](#).

(B) Any conduct proscribed by [Section 220 of the Penal Code](#), except assault with intent to commit mayhem.

(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(F) An attempt or conspiracy to engage in conduct described in this paragraph.

(2) "Consent" shall have the same meaning as provided in [Section 261.6 of the Penal Code](#), except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.

CREDIT(S)

CREDIT(S)(Added by Stats.1995, c. 439 (A.B.882), § 2. Amended by Stats.2001, c. 517 (A.B.380), § 1; Stats.2002, c. 194 (A.B.2252), § 1; Stats.2002, c. 828 (A.B.2499), § 1.)

§ 1109.

Evidence of defendant's other acts of domestic violence

(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.

(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, “domestic violence” has the meaning set forth in [Section 13700 of the Penal Code](#). “Abuse of an elder or a 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. 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1996, c. 261 (S.B.1876), § 2. Amended by Stats.1998, c. 707 (S.B.1682), § 1; Stats.2000, c. 97 (A.B.2063), § 1; Stats.2004, c. 116 (A.B.141), § 1; Stats.2004, c. 823 (A.B.20), § 6.5.)

CHAPTER 2. MEDIATION

§ 1115.

Definitions

For purposes of this chapter:

(a) “Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) “Mediator” means a neutral person who conducts a mediation. “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1116.

Effect of chapter

(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1117.

Application of chapter

- (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.
- (b) This chapter does not apply to either of the following:
 - (1) A proceeding under Part 1 (commencing with [Section 1800](#)) of Division 5 of the Family Code or Chapter 11 (commencing with [Section 3160](#)) of Part 2 of Division 8 of the Family Code.
 - (2) A settlement conference pursuant to [Rule 222 of the California Rules of Court](#).

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1118.

Oral agreements

An oral agreement “in accordance with Section 1118” means an oral agreement that satisfies all of the following conditions:

- (a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
- (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.
- (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.
- (d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1119.

Written or oral communications during mediation process; admissibility

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1120.

Evidence otherwise admissible

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1121.

Mediator's reports and findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1122.

Communications or writings; conditions to admissibility

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1123.

Written settlement agreements; conditions to admissibility

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1124.

Oral agreements; conditions to admissibility

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1125.

End of mediation; satisfaction of conditions

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1126.

Protections before and after mediation ends

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1127.

Attorney's fees and costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

§ 1128.

Subsequent trials; references to mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of [Section 657 of the Code of Civil Procedure](#). Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 772 (A.B.939), § 3.)

CHAPTER 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

§ 1150.

Evidence to test a verdict

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1151.

Subsequent remedial conduct

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previ-

ously, 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1152.

Offers to compromise

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of [subdivision \(h\) of Section 790.03 of the Insurance Code](#), then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of [subdivision \(h\) of Section 790.03 of the Insurance Code](#), evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2007, § 7; Stats.1987, c. 496, § 1.)

§ 1152.5.

Repealed by stats.1997, c. 772 (A.B.939), § 5

§ 1152.6.

Repealed by stats.1997, c. 772 (A.B.939), § 6

§ 1153.

Offer to plead guilty or withdrawn plea of guilty by criminal defendant

Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other

crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1153.5.

Offer for civil resolution of crimes against property

Evidence of an offer for civil resolution of a criminal matter pursuant to the provisions of [Section 33 of the Code of Civil Procedure](#), or admissions made in the course of or negotiations for the offer shall not be admissible in any action.

CREDIT(S)

CREDIT(S)(Added by Stats.1982, c. 1518, p. 5890, § 2.)

§ 1154.

Offer to discount a claim

Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1155.

Liability insurance

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1156.

Records of medical or dental study of in-hospital staff committee

Text of section operative until July 1, 2005

(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 [Sections 2016 to 2036, inclusive, 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 674, p. 1468, § 1.)

For text of section operative July 1, 2005, see [Evidence Code § 1156](#), post.

§ 1156.1.

Records of medical or psychiatric studies of quality assurance committees

Text of section operative until July 1, 2005

(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 [Sections 2016 to 2036, inclusive, 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1982, c. 234, p. 767, § 4, eff. June 2, 1982.)

For text of section operative July 1, 2005, see [Evidence Code § 1156.1](#), post.

§ 1157.

Proceedings and records of organized committees having responsibility of evaluation and improvement of quality of care; exceptions

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1968, c. 1122, p. 2138, § 1. Amended by Stats.1975, c. 674, p. 1468, § 2; Stats.1978, c. 7, p. 62, § 1, eff. Feb. 10, 1978; Stats.1978, c. 503, p. 1648, § 2; Stats.1982, c. 705, p. 2864, § 3; Stats.1983, c. 289, § 3; Stats.1983, c. 422, § 1; Stats.1983, c. 1081, § 2.5; Stats.1985, c. 725, § 1; Stats.1990, c. 196 (A.B.1565), § 2; Stats.1994, c. 815 (S.B.1279), § 3; Stats.2000, c. 136 (A.B.2374), § 1.)

§ 1157.5.

Organized committee of nonprofit medical care foundation or professional standards review organization; proceedings and records

Except in actions involving a claim of a provider of health care services for payment for such services, the prohibition relating to discovery or testimony provided by Section 1157 shall be applicable to the proceedings or records of an organized committee of any nonprofit medical care foundation or professional standards review organization which is organized in a manner which makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care.

CREDIT(S)

CREDIT(S)(Added by Stats.1973, c. 848, p. 1515, § 1. Amended by Stats.1980, c. 524, p. 1461, § 1.)

§ 1157.6.

Proceedings and records of quality assurance committees for county health facilities

Neither the proceedings nor the records of a committee established in compliance with [Sections 4070 and 5624 of the Welfare and Institutions Code](#) having the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities shall be subject to discovery. Except as provided in this section, no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery or testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting, or to any person requesting facility staff privileges.

CREDIT(S)

CREDIT(S)(Added by Stats.1982, c. 234, p. 767, § 5, eff. June 2, 1982.)

§ 1157.7.

Application of Section 1157 discovery or testimony prohibitions; application of public records and meetings provisions

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1983, c. 1237, § 1.)

§ 1158.

Inspection and copying of patient's records; authorization; failure to comply; costs

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 8½" 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1968, c. 1122, p. 2138, § 2. Amended by Stats.1970, c. 556, p. 1077, § 1; Stats.1974, c. 250, p. 461, § 1; Stats.1974, c. 667, p. 1530, § 1; Stats.1975, c. 563, p. 1144, § 1; Stats.1978, c. 493, p. 1625, § 1; Stats.1980, c. 697, p. 2099, § 1; Stats.1986, c. 603, § 5; Stats.1987, c. 19, § 1, eff. May 12, 1987; Stats.1993, c. 226 (A.B.1987), § 9; Stats.1997, c. 442 (A.B.758), § 15.)

§ 1159.

Animal experimentation in product liability actions

(a) No evidence pertaining to live animal experimentation, including, but not limited to, injury, impact, or crash experimentation, shall be admissible in any product liability action involving a motor vehicle or vehicles.

(b) This section shall apply to cases for which a trial has not actually commenced, as described in [paragraph \(6\) of subdivision \(a\) of Section 581 of the Code of Civil Procedure](#), on January 1, 1993.

CREDIT(S)

CREDIT(S)(Added by Stats.1992, c. 188 (A.B.3691), § 1.)

§ 1160.

Admissibility of expressions of sympathy or benevolence; definitions

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.2000, c. 195 (A.B.2804), § 1.)

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§ 1200.

The hearsay rule

(a) “Hearsay evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1201.

Multiple hearsay

A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2007, § 8.)

§ 1202.

Credibility of hearsay declarant

Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1203.

Cross-examination of hearsay declarant

- (a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.
- (b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the statement.
- (c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.
- (d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1203.1.

Hearsay offered at preliminary examination; application of § 1203

Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in [Section 872 of the Penal Code](#).

CREDIT(S)

CREDIT(S)(Added by Initiative Measure (Prop. 115), approved June 5, 1990.)

§ 1204.

Hearsay statement offered against criminal defendant

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1205.

No implied repeal

Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

ARTICLE 1. CONFESSIONS AND ADMISSIONS

§ 1220.

Admission of party

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 state-

ment was made in his individual or representative capacity.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1221.

Adoptive admission

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1222.

Authorized admission

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
- (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1223.

Admission of co-conspirator

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1224.

Statement of declarant whose liability or breach of duty is in issue

When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1225.

Statement of declarant whose right or title is in issue

When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1226.

Statement of minor child in parent's action for child's injury

Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under [Section 376 of the Code of Civil Procedure](#) for injury to such minor child.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1227.

Statement of declarant in action for his wrongful death

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](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1228.

Admissibility of certain out-of-court statements of minors under the age of 12; establishing elements of certain sexually oriented crimes; notice to defendant

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1984, c. 1421, § 1. Amended by Stats.1985, c. 1572, § 1, eff. Oct. 2, 1985.)

§ 1228.1.

Signature of parent or guardian on child welfare services case plan; acceptance of services; use in court of law; failure to cooperate

- (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](#).

CREDIT(S)

CREDIT(S)(Added by Stats.1995, c. 540 (A.B.1523), § 1. Amended by Stats.1997, c. 793 (A.B.1544), § 1.)

ARTICLE 2. DECLARATIONS AGAINST INTEREST

§ 1230.

Declarations against interest

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2.5. SWORN STATEMENTS REGARDING GANG-RELATED CRIMES

§ 1231.

Prior statements of deceased declarant; hearsay exception

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 is-

sue 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 499 (S.B.941), § 1.)

§ 1231.1.

Statements made by deceased declarant; admissibility; notice of statement to adverse party

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 499 (S.B.941), § 1.)

§ 1231.2.

Administer and certify oaths

A peace officer may administer and certify oaths for purposes of this article.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 499 (S.B.941), § 1. Amended by Stats.1998, c. 606 (S.B.1880), § 2.)

§ 1231.3.

Testimony of law enforcement officer; hearsay

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 499 (S.B.941), § 1.)

§ 1231.4.

Cause of death; deceased declarant

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1997, c. 499 (S.B.941), § 1.)

ARTICLE 3. PRIOR STATEMENTS OF WITNESSES

§ 1235.

Inconsistent statements

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1236.

Prior consistent statements

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1237.

Past recollection recorded

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

- (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
- (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of

recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1238.

Prior identification

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 4. SPONTANEOUS, CONTEMPORANEOUS, AND DYING DECLARATIONS

§ 1240.

Spontaneous statement

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1241.

Contemporaneous statement

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and
- (b) Was made while the declarant was engaged in such conduct.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1242.

Dying declaration

Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 5. STATEMENTS OF MENTAL OR PHYSICAL STATE

§ 1250.

Statement of declarant's then existing mental or physical state

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1251.

Statement of declarant's previously existing mental or physical state

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1252.

Restriction on admissibility of statement of mental or physical state

Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1253.

Statements for purposes of medical diagnosis or treatment; contents of statement; child abuse or neglect; age limitations

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1995, c. 87 (A.B.355), § 2.)

ARTICLE 6. STATEMENTS RELATING TO WILLS AND TO CLAIMS AGAINST ESTATES

§ 1260.

Statement concerning declarant's will

- (a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.
- (b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1261.

Statement of decedent offered in action against his estate

(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 7. BUSINESS RECORDS

§ 1270.

A business

As used in this article, “a business” includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1271.

Admissible writings

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1272.

Absence of entry in business records

Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

- (a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and
- (b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 8. OFFICIAL RECORDS AND OTHER OFFICIAL WRITINGS

§ 1280.

Record by public employee

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

- (a) The writing was made by and within the scope of duty of a public employee.
- (b) The writing was made at or near the time of the act, condition, or event* * * .
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1996, c. 642 (A.B.1387), § 4.)

§ 1281.

Vital statistics records

Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1282.

Finding of presumed death by authorized federal employee

A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; [50 U.S.C. App. 1001](#)–1016), as enacted or as heretofore or hereafter amended, shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1283.

Record by federal employee that person is missing, captured, beleaguered, besieged, detained, or dead

An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1284.

Statement of absence of public record

Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 9. FORMER TESTIMONY

§ 1290.

Former testimony

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1291.

Former testimony offered against party to former proceeding

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

- (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
- (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

- (1) Objections to the form of the question which were not made at the time the former testimony was given.
- (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1292.

Former testimony offered against person not a party to former proceeding

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

- (1) The declarant is unavailable as a witness;
- (2) The former testimony is offered in a civil action; and
- (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1293.

Former testimony by minor child complaining witness at preliminary examination

(a) Evidence of former testimony made at a preliminary examination by a minor child who was the complaining witness is not made inadmissible by the hearsay rule if:

(1) The former testimony is offered in a proceeding to declare the minor a dependent child of the court pursuant to [Section 300 of the Welfare and Institutions Code](#).

(2) The issues are such that a defendant in the preliminary examination in which the former testimony was given had the right and opportunity to cross-examine the minor child with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the proceeding to declare the minor a dependent child of the court.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the minor child were testifying at the proceeding to declare him or her a dependent child of the court.

(c) The attorney for the parent or guardian against whom the former testimony is offered or, if none, the parent or guardian may make a motion to challenge the admissibility of the former testimony upon a showing that new substantially different issues are present in the proceeding to declare the minor a dependent child than were present in the preliminary examination.

(d) As used in this section, “complaining witness” means the alleged victim of the crime for which a preliminary examination was held.

(e) This section shall apply only to testimony made at a preliminary examination on and after January 1, 1990.

CREDIT(S)

CREDIT(S)(Added by Stats.1989, c. 322, § 1.)

§ 1294.

Unavailable witnesses; prior inconsistent statements; preliminary hearing or prior proceeding

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1996, c. 560 (A.B.2483), § 1.)

ARTICLE 10. JUDGMENTS

§ 1300.

Judgment of conviction of crime punishable as felony

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1982, c. 390, p. 1724, § 2.)

§ 1301.

Judgment against person entitled to indemnity

Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

- (a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;
- (b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or
- (c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1302.

Judgment determining liability of third person

When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 11. FAMILY HISTORY

§ 1310.

Statement concerning declarant's own family history

(a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3202, § 15.)

§ 1311.

Statement concerning family history of another

(a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3202, § 16.)

§ 1312.

Entries in family records and the like

Evidence of entries in family Bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship

by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3202, § 17.)

§ 1313.

Reputation in family concerning family history

Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3202, § 18.)

§ 1314.

Reputation in community concerning family history

Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1315.

Church records concerning family history

Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history which is contained in a writing made as a record of a church, religious denomination, or religious society is not made inadmissible by the hearsay rule if:

- (a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271; and
- (b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3203, § 19.)

§ 1316.

Marriage, baptismal and similar certificates

Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

- (a) The maker was a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and
- (b) The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1975, c. 1244, p. 3203, § 20.)

ARTICLE 12. REPUTATION AND STATEMENTS CONCERNING COMMUNITY HISTORY, PROPERTY INTERESTS, AND CHARACTER

§ 1320.

Reputation concerning community history

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1321.

Reputation concerning public interest in property

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1322.

Reputation concerning boundary or custom affecting land

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1323.

Statement concerning boundary

Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1324.

Reputation concerning character

Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 13. DISPOSITIVE INSTRUMENTS AND ANCIENT WRITINGS

§ 1330.

Recitals in writings affecting property

Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

- (a) The matter stated was relevant to the purpose of the writing;
- (b) The matter stated would be relevant to an issue as to an interest in the property; and
- (c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1331.

Recitals in ancient writings

Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 14. COMMERCIAL, SCIENTIFIC, AND SIMILAR PUBLICATIONS

§ 1340.

Publications relied upon as accurate in the course of business

Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1341.

Publications concerning facts of general notoriety and interests

Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 15. DECLARANT UNAVAILABLE AS WITNESS

§ 1350.

Unavailable declarant; hearsay rule

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1985, c. 783, § 1. Amended by Stats.2001, c. 854 (S.B.205), § 5.)

ARTICLE 16. STATEMENTS BY CHILDREN UNDER THE AGE OF 12 IN CHILD NEGLECT AND ABUSE PROCEEDINGS

§ 1360.

Statements describing an act or attempted act of child abuse or neglect; criminal prosecutions; requirements

(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](#).

CREDIT(S)

CREDIT(S)(Added by Stats.1995, c. 87 (A.B.355), § 3.)

ARTICLE 17. PHYSICAL ABUSE

§ 1370.

Threat of infliction of injury

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1996, c. 416 (A.B.2068), § 2, eff. Sept. 4, 1996. Amended by Stats.2000, c. 1001 (S.B.1944), § 2.)

§ 1380.

Elder and dependent adults; statements by victims of abuse

(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.

CREDIT(S)

CREDIT(S)(Added by Stats.1999, c. 383 (A.B.526), § 1.)

DIVISION 11. WRITINGS

CHAPTER 1. AUTHENTICATION AND PROOF OF WRITINGS

ARTICLE 1. REQUIREMENT OF AUTHENTICATION

§ 1400.

Authentication

Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1401.

Authentication required

- (a) Authentication of a writing is required before it may be received in evidence.
- (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1402.

Authentication of altered writings

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 2. MEANS OF AUTHENTICATING AND PROVING WRITINGS

§ 1410.

Article not exclusive

Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1410.5.

Graffiti constitutes a writing; admissibility

- (a) For purposes of this chapter, a writing shall include any graffiti consisting of written words, insignia, symbols, or any other markings which convey a particular meaning.
- (b) Any writing described in subdivision (a), or any photograph thereof, may be admitted into evidence in an action for vandalism, for the purpose of proving that the writing was made by the defendant.
- (c) The admissibility of any fact offered to prove that the writing was made by the defendant shall, upon motion of the defendant, be ruled upon outside the presence of the jury, and is subject to the requirements of Sections 1416, 1417, and 1418.

CREDIT(S)

CREDIT(S)(Added by Stats.1989, c. 660, § 1.)

§ 1411.

Subscribing witness' testimony unnecessary

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1412.

Use of other evidence when subscribing witness' testimony required

If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1413.

Witness to the execution of a writing

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1414.

Admission of authenticity; acting upon writing as authentic

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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1415.

Authentication by handwriting evidence

A writing may be authenticated by evidence of the genuineness of the handwriting of the maker.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1416.

Proof of handwriting by person familiar therewith

A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

- (a) Having seen the supposed writer write;
- (b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
- (c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
- (d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1417.

Comparison of handwriting by trier of fact

The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1418.

Comparison of writing by expert witness

The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1419.

Exemplars when writing is more than 30 years old

Where a writing whose genuineness is sought to be proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is genuine.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1420.

Authentication by evidence of reply

A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1421.

Authentication by content

A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 3. PRESUMPTIONS AFFECTING ACKNOWLEDGED WRITINGS AND OFFICIAL WRITINGS

§ 1450.

Classification of presumptions in article

The presumptions established by this article are presumptions affecting the burden of producing evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1451.

Acknowledged writings

A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with [Section 1180](#)) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1452.

Official seals

A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

- (a) The United States or a department, agency, or public employee of the United States.
- (b) A public entity in the United States or a department, agency, or public employee of such public entity.
- (c) A nation recognized by the executive power of the United States or a department, agency, or officer of such nation.
- (d) A public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity.
- (e) A court of admiralty or maritime jurisdiction.
- (f) A notary public within any state of the United States.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1453.

Domestic official signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

- (a) A public employee of the United States.
- (b) A public employee of any public entity in the United States.
- (c) A notary public within any state of the United States.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1454.

Foreign official signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or public entity in a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another

foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

CHAPTER 2. SECONDARY EVIDENCE OF WRITINGS

ARTICLE 1. PROOF OF THE CONTENT OF A WRITING

§ 1500 to 1511. Repealed by stats.1998, c. 100 (S.B.177), § 1, operative jan. 1, 1999

§ 1520.

Content of writing; proof

The content of a writing may be proved by an otherwise admissible original.

CREDIT(S)

CREDIT(S)(Added by Stats.1998, c. 100 (S.B.177), § 2, operative Jan. 1, 1999.)

§ 1521.

Secondary evidence rule

(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

- (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
- (2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the “Secondary Evidence Rule.”

CREDIT(S)

CREDIT(S)(Added by Stats.1998, c. 100 (S.B.177), § 2, operative Jan. 1, 1999.)

§ 1522.

Additional grounds for exclusion of secondary evidence

(a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

- (1) A duplicate as defined in Section 260.
 - (2) A writing that is not closely related to the controlling issues in the action.
 - (3) A copy of a writing in the custody of a public entity.
 - (4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.
- (b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or any other law, shall not be made in the presence of the jury.

CREDIT(S)

CREDIT(S)(Added by Stats.1998, c. 100 (S.B.177), § 2, operative Jan. 1, 1999.)

§ 1523.

Oral testimony of the content of a writing; admissibility

- (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.

CREDIT(S)

CREDIT(S)(Added by Stats.1998, c. 100 (S.B.177), § 2, operative Jan. 1, 1999.)

ARTICLE 2. OFFICIAL WRITINGS AND RECORDED WRITINGS

§ 1530.

Copy of writing in official custody

- (a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima

facie evidence of the existence and content of such writing or entry if:

- (1) The copy purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept;
 - (2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or
 - (3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Prior to January 1, 1971, the final statement may also be made by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.
- (b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1970, c. 41, p. 60, § 1, eff. April 3, 1970.)

§ 1531.

Certification of copy for evidence

For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1532.

Official record of recorded writing

(a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:

- (1) The record is in fact a record of an office of a public entity; and
 - (2) A statute authorized such a writing to be recorded in that office.
- (b) The presumption established by this section is a presumption affecting the burden of producing evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

ARTICLE 3. PHOTOGRAPHIC COPIES AND PRINTED REPRESENTATIONS OF WRITINGS

§ 1550.

Photographic copies made as business records

Text of section prior to amendment by Stats.2002, c. 124 (A.B.2033), § 1.

A nonerasable optical image reproduction provided that additions, deletions, or changes to the original document are not permitted by the technology, a photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of that business. The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard copy printout of the document.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1992, c. 876 (A.B.3296), § 10.)

For text of section as amended by Stats.2002, c. 124 (A.B.2033), § 1, see [Evidence Code § 1550](#), post.

§ 1550.

Types of evidence as writing admissible as the writing itself

Text of section as amended by Stats.2002, c. 124 (A.B.2033), § 1.

(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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1992, c. 876 (A.B.3296), § 10; Stats.2002, c. 124 (A.B.2033), § 1.)

For text of section prior to amendment by Stats.2002, c. 124 (A.B.2033), § 1, see [Evidence Code § 1550](#), ante.
For text of section prior to amendment by Stats.2002, c. 124 (A.B.2033), § 1, see [Evidence Code § 1550](#), main volume.

§ 1550.1.

Admissibility of reproductions of files, records, writings, photographs, and fingerprints

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.

CREDIT(S)

CREDIT(S)(Added by Stats.2004, c. 65 (A.B.883), § 1.)

§ 1551.

Photographic copies where original destroyed or lost

A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1969, c. 646, p. 1298, § 1.)

§ 1552.

Printed representation of computer information or computer programs

(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 presump-

tion 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.

CREDIT(S)

CREDIT(S)(Added by Stats.1998, c. 100 (S.B.177), § 4, operative Jan. 1, 1999.)

§ 1553.

Printed representation of images stored on a video or digital medium

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.

CREDIT(S)

CREDIT(S)(Added by Stats.1998, c. 100 (S.B.177), § 5, operative Jan. 1, 1999.)

ARTICLE 4. PRODUCTION OF BUSINESS RECORDS

§ 1560.

Compliance with subpoena duces tecum for business records

(a) As used in this article:

(1) “Business” includes every kind of business described in Section 1270.

(2) “Record” includes every kind of record maintained by 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, within five days after the receipt of the subpoena in any criminal action or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness, or within 15 days after the receipt of the subpoena in any civil action or within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness, delivers by mail or otherwise a true, legible, and durable copy of all the records described in the subpoena to the clerk of the court or to the judge if there be no clerk or to another person described in [subdivision \(c\) of Section 2026 of the Code of Civil Procedure](#), together with the affidavit

described in Section 1561.

(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, or to the judge thereof if there be no clerk.

(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 which are original documents and which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records which 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 [paragraph \(3\) of subdivision \(d\) of Section 2020 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 [subdivision \(h\) of Section 2020 of the Code of Civil Procedure](#).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1969, c. 199, p. 484, § 2; Stats.1982, c. 452, p. 1824, § 2.5; Stats.1984, c. 481, § 2; Stats.1986, c. 603, § 6; Stats.1991, c. 1090 (A.B.1484), § 14; Stats.1997, c. 442 (A.B.758), § 16; Stats.1999, c. 444 (A.B.794), § 4; Stats.2000, c. 287 (S.B.1955), § 1; Stats.2004, c. 182 (A.B.3081), § 32, operative July 1, 2005; Stats.2004, c. 162 (A.B.1249), § 1.)

§ 1561.

Affidavit accompanying records

(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) Where the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1969, c. 199, p. 484, § 3; Stats.1986, c. 603, § 7; Stats.1987, c. 19, § 2, eff. May 12, 1987; Stats.1996, c. 146 (A.B.3001), § 1; Stats.1999, c. 444 (A.B.794), § 5.)

§ 1562.

Admissibility of affidavit and copy of records

If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1989, c. 1416, § 31; Stats.1996, c. 146 (A.B.3001), § 2.)

§ 1563.

One witness and mileage fee

(a) This article shall not be interpreted to require tender or payment of more than one witness fee and one mileage fee or other charge, to a witness or witness' business, unless there is an agreement to the contrary between the witness and the requesting party.

(b) All reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of all or any part of business records the production of which is requested pursuant to a subpoena duces tecum may be charged against the party serving the subpoena duces tecum.

(1) "Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8½" 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).

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1972, c. 396, p. 719, § 1; Stats.1981, c. 1014, p. 3913, § 2; Stats.1982, c. 452, p. 1825, § 3; Stats.1986, c. 603, § 8; Stats.1987, c. 19, § 3, eff. May 12, 1987; Stats.1997, c. 442 (A.B.758), § 17; Stats.1999, c. 444 (A.B.794), § 6.)

§ 1564.

Personal attendance of custodian and production of original records

The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads:

“The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to [subdivision \(b\) of Section 1560](#), and [Sections 1561 and 1562, of the Evidence Code](#) will not be deemed sufficient compliance with this subpoena.”

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1984, c. 603, § 2; Stats.1986, c. 603, § 9; Stats.1987, c. 19, § 4, eff. May 12, 1987.)

§ 1565.

Service of more than one subpoena duces tecum

If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1969, c. 199, p. 485, § 4.)

§ 1566.

Applicability of article

This article applies in any proceeding in which testimony can be compelled.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1567.

Employee income and benefit information; forms completed by employer; support modification or termination proceedings

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](#).

CREDIT(S)

CREDIT(S)(Added by Stats.1995, c. 506 (A.B.413), § 1.)

CHAPTER 3. OFFICIAL WRITINGS AFFECTING PROPERTY

§ 1600.

Record of document affecting property interest

(a) The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

- (1) The record is in fact a record of an office of a public entity; and
 - (2) A statute authorized such a document to be recorded in that office.
- (b) The presumption established by this section is a presumption affecting the burden of proof.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2007, § 9.)

§ 1601.

Proof of content of lost official record affecting property

(a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or de-

struction, 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.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1602.

Repealed by stats.1967, c. 650, p. 2008, § 10

§ 1603.

Deed by officer in pursuance of court process

A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2008, § 11.)

§ 1604.

Certificate of purchase or of location of lands

A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is prima facie evidence that the holder or assignee of such certificate is the

owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 1605.

Authenticated Spanish title records

Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865–66, are admissible as evidence with like force and effect as the originals and without proving the execution of such originals.

CREDIT(S)

CREDIT(S)(Stats.1965, c. 299, § 2, operative Jan. 1, 1967. Amended by Stats.1967, c. 650, p. 2008, § 12.)

[\[FN1\] 42 U.S.C.A. § 12101 et seq.](#)

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